Neutral Citation Number: [2019] EWCA Crim 1430

No: 201901209/A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 9 July 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE WARBY

HIS HONOUR JUDGE POTTER

(Sitting as a Judge of the CACD)

R E G I N A

v

JASON HUGH ALLINGTON

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information 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 transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr P Flemming appeared on behalf of the **Appellant**

J U D G M E N T

(As approved)

1. HIS HONOUR JUDGE POTTER: The appellant appeals, with leave of the single judge, the sentence imposed upon him in these proceedings on 1 November 2018 at Aylesbury Crown Court. On 21 September 2018 the appellant pleaded guilty before the Magistrates' Court to one offence of arranging or facilitating the commission of a child sex offence, contrary to section 14 of the Sexual Offences Act 2003. His case was committed for sentence to the Crown Court pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. The sentence imposed upon the appellant on 1 November at the Crown Court was an extended sentence, under section 226A of the Criminal Justice Act 2003, comprising a custodial term of 4 years and an extension period of 3 years.

2. The appellant was ordered to pay a victim surcharge and made subject to a sexual harm prevention order for a period of 10 years. Other ancillary orders were also made including an obligation upon him to comply with the notification requirements in relation to the sex offender register indefinitely.

3. The facts of this case are as follows. In March 2018 the Organised Crime Unit Southeast Region set up a profile in the name of “Ellie” on the Number One website for dating teens called “MyLOL”. “Ellie” in her profile purported to be 13 years old. The appellant accessed her profile. His profile said that he was a 17-year-old male from Birmingham and when they began conversing on the website he told her that he was 18. He was in fact 40 at the time.

4. Within minutes he asked her via the website whether she also had access to another messaging service, a secure encrypted instant messaging called “KIK”. They began messaging and very quickly he was asking her things like what she had done sexually before. He told her that he had digital sex with other girls. They spoke about “Ellie” being a virgin. He was aware that “Ellie” was still at school and said after they had met she would no longer be a virgin. He told her about the size of his penis when erect and “Ellie” gave him her body measurements when he asked for them. There was talk about meeting up over the days that followed. He told her twice to delete their messaging and not to tell anybody about it and that when they met and, if they had sex, then she could not tell anyone until she was 16. He asked for pictures but no sexual images were exchanged between them but he did take pictures of the bed in the cab of the lorry that they were to meet in. He suggested various dates to meet but it did not happen until a fixed arrangement was made for 10 April 2018. The appellant said that he was working, driving down the M1 and could come and meet her in Milton Keynes in his lorry. He asked her if she was on her period because he did not want to have sex with her when she was on her period. “Ellie” said she was worried about pregnancy and there was talk of condoms. He said he would pull out before he “came” but agreed to get condoms on the way to meeting her. There was talk about what she should wear. He apologised that he would be in his work clothes. He told her he was falling in love with her and she was his “special girlfriend”.

5. The appellant arrived in his HGV at the time and place they had agreed on a main road in Milton Keynes. He had condoms in the cab. When he arrived he was arrested by the the police who were waiting for him. His phone was seized. On that phone no indecent images of children were found. In interview the appellant gave a “no comment” response.

6. He was subsequently charged and pleaded guilty at the Magistrates’ Court. His case was then committed to the Crown Court for sentence. In sentencing the appellant the sentencing judge made reference to the Sentencing Council’s Guidelines. The guidelines for offences committed contrary to section 14 says this: #

”Sentencers should refer to the guideline for the applicable, substantive offence of arranging or facilitating under sections 9 to 12...The level of harm should be determined by reference to the type of activity arranged or facilitated. Sentences commensurate with the applicable starting point and range will ordinarily be appropriate.”

7. Following this guidance the sentencing judge then correctly referred to the guideline for the substantive applicable offence, here sexual activity with a child, an offence contrary to section 9 of the Sexual Offences Act 2003. He then took the view that this was a category 1 harm offence, given that what was being arranged by the appellant was clearly penetration of the vagina with his penis.

8. Regrettably the sentencing judge was not made aware of the authority of *R v Baker [2014] EWCA Crim 2752* . In that case it was made clear that the question to be considered by the court was whether making an arrangement to behave in a particular way, which did not involve anything more, fell within the same category of harm as actually committing the fact, that is in the circumstances of this case, the penile penetration of a child's vagina. Putting it another way: does making arrangement to commit such an act deserve the same level of sanction as committing the act itself, subject of course to additional considerations of culpability and aggravating and mitigating features of the case?

9. Apply this question to the circumstances of this case, we come to the view that it does not. The level of harm disclosed by the harm in this case falls, in our judgment, at category 3 within the guidelines namely as "other sexual activity". It should be remembered that in this case there was no victim of the offender's abusive behaviour - "Ellie" being a fictitious online profile created by the authorities with a view to ensnaring those like this appellant who wished to sexually abuse children. Harm caused by the penile penetration of "Ellie" could never have taken place in the circumstances even though this was very much in contemplation of the appellant. This is not to say that this offending was not so serious as to merit anything other than an immediate custodial sentence, just that the appropriate starting point within the guidelines is 26 weeks' imprisonment, up to a limit of 3 years' imprisonment within the sentencing range.

10. The appellant has previous convictions. None of which trigger the dangerousness assumption within the Criminal Justice Act 2003. It follows that unless the sentence to be imposed was of at least 4 years' duration, the appellant could not then be sentenced within the dangerousness provisions. Given our approach to the application of the Sentencing Guidelines in this case, as we have outlined above, we come to the view that the custodial sentence imposed was wrong in this case. The appellant should be sentenced outside the dangerousness provisions. He should instead receive an immediate determinate custodial sentence.

11. This is a category 3A offence. There is culpability at level A because of the planning involved in this case, including sending pictures of the bed in which intercourse was to occur and the purchase of condoms. The appellant also lied about his age. Additional aggravating features can be found in the appellant taking steps to prevent "Ellie" reporting his behaviour towards her, the time period over which this offending took place and the appellant's willingness to travel to an agreed destination where he believed he would be able to sexually abuse a child. These aggravating features significantly increase the starting point in this case towards near to the top of

the range of sentences available, particularly given what the appellant contemplated would occur.

12. The contents of the pre-sentence report in this case described the appellant as at “medium risk of re-offending but posing a high risk of causing serious harm to young teenage females”. There is mitigation available to the appellant in his lack of relevant previous convictions and in matters raised by way of mitigation in the pre-sentence report. We also take note of the contents of the grounds of appeal repeated and added to in oral submissions from Mr Flemming who appears for the appellant today. We have also considered the recent report regarding the appellant of Mrs Norton, psychologist, dated 7 July 2019, provided to us earlier this week.

13. Balancing the aggravating and mitigating features of this case, the appellant could have expected to receive a sentence after conviction at trial of 30 months. Applying credit for plea, this sentence is reduced to one of 20 months. To that extent this appeal is allowed. The victim surcharge order will remain in place, the sexual harm prevention order will also remain in place for 10 years but the notification period for the sex offender’s register will be reduced to a similar period of 10 years given the sentence we have imposed. The other orders remain in place.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk

Crown copyright