Leave to Appeal against sentence – regarding attempting to facilitate child sex offences & making indecent images of children.

[2025]GCA061

IN THE COURT OF APPEAL OF GUERNSEY

CRIMINAL DIVISION

Between: **BENJAMIN SOLOWAN** **Applicant**

-v-

LAW OFFICERS OF THE CROWN **Respondent**

APPLICATION FOR LEAVE TO APPEAL

Decision on the Papers

Decision of Sir Richard McMahon, Bailiff

Date of Decision: 4 August 2025

Applicant's representative: Advocate O C Fattorini

1. On 25 June 2025, the Applicant was sentenced to a total of 12 years' imprisonment on an Indictment containing 12 Counts, to all of which he had pleaded guilty.

2. The Counts were split into two distinct parts. The first six Counts were all relating to attempting to arrange or facilitate the commission of a child sex offence contrary to section 25 of the Sexual Offences (Bailiwick of Guernsey) Law, 2020 and section 1 of the Criminal Justice (Attempts, Conspiracy and Jurisdiction) (Bailiwick of Guernsey) Law, 2006. Five of those Counts related to what would have involved the rape of a child under 13. Count 2 related to the sexual touching of a child. Counts 7 to 12 each related to making an indecent image of a child contrary to section 105(1)(a) of the 2020 Law. Those Counts related respectively to 50 images, 1 image, 45 images, 3 images, 233 and 33 images which had been categorised according to the Child Abuse Images Database as being category A for the first two Counts, category B for the next two Counts and category C for the final two Counts. The sentences imposed by the Royal Court were 10 years' imprisonment for each of Counts 1 to 6, running concurrently with each other, plus two years' imprisonment in respect of each of Counts 7 to 12, running concurrently with each other but consecutive to the 10-year sentence. Because the Applicant had been in custody since 16 December 2024, the sentences commenced from that date. An extended sentence licence of 5 years was imposed for each Count. On 26 June 2025, the extended sentence licence in respect of each of Counts 1 to 6 was removed, when it was realised that the combination of the sentence of imprisonment and the extended sentence licence exceeded the maximum of 14

years' imprisonment for those Counts (as set by section 29(5)(b) of the 2020 Law). In accordance with the Criminal Justice (Sex Offenders and Miscellaneous Provisions) (Bailiwick of Guernsey) Law, 2013, the Applicant was made subject to a 10-year notification period.

3. By a Notice of Appeal dated 23 July 2025, settled by Advocate Fattorini, the Applicant seeks leave to appeal on the ground that the sentence of 10 years for each of Counts 1 to 6 was manifestly excessive. There are two grounds identified in this Notice. The first contends that the starting point adopted of 12 years was too high, with particular reference to the totality principle and that the geographic separation of the Applicant from those with whom he was corresponding meant he could not prevent them from reporting what was being exchanged. It is further suggested that the Applicant did not lie about his age or exploit his intended victims. In addition, it is contended that insufficient discount was given, of just two years, from that starting point, including by reference to his guilty pleas and his remorse. The second ground refers to the way in which the extended sentence licence was amended under the slip rule so that it did not apply to Counts 1 to 6, which should instead have led to the sentences for those Counts being reduced to nine years' imprisonment, combined with an extended sentence licence running for 5 years, demonstrating that the sentences on these Counts was manifestly excessive.

4. It follows from the Notice of Appeal that there does not appear to be any appeal against the sentences imposed in respect of Counts 7 to 12, the extended sentence licence attaching to each of those Counts, or to the notification period of 10 years for this offending. I have, therefore, concentrated on whether the sentence of 10 years' imprisonment running concurrently for each of Counts 1 to 6 can be argued to be manifestly excessive, noting that there is no extended sentence licence attaching to any of these Counts, but also having regard to the reasoning in the second ground of appeal.

5. In considering that question, I have paid particular attention to the sentencing remarks ([2025] GRC 059) and the route therein setting out how these sentences came to be imposed. I have considered the prosecution outline about this offending, the social enquiry report, which confirms that the Applicant was under no illusion that he faces a substantial term of imprisonment and how Advocate Fattorini might develop the grounds of appeal he has raised in respect of Counts 1 to 6.

6. In the sentencing remarks, immediately following the heading "Sentencing Considerations", reference is made to a number of cases. They are *R v Privett* [2020] EWCA Crim 557, *R v Reed and others* [2021] EWCA Crim 572, as well as the comparatively recent local decision, *Law Officers of the Crown v Bellingham* [2025] GRC 025, principally because in that case the Royal Court found reference to the English Sentencing Council guidelines relating to section 14 of the Sexual Offences Act 2003 helpful. (I understand that section 14 of the 2003 Act is the basis for what is found in section 25 of the 2020 Law.) I have paid particular regard to the approach taken by the English Court of Appeal in the two cases I have mentioned, noting that the judgment in each was given by Sir Adrian Fulford, who until recently was a Judge of Appeal in this Court and who at the time was the Vice-President of the English Court of Appeal (Criminal Division). In considering these matters, I have focused on whether the starting point might fall outside the range applicable to the combination of Counts 1 to 6.

7. In *Bellingham*, those English Sentencing Council guidelines were treated as helpful and resulted in a starting point for the relevant Count in that exercise of 4 years' imprisonment (where that Count was regarded as the lead offence and related to messages sent for the purposes of having penetrative vaginal sex, which led to a trial and a finding of guilt), which was then aggravated to 6 years, and in respect of which no discount for plea could be attached, although reference is also made to there being a global discount of 25% in respect of the mixed pleas "*across all the offences*". Having regard to personal mitigation, the resulting sentence

was 3 years' imprisonment. The Count in that case was of a different nature to the Counts to which the Applicant pleaded.

8. The sentencing remarks in the present case set out a summary of the considerations from the guideline:

> "*(i) no sexual activity need take place for an offence to be committed (including instances where no child victim exists);*
> *(ii) in such cases the court should identify the category of harm on the basis of the sexual activity the offender intended;*
> *(iii) then a downward adjustment is made to reflect the fact that no harm resulted;*
> *(iv) this adjustment should be specific to the facts of the case. Where a child victim does not exist but for that fact the offender would have carried out the intended sexual activity, only a very small reduction will usually be appropriate; and*
> *(v) so where a child victim does not exist and but for that fact the offender would have carried out the offence, only, as stated, a very small reduction in the range would be appropriate. No additional reduction should be made for the fact that the offending is an attempt, as in the case today.*"

Whilst the guideline appears to have been modified in 2022 because of a change in maximum sentences under the 2003 Act that has not been reflected in the 2020 Law, this is an accurate summary of the considerations. Indeed, reference might also have been made to another aspect of the guideline which states that "*it may be the case that a more severe sentence is imposed in a case where very serious sexual activity was intended but did not take place than in a case where relatively less serious sexual activity did take place*".

9. I have also found the approach in the two English Court of Appeal decisions helpful. As stated at the outset in *Privett*, four cases were heard together under section 14 of the 2003 Act to enable consideration to be given to "*the correct approach to assessing harm*". Looking specifically at what had been done by the appellant, Privett, this was approached as being a section 9 offence under the 2003 Act (sexual activity with a child, which includes penetration). Reference was made to the degree of planning. In that case, a sentence of 5 years and 4 months' imprisonment, plus an extended licence period of 2 years was imposed. His appeal was dismissed. It suffices for me to quote para. 72 of the judgment of Fulford LJ:

> "*Sentencers in future with section 14 offences in these circumstances should follow the Sentencing Guideline in the way we have described above at [67]. This may lead to the result that a defendant who arranges the rape of a fictional 6-year-old is punished more severely than a defendant who facilitates a comparatively minor sexual assault on a real 15-year-old. In our view, there is nothing necessarily wrong in principle with that result. The sentence should be commensurate with the applicable starting point and range, and in cases where the child is a fiction this will usually involve some reduction (as in Bayliss) to reflect the lack of harm.*"

What had been set out in para. 67 was that: "*the judge should, first, identify the category of harm on the basis of the sexual activity the defendant intended ("the level of harm should be determined by reference to the type of activity arranged or facilitated"), and, second, adjust the sentence in order to ensure it is "commensurate" with, or proportionate to, the applicable starting point and range if no sexual activity had occurred (including because the victim was fictional) ("sentences commensurate with the applicable starting point and range will ordinarily be appropriate").*"

10. Moving on to the *Reed* case, this involved six different persons, which were listed together so the Court of Appeal could "*consider whether the reasoning in Privett should apply more widely to other offences under*" the 2003 Act and where "*no sexual activity occurs*" (para. 5). Paragraph 8 then repeats what I have just set out from *Privett*, ending with the explanation that section 14 (and so also section 25 of the 2020 Law) is a "*preparatory offence and was complete when the arrangements for the offence were made or the intended offence had been facilitated and it was not, therefore, dependent on the completed offence happening or even being possible. In those circumstances, the absence of an actual victim did not, therefore, reduce culpability.*" The final sentence in para. 23 is also, in my view, of relevance: "*The harm should always be assessed in the first instance by reference to his or her intentions, followed by a downward movement from the starting point to reflect the fact that the sexual act did not occur, either because there was no real child or for any other reason.*"

11. Of the six appellants in *Reed*, two are more notable than the others. In the case of the appellant, Vasile, this was a reference by the Attorney General. It involved contact with a 12-year-old girl, who was actually an undercover police officer. This offence contrary to section 14 of the 2003 Act was dealt with on the basis that it was a section 9 offence (which is one of the differences with the Applicant). The Court of Appeal disagreed with the categorisation of the offending. It was not a category 3A offence, but was instead a category 1A offence, given the "*planning, grooming and the significant age disparity*" (para. 67), with a starting point of 5 years' custody with a range of 4 to 10 years' custody. The outcome of that reference does not matter, because it turned on issues that have no bearing on the Applicant. The second instance is that of the appellant, Millen, which was similarly a reference by the Attorney General of an unduly lenient sentence. This case involved someone met online who Millen thought was the father of an 11-year-old girl, but who was an undercover police officer and the girl was fictitious. As para. 73 explains, the sentencing judge applied the guideline for a victim under 13, "*which referred him to the guideline for rape of a child under 13*". It was categorised as a 3A offence, suggesting a starting point of 10 years in a range of 8 to 13 years' imprisonment. Due to the fictitious nature of the father and daughter, there was "*a substantial discount on sentence*", resulting in a sentence of 3 years' imprisonment. That level of discount was regarded as unduly lenient and the Court of Appeal substituted a sentence of 7 years' imprisonment.

12. I have referred to the matter of Millen in *Reed*, because there were in the Applicant's case five Counts where the approach to take would, if the English Sentencing Council guideline were to be adopted for these purposes, have potentially involved aggravating such a 10-year starting point for the multiple offending. When Count 2 is also factored in, I am not persuaded that the 12-year starting point inevitably makes the resulting sentences manifestly excessive. To that extent, I am not persuaded that ground 1(a), which refers to this combined starting point of 12 years is in itself an arguable ground of appeal. If viewed in isolation, I would not grant leave to appeal on this element of the first ground.

13. However, I do not fully understand why the reduction from that combined starting point of 12 years across these six Counts was not greater than the two year discount applied. Whilst it does not always follow that the full one-third discount for plea will be afforded, there is no real explanation in the sentencing remarks for the comment made that "*as the evidence was overwhelming and totally unanswerable the discount falls to be restricted appropriately*". Having reached the combined starting point of 12 years, the approach in the Sentencing Council guideline would have been to reduce that starting point commensurately before then turning to any other mitigation, including guilty pleas. Even allowing for a "*very small reduction in the range*", to which was then added "*a small reduction for the inevitable pleas on all Counts in the Indictment*" mentioned towards the end of the mitigation addressed in the sentencing remarks, this appears to me to be the area where there might be an argument that the sentences imposed were manifestly excessive. It would have assisted to set out expressly the size of the commensurate discount from that starting point and also the percentage reduction afforded for the guilty pleas. By way of example, in Millen's appeal in *Reed*, even making an allowance

for any element of double jeopardy on a reference by the Attorney General, there was still a discount from the starting point that appears to be greater than that given in the Applicant's case.

14. There is also a potential inconsistency between the approach taken to the indecent images of children, even though there is no appeal relating to the consecutive sentence of 2 years' imprisonment imposed for those six Counts, where the "*significant number of Class A images*" had led to a starting point of 3 years' imprisonment, reference being made to *Wicks* 2011-12 GLR 482. If this was part of applying the totality principle, it might have been expressed more clearly. However, the overall discount, recognising that the guilty pleas were just as inevitable, from that 3-year starting point, was an overall reduction of one-third. In the absence of an explanation in the sentencing remarks as to why a lower discount for the combined mitigation of just one-sixth was applied to Counts 1 to 6, I am persuaded that I should grant leave to appeal the sentences of 10 years' imprisonment imposed on the Applicant in respect of those Counts, principally on the basis of ground 1(b).

15. I am not, though, persuaded that the second ground advanced by Advocate Fattorini is arguable. It adds nothing to the sentences actually imposed on the Applicant because, under the so-called slip rule, the extended sentence licence was revoked, or corrected, in respect of Counts 1 to 6. What matters is the sentence the Royal Court actually imposed. There is no separate appeal against a five-year extended sentence licence as imposed for each of Counts 7 to 12. Because there has been no extended sentence licence in respect of any of Counts 1 to 6, there can be no appeal against the absence of such an extended sentence licence. On that basis, no leave is granted in respect of the second ground and if the Applicant wishes to pursue that aspect a renewed application for leave will need to be made to the plenary Court.

16. For the reasons I have given, leave to appeal is, therefore, granted only in respect of the first ground of appeal and principally on the basis of what is set out in ground 1(b).

17. Further, having granted leave to appeal, the Applicant will also be granted legal aid in respect of his appeal against sentence.