Neutral Citation Number: [2023] EWCA Crim 1242

Case No: 202202875 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE GOSS
and
MRS JUSTICE ELLENBOGEN

- -

Between:

"BNE"	**Appellant**
- and -	
THE KING	**Respondent**

- -
- -

"appellant's counsel" (assigned by **the Registrar of Criminal Appeals**) for the **appellant**
"respondent's counsel" (instructed by **CPS Appeals and Review Unit**) for the **respondent**

Hearing date: 4 October 2023

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REDACTED JUDGMENT

NOTICE: this REDACTED form of this judgment may be published, but is subject to the reporting restrictions stated in paragraphs 1, 33 and 34 of the judgment. Further reporting restrictions do apply to the UNREDACTED form of the judgment, which may not be published until after the conclusion of the retrial of the appellant.
The reporting restriction applicable to this REDACTED judgment prohibits the publication of any matter which is likely to lead members of the public to identify any of the persons, names or other details which have been redacted. It applies to publication of any such matter to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this REDACTED transcript is

Lord Justice Holroyde:

1. This is an appeal, by leave of the single judge, against convictions for offences of attempted sexual communication with a child (count 1) and attempting to incite a child to engage in sexual activity (count 2). The appellant, a man of previous good character, was subsequently sentenced to a total of 3 years 6 months' imprisonment. There is no appeal against that sentence. Reporting restrictions apply to the UNREDACTED form of this judgment. In view of the importance of the principles considered in this judgment, the court has approved this REDACTED form of the judgment so that it may be published without delay. This REDACTED judgment itself is not subject to any reporting restrictions, but no matter may be included in any publication if it is likely to lead members of the public to identify any of the persons, names or other details which have been redacted.

2. The charges arose out of correspondence on social media between the appellant and an undercover police officer using the name [X].

3. The correspondence began on a social media platform "Chatiw", and quickly moved to the KiK platform. X's user name was […] and her profile described her as being 18. From the outset, however, X told the appellant that she was 14. Later, she told him that she was in Year 9 at school and complained about having to continue to wear her school uniform for another two years. The appellant, whose user name was […], told X, accurately, that he was aged 44.

4. They continued to exchange messages over a period of days. They sent images to one another. The exchanges became flirtatious and then sexualised (count 1). The appellant encouraged X to masturbate and told her how she should go about doing so (count 2). She said in her messages that she was doing as he suggested, and he replied to the effect that he was also masturbating. It is unnecessary, for present purposes, to go into further detail about the facts.

5. It is important to emphasise the precise nature of the appellant's case, which was that he had at all times believed he was communicating with an adult who was pretending to be only 14 as part of a role-playing fantasy. He gave evidence to that effect. He relied on the facts that Chatiw was aimed at adults and X's profile stated that she was 18. He also relied on features of X's messages such as her use of language, punctuation and grammar, and her professed liking for certain musicians. He further relied on X's profile picture, and the images provided by X, all of which, he asserted, showed what he believed to be a woman aged around 19-23. He pointed to the fact that in each of those images X's face was partially obscured, which he regarded as consistent with his belief that she was an adult engaged in role-playing.

6. The case was tried in the Crown Court at […] before […] ("the judge") and a jury. In advance of the trial [appellant's counsel], then as now representing the appellant, had been shown copies of the four images which X had sent to the appellant. The prosecution's intention, to which no objection was raised, was that paper copies of the

images would be shown to the jury, but would be collected at the end of each court day so that they could be stored securely. The images had not been uploaded to the Digital Case System.

7. The defence had also requested disclosure of the true age of the person shown in the images. Their written request contended that if the person pictured was in fact a young adult, that would lend support to the appellant's case and undermine the prosecution's allegations. It further contended that it would be unfair for the jury to be led to believe that the person depicted was under-age if in fact she was over the age of consent. On instructions, counsel then representing the prosecution declined to provide the information requested.

8. Submissions were made to the judge in the absence of the jury. Appellant's counsel reiterated her request for disclosure, emphasising that she sought only the age of the person depicted, not any further information about her.

9. The judge ruled that the age of the person shown was *prima facie* disclosable. He was then invited to, and did, conduct a public interest immunity ("PII") hearing at which prosecution counsel made submissions to him in the absence of the appellant or any defence representative.

10. At the conclusion of that hearing, the judge gave a ruling in open court. He noted that the appellant admitted that he had exchanged messages with X. He correctly identified the principal issues on each count as being whether the appellant genuinely believed that he was exchanging messages with a person aged 16 or over and, if so, whether that belief was reasonable. He repeated his earlier ruling that the age of the person depicted was *prima facie* disclosable, but held that, in the light of what he had heard in chambers, there was a public interest in not disclosing that information.

11. The trial then proceeded and the appellant was, as we have said, convicted.

12. No objection was made at trial, and none is made now, to steps taken by the prosecution to maintain the anonymity of the undercover police officer, who gave evidence under her pseudonym of X, and to preserve the confidentiality of investigative methods used. The sole ground of appeal challenges the refusal to disclose the true age of the person shown in the images which X sent to the appellant. Appellant's counsel submits that, as the correspondence developed, it was X who first made any reference to photographs. She further submits that X's age was at the centre of both counts, and the photographs purporting to depict her were before the jury and played a central role in the trial for both prosecution and defence. Appellant's counsel accepts that the true age of the person shown did not provide a complete answer to the charges, but she argues that it was an important consideration for the jury when considering the reasonableness of the appellant's belief. It was, she submits, potentially unfair to refuse disclosure of the age of the person depicted; and any sensitivity attaching to the images had already been compromised because the officer posing as X had sent them to the appellant.

13. Appellant's counsel points out that the prosecution had failed to make the written application for a PII hearing which is required by rule 15.3 of the Criminal Procedure Rules. She also submits that the prosecution had the opportunity at the PII hearing to adduce before the judge any evidence on which it wished to rely, and should therefore

not be permitted to adduce any further or different evidence before this court. Subject to those points, she invited this court to review the PII material to determine whether in the circumstances of this case it was fair to allow the trial to continue without disclosing the age of the person depicted.

14. On behalf of the respondent, [respondent's counsel] opposes the appeal. He submits that the age of the person depicted was irrelevant to the issues which the jury had to decide, could neither undermine the prosecution case nor assist the defence case, and therefore failed the test for disclosure. Alternatively, if it was in principle a fact which was capable of assisting the defence or undermining the prosecution, the judge had correctly ruled that there was a public interest against disclosure. Finally, even if those arguments were rejected, respondent's counsel submits that the conviction is safe because of the other evidence against the appellant. He invited this court to conduct a PII hearing, and to receive further evidence bearing on the public interest against any disclosure.

15. We are grateful to counsel for their written and oral submissions, and for their assistance in the efficient management of the hearings before this court. We conducted an initial PII hearing, in the absence of the appellant and his counsel, in which we heard *de bene esse* evidence from two witnesses in addition to that which had been given to the judge. We thereafter heard the submissions of the parties in open court.

16. It is common ground that the principles to be followed in considering the PII application are those stated by the House of Lords in *R v H & C* [2004] 2 AC 134.

17. So far as is material for present purposes, the provisions of the Sexual Offences Act 2003 creating the offences which the appellant was found to have attempted to commit state as follows:

> "**10 Causing or inciting a child to engage in sexual activity**
>
> (1) A person aged 18 or over (A) commits an offence if –
>
> (a) he intentionally causes or incites another person (B) to engage in an activity,
>
> (b) the activity is sexual, and
>
> (c) either –
>
> (i) B is under 16 and A does not reasonably believe that B is 16 or over, or
>
> (ii) B is under 13.
>
> **15A Sexual communication with a child**
>
> (1) A person aged 18 or over (A) commits an offence if –
>
> (a) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B),

> (b) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and
>
> (c) B is under 16 and A does not reasonably believe that B is 16 or over."

18. Those provisions are aimed at the protection of children aged under 16. The conduct which they prohibit frequently takes place over social media. The use by undercover police officers of what may be referred to as decoy profiles, set up on social media to enable the officers to pose as children under 16 and thereby to identify offenders who trawl the internet looking for opportunities to commit sexual offences against children, is a legitimate measure taken to prevent crime and is in the public interest. It inevitably involves the undercover officer conducting the correspondence in a manner intended to sustain the decoy profile. It follows that an officer pretending to be an adolescent would not use images portraying a mature adult. We have no doubt that there is in principle a strong public interest in maintaining the anonymity of undercover police officers who play the decoy roles, and in maintaining the confidentiality of the investigative techniques which they use.

19. The appellant admitted that he had exchanged messages with X in the terms read by the jury, and there could be no doubt that some of their content was sexual and that some of them incited X to engage in sexual activity. On both counts, accordingly, the principal issue was whether the jury were sure either that the appellant did not genuinely believe that X was 16 or over, or that any genuine belief he may have held was not reasonable. That issue required the jury to assess what the appellant believed or may have believed in the light of the circumstances known to him.

20. As was said by the court in *R v Ishaqzai* [2020] EWCA Crim 222 (a judgment concerned with comparable provisions in section 9 of the 2003 Act), the prosecution could prove the mental element of the attempted offences in two ways. First, by making the jury sure that the appellant did not believe X to be 16 or over; and secondly by proving that, even if the appellant did believe her to be 16 or over, or may have done so, any such belief was not reasonable. The first approach involves the jury making a determination as to the appellant's subjective belief. The second involves the jury making an assessment as to whether, in all the relevant circumstances of the case, any such belief was not reasonable. In that latter regard, we agree with what is said by the learned authors of *Rook and Ward on Sexual Offences* at paragraph 4.63 of the current, 6th, edition:

> "… the jury's task is not to consider whether the hypothetical reasonable man would have believed B to be 16 or over, but whether A may actually have believed that and, if so, whether the belief was reasonable. If they find that A may have believed B to be 16 or over, then in determining whether the belief was reasonable the jury should have regard to all the circumstances, including what B told A about herself and B's appearance at the relevant time."

21. The circumstances known to the appellant were the nature and content of the messages sent by X, the profile picture which she used, and the images sent to him by

X. They did not include any further knowledge of the provenance of those images. That, of course, will usually be the case in decoy operations of this kind. To encapsulate the rival contentions, appellant's counsel submits that the true age of the person shown in the images, although not known to the appellant, was a relevant circumstance because a jury could properly take it into account in deciding what the appellant believed, or at least in deciding whether any belief held by the appellant was reasonable. Respondent's counsel submits that the jury were required to focus only on what was actually received by and known to the appellant, and that the true age of the person depicted was an extraneous factor which could not have affected the appellant's mind and was therefore irrelevant to the jury's decisions.

22. We begin by reflecting on decoy operations of this kind generally, before returning to this particular case.

23. In any case involving the use of a decoy profile, it will be understood by the jury from the outset that the messages were in fact sent by an adult police officer playing the decoy role. It will also be clear to the jury, from their own observations of the witness, that the images sent to the defendant, in support of the decoy profile, are not contemporaneous true likenesses of the adult police officer who sent them.

24. We accept appellant's counsel's submission that a jury, shown images such as were used in this case and given no information about their provenance, may well assume that the images are accurate photographs and true likenesses of a real person of the age stated in the decoy profile, or at any rate a real person aged under 16. We do not think that the direction customarily given to juries, not to speculate about any matter in respect of which they have heard no evidence, is sufficient to avoid the possibility of such an assumption being made: given that the purpose of showing the images to the defendant was to foster the illusion that he was corresponding with an underage child, jurors may think they are drawing a legitimate inference about the subject of the imagery, rather than engaging in impermissible speculation. We also accept that a defendant charged with offences of this nature may be unfairly prejudiced if such an assumption is made when it is factually incorrect. When a defendant's belief as to the age of his correspondent is in issue, how is the risk of such prejudice to be avoided, if no information is provided about the provenance and subject of the imagery? In our view, it is necessary to distinguish between two different situations which might in principle arise.

25. First, if the relevant image is an unaltered photograph of a real person who was in fact aged 16 or over when photographed, it seems to us that the true age of the person, at the time when the photograph was taken, should be disclosed to the defence. In such circumstances, we accept appellant's counsel's submission that the true age of the person depicted is a fact capable of undermining the prosecution case, and/or of assisting the defence case. That is because the jury can properly take the fact, that the image is a true likeness and an accurate portrayal of a real person aged 16 or over, into account when assessing whether a defendant may have believed that he was corresponding with someone aged 16 or over, and/or whether any such belief was reasonable. Moreover, the jury must not be misled by being shown images in circumstances which may give rise to an incorrect assumption about the age of the person depicted. True it is, as respondent's counsel submits, that a defendant who does not know the true age of the person depicted cannot himself be influenced by that fact; but it does not follow that the fact is irrelevant to the issues which the jury

has to decide. If, for example, the decoy profile was that of a 14 year old, and the images used were unaltered photographs of a real person taken when she was 18, a jury could properly take that fact into account when deciding whether the defendant may have believed her to be 16 or over and/or when deciding whether his belief was reasonable.

26. It follows that, in this first situation, the prosecution should disclose the actual age of the person shown at the time when the photograph was taken, and not merely the fact that the person was aged 16 or over. It will no doubt often be convenient for that information to be adduced in evidence before the jury in the form of an admission of fact.

27. Secondly, what if images have been digitally created, altered or modified in some way, in order to produce images consistent with the decoy profile? In such circumstances, whatever the nature and extent of the process used, its purpose and effect was to create an entirely artificial image or to alter the appearance of the person initially photographed so that it ceases to be a true likeness. In this second situation, the true age and original appearance of any person originally photographed can in our view be of no relevance. The jury are not to be diverted into an examination of the skill with which the digital manufacture of the image has been carried out. Their focus must be on the images seen by the defendant, not on different images which he did not see.

28. It follows that, in this second situation, the prosecution's duty of disclosure does not extend to disclosing the true age of any real person originally photographed or the nature and extent of the digital process which has been used to make the images. It is however necessary that the defence should be informed of the fact that the images have been digitally manufactured, altered or modified so as to make, for the purpose of the decoy profile, images which are not a true likeness of any real person who may originally have been photographed. Subject of course to the precise issues in a particular case, it will generally be appropriate for that limited statement of fact to be adduced in evidence before the jury – again, it will no doubt usually be convenient to do so by way of an admission of fact. It will be sufficient for the statement of fact to be in the precise terms which we have used, without distinguishing between manufacture, alteration or modification. We are satisfied that, to that very limited extent, it will be necessary in the interests of justice to disclose one aspect of the investigative techniques which must otherwise remain confidential.

29. Subject again to the precise issues in a particular case, it follows from what we have said that, in a case where there has been no disclosure of the true age of the person shown at the time when the photograph was taken, it will usually be necessary for the jury to hear evidence of the fact that the images were manufactured, altered or modified so as to fit the decoy profile. Where that fact is in evidence, the trial judge should direct the jury that there is no evidence about the true age of any person shown in the images; that there is no evidence about what was done to manufacture, alter or modify them; that they must not speculate about those matters, because they are not relevant to the jury's verdicts; and that they must concentrate on the evidence of the material – the messages and the images – which the defendant received.

30. Returning to the present case, we repeat that the appellant's defence was a belief that he was corresponding with an adult who was playing a role. He had raised that

defence in his defence case statement even before the images which were before the jury had been disclosed; and as part of that defence he gave evidence of a belief that the images showed an adult who was deliberately obscuring part of her face. We sympathise with the judge, who was faced at trial with a difficult issue which was not argued as fully, or in the same way, as it has been before this court. His written and oral directions to the jury clearly reflected a good deal of careful work on his part. They included a general direction to the jury not to speculate. However, because of the way the argument had developed before him and the evidence he had heard in chambers, he did not address the issue of disclosure in the way which we have found to be appropriate. This was neither a case which was identified by the prosecution as falling into the first of the two categories we have mentioned, nor a case in which the prosecution provided the information which is necessary in the second of those categories. In the result, we accept the submission that the appellant was unfairly prejudiced because the jury may well have assumed that the images were true likenesses of a real girl aged 14, or at least aged under 16, at the time when she was photographed. On the evidence before the jury, that was not an assumption which they could properly have made.

31. That is sufficient to compel the conclusion that the convictions are unsafe and must be quashed. We reach that conclusion on the basis of the approach which we have held to be applicable to cases of this nature generally, and without needing to reflect further on any specific features of this particular case. For that reason, we do not think it necessary to give any separate closed ruling in relation to the PII hearing.

32. This appeal will accordingly be allowed, and the conviction quashed. Having considered written submissions from counsel, for which we are grateful, we are satisfied that the interests of justice require that the appellant be retried on both charges.

33. We are further satisfied that publication of this judgment in UNREDACTED form would give rise to a serious risk to the administration of justice in the retrial proceedings. We therefore order, pursuant to section 4(2) of the Contempt of Court Act 1981, that publication of this judgment in UNREDACTED form must be postponed until after the conclusion of the retrial. In view of the importance of the principles to which we have referred, which will be of application in other cases, we have prepared a REDACTED version of this judgment, which may be published without delay. The REDACTED judgment itself is not subject to any reporting restrictions; but pursuant to section 11 of the Contempt of Court Act 1981 we order that no matter may be included in or with any publication of the REDACTED judgment if it is likely to lead members of the public to identify any of the persons, names or other details which have been redacted.

34. For those reasons, we make the following orders:

    i) The appeal is allowed and the convictions on counts 1 and 2 quashed.

    ii) The appellant must, as soon as practicable, be retried in the Crown Court at […], before a judge to be allocated by the Resident Judge of that court, on both charges.

iii) A draft of the fresh indictment must be served by the respondent on the Crown Court officer no more than 28 days after this order.

iv) The appellant must be rearraigned on the fresh indictment within 2 months after this order.

v) There being no application for bail, the appellant will be remanded in custody pending his retrial. Any application for bail which may be made in the future shall be made to the Crown Court at […].

vi) Pursuant to section 4(2) of the Contempt of Court Act 1981, this judgment in its UNREDACTED form must not be published until after the conclusion of the retrial. The respondent must notify the Criminal Appeal Office as soon as the retrial has been concluded, so that this order may be withdrawn.

vii) The REDACTED version of this judgment, as approved by the court, may be published. The REDACTED judgment itself is not subject to any reporting restrictions; but, pursuant to section 11 of the Contempt of Court Act 1981, no additional matter may be included in or with any publication of the REDACTED judgment if it is likely to lead members of the public to identify any of the persons, names or other details which have been redacted.