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No: 201705523 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 7 March 2018

B e f o r e:

LADY JUSTICE HALLETT DBE
VICE PRESIDENT OF THE CACD

MR JUSTICE GOSS

MR JUSITCE ANDREW BAKER

R E G I N A
v
AMAR BOSTAN

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Mr C Harper appeared on behalf of the **Appellant**

Ms C Summers appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

MR JUSTICE ANDREW BAKER:

1. This is an application to the full court for permission to appeal against sentence. It was referred to us by the Registrar and has not been considered by a single judge on the papers. As will become apparent, the application raises properly arguable grounds of appeal. We grant permission and will proceed to determine the appeal.
2. The appellant appeared before Ms Recorder Levitt QC for sentence in the Crown Court at Wood Green on 16 November 2017. He had pleaded guilty before magistrates a week before to a single offence of disclosing a private sexual image with intent to cause distress, committed on 30 October 2017, his 19th birthday.
3. This new offence was created by section 33 of the Criminal Justice and Courts Act 2015. Its creation was well publicised as a response by Parliament to the very modern phenomenon often referred to as 'revenge porn'. It carries a maximum sentence of 2 years in custody.
4. There is no offence-specific sentencing guideline. The learned Recorder made reference to a draft guideline circulated as a consultation document by the Sentencing Council in relation to intimidatory offences and domestic abuse. She was invited to do so by both council. But a draft guideline issued for consultation does not fall to be taken into account. The question whether the sentence was manifestly excessive, as the appellant submits, is a matter for general sentencing principles and practice, in particular under the Definitive Overarching Principles: Seriousness guideline published by the Sentencing Guidelines Council (as it was then) in 2004.
5. The sentence was an immediate sentence of detention with a term of 4 months. In addition, the learned Recorder purported to activate a suspended sentence of 9 months'

detention but with a reduced activated term of 6 months to be served consecutively, so the total sentence imposed was one of 10 months. The suspended sentence had been imposed by the Crown Court at Snaresbrook on 20 January 2017 with an operational period of 24 months.

6. For someone of his age, the appellant already had a substantial criminal record. There were 10 previous convictions for 25 offences spanning drugs, criminal damage, violence, intimidatory behaviour and driving matters. Under a sentence imposed on 26 October 2017, again by the Crown Court at Snaresbrook, the appellant was a serving inmate at the time of the sentencing hearing with which we are concerned. It is accepted on his behalf that in the circumstances a short additional custodial sentence consecutive to that sentence was a reasonable disposal in relation to the private sexual image offence.

7. Permission to appeal was sought solely upon the ground that the period of 4 months imposed for that offence was manifestly excessive. Since the appellant was due for release in June under the sentence as passed, and given his youth and the absence of an offence-specific sentencing guideline, the Registrar referred the application directly to the full court.

8. Furthermore, although the activation of the January 2017 suspended sentence was expressly not challenged in the application for permission, the Registrar was concerned it may have been unlawful. That concern has been considered by counsel for the appellant and by the CPS Appeals and Review Unit on behalf of the Crown, whose respondent's notice was settled by Ms Summers of counsel, who has appeared also for the Crown today. They are all agreed that indeed the sentence imposed on 16 November 2017 was, to the extent of purporting to activate the January suspended sentence, unlawful. We also agree. To show why, we need to explain in a little more detail the January and October

2017 Snaresbrook sentences. We shall deal with that aspect first before returning to the sentence for the private sexual image offence.

9. On 20 January 2017, the appellant received custodial sentences all suspended for 24 months for four offences, and fines for two further offences. The custodial sentences were as follows: 9 months for an unlawful wounding; 3 months consecutive to that for driving whilst disqualified; 6 months each, concurrent to each other but consecutive to the 9 months and the 3 months, for two bladed article offences. Thus in aggregate the custodial sentence imposed in January 2017 was one of 18 months suspended for 24 months. At the sentencing hearing giving rise to the appeal now before us, the learned Recorder was told in error that the January sentence had been 15 months suspended for 24 months, but nothing will turn on that.

10. On 16 October 2017, the appellant was sentenced to 4 months' immediate custody for further driving whilst disqualified in April 2017. That offence put the appellant in breach of the January suspended sentence. It was activated but with a reduced term very favourable to the appellant. Whereas the individual custodial periods imposed in January made an 18-month aggregate sentence suspended for 24 months, the activated custodial term was only 3 months, to be served consecutively to the sentence for the April disqualified driving. Thus, when he appeared before the learned Recorder on 16 November 2017, the appellant was 3 weeks into a 7-month sentence constituted in part by the January unlawful wounding sentence as activated with a reduced term.

11. It appears from the sentencing remarks in October that the judge on that occasion may have intended to activate only the 3 months for disqualified driving imposed in January and not the "other" suspended terms imposed in January. Mr Harper for the appellant submits, and Ms Summer for the Crown, agrees, that it was not possible for the individual

components of the January sentence to be treated separately in relation to activation. He submits that although it was built from four separate consecutive custodial sentences, the January sentence was in law a single, indivisible custodial term of 18 months, suspended for 24 months.

12. We agree. The result is that the suspended sentence imposed in January for the unlawful wounding was activated on 26 October, even if that had not been the judge's intention on that occasion. By paragraph 8(2)(b) of schedule 12 of the Criminal Justice Act 2003, the suspended sentence order of 20 January 2017 was thus substituted on 26 October 2017 by an immediate custodial sentence with a reduced term; and by paragraph 9(3) of that schedule, on and from 26 October 2017 the appellant stood sentenced for the unlawful wounding to an immediate custodial term of 3 months and nothing more. As a result, there was no suspended sentence order capable of activation on 16 November 2017 and there was no unactivated custodial term for the unlawful wounding that the appellant could be required to serve.

13. The learned Recorder in November was aware that the appellant was serving a sentence imposed as recently as October but she was misinformed that there was an extant suspended custodial term capable of activation. We have no doubt that that error was an error in good faith. Further, we have observed that the substituted term of 3 months on activation of the January sentence seems very lenient and may not fully have reflected the intention of the judge sentencing in October (as he had in mind that he was leaving a 15-month suspended term hanging over the applicant capable of future activation). But be all of that as it may, the fact is it was not open to the learned Recorder on 16 November to impose a sentence upon the appellant for his unlawful wounding offence as she purported to do. Therefore, that part of her sentence must be quashed.

14. We return then to the private sexual image offence. The appellant sent a single still image of the complainant, who had just turned 18, to her mother. It was a topless photo. The complainant was naked above the waist only, not striking any overtly sexual pose or doing anything sexual beyond baring her top half. She and the appellant had been in a relationship between September 2016 and June 2017. The complainant had allowed the appellant to have the topless photo of her as a private matter between them within the scope of their boyfriend/girlfriend intimacy only. We infer that the complainant was 17 when the photo was taken.

15. The appellant sent the photo to the complainant's mother in October as an act of revenge because the complainant had made contact with his new girlfriend. The complainant did that when she discovered that the appellant had cheated on her with this new girlfriend, to warn her about his character (as the complainant would say), to blacken his name with the new girlfriend (as he would say). Whether the complainant's motive was noble or spiteful, her contacting the new girlfriend gave the appellant no excuse whatever for what he did. He sent the photo to the complainant's mother intending by doing so to cause distress and by doing so he did in fact cause some very real distress, as the complainant explained in her victim personal statement. That was the case in particular because, to the appellant's knowledge, the complainant was from a conservative family and her mother would be shocked and ashamed that her daughter had allowed the appellant to have such a photo of her in the first place. The appellant aggravated the sending of the photo by the message to the complainant's mother he sent with it, since that included a threat that if the complainant did not leave him alone he would "expose her to the world".

16. The appellant admitted in interview that he sent the photo and that he should not have

done so. He said it was a moment of madness when he was annoyed with the complainant. He knew as he sent it that her mother would 'hit the roof' and cause the complainant 'all sorts of grief'. He pleaded guilty before the magistrates and was given credit of one third for that plea.

17. The learned Recorder identified fairly the real harm intended and in fact caused. She also identified correctly that the offence involved only a single still image, not in fact disseminated widely and of a less serious kind. She said that enabled her to take a more lenient course than she would otherwise have done. She also referred to the remorse expressed by the appellant for the effect his actions had had on the complainant in a letter written to the court. Finally, apart of course from giving him full credit for his plea, she said the sentence she was passing was reduced because of the appellant's age.
18. We do not think there is any flaw in any of that reasoning, so far as it goes in identifying the factors relevant to the seriousness of the particular offence.
19. Before moving on, we should deal with a submission by Ms Summers today that the sentence may have been additionally reduced, as against what it might otherwise have been, because of the principle of totality, given that the learned Recorder was also purporting to activate, as we have described, the January suspended sentence. There is, however, no hint of that, with respect, in the learned Recorder's sentencing remarks and we do not think that was a well-founded submission.
20. Having said that, so far as it went, the learned Recorder's recitation of the material facts was fair and accurate, the learned Recorder prefaced her whole consideration of the particular facts by stating that offences such as this are "always serious, particularly where the victim is young ... and comes from a religious background", and concluded by stating that the offence was so serious that only an immediate custodial sentence could be

justified.

21. As we have said, the imposition of a short immediate custodial sentence is not challenged given the appellant's circumstances. However, the learned Recorder did not impose such a sentence as a pragmatic inevitability but on the basis that the offence in this case plainly crossed the custody threshold by such a margin that were the appellant not as young as he is a term materially longer than 6 months would have been correct prior to giving credit for plea.

22. In that, and with respect, the learned Record was, in our view, in error. Parliament has recognised that disclosing private images of this kind can cause very real distress to the victim by making it an offence punishable with imprisonment. However, the maximum sentence provided is 24 months and it obviously remains an important part of the sentencing process to assess where in the scale of seriousness an individual offence lies.

23. In our view, the Recorder, who had little, if any, guidance available to her, has placed the offending in this case at too high a level of seriousness. We do not underestimate the distress caused to the victim and to her mother nor the aggravating importance of this appellant's record. But given the nature of the image and its limited disclosure, we are satisfied the sentence was excessive.

24. The appellant does not challenge the imposition of a short additional custodial term in his particular circumstances and we give effect to our conclusion by reducing the term to 2 months, reduced from 3 months to give full credit for the appellant's guilty plea.

25. This appeal is thus allowed. A sentence of 2 months' detention, consecutive to the sentence imposed on 26 October 2017, is substituted for the sentence that was passed on 16 November 2017.

WordWave International Ltd trading as DTI hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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