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No: 201403049/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 17th December 2014

B e f o r e:
LORD JUSTICE ELIAS

MR JUSTICE SIMON
MR JUSTICE COX DBE
R E G I N A

v

JOSHUA BRYAN JOHN HARRIS

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Mr R Conley (Solicitor-Advocate) appeared on behalf of the **Appellant**
Mr N Casey appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MRS JUSTICE COX: On 6th May 2014, in the Chelmsford Crown Court, this 20-year-old appellant pleaded guilty to three offences of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003. On 4th June he was sentenced for each offence to a term of 40 months' detention in a young offender institution, those sentences to run concurrently. He now appeals against that sentence by leave of the single judge.

2. The relevant facts are these. The appellant was born on 15th May 1994. When he was 18 years of age he came into contact with the female victim of these offences via a mutual friend, through Blackberry messaging (BBM). She was aged 14 and she told him she was 14 and that she was in year 10 at the school she attended. In this judgment we shall refer to the victim throughout as "X".

3. In early May 2013 they met up in the town centre in Maldon, when X was with two of her friends. There was then further contact by BBM, during which the appellant suggested that they should indulge in sexual acts together. X agreed and they arranged a further meeting in Maldon. X then took the appellant back to her home and, while the family were away, they had consensual vaginal sexual intercourse in the living room and bedroom. This was the first offence charged on count 1 of the indictment. X then told her parents that she was seeing the appellant and that she had some concerns. They advised her to stop seeing him.

4. However, about 3 months later, on 26th August, the appellant got in touch with X via text message and suggested they should meet up. She agreed to meet him on condition that there was no sexual activity between them. They met in an alley by Morrison's supermarket. The appellant offered her a cigarette and suggested that they should go into the woods. They walked down a footpath, which led to a community centre, and arrived at a clearing where there were two benches. They sat down on one of the benches and she accepted a cigarette from him and began to smoke.

5. The appellant then pulled his jogging bottoms down, exposing his penis, and he stood in front of her. He held the back of her head with one hand and his penis with the other. She turned her head away and the appellant desisted initially but then he did it again, and, although reluctant, she put his penis into her mouth. He pushed her head down and about 3 minutes later he ejaculated into her mouth, causing her to gag. He asked her to suck his testicles but she refused. This incident formed the subject of the second offence charged on count 2.

6. The appellant then asked X if he could have sexual intercourse. She said "no" because he did not have a condom. The appellant persisted. He took her wrists and lifted her from the seat, unbuttoned her shorts and took her underwear down to her knees. He then had vaginal sex from behind, touching her breasts over her clothing at the same time. Again he ejaculated inside her. This was the third offence on count 3.

7. Afterwards they went to a local shop in a road nearby, where the appellant bought cigarettes and they then went their separate ways.

8. X was afraid that she might be pregnant, no condom having been used, and she told one of her best friends what had happened. Due to her concern about being pregnant she also told her parents and the matter was reported to the police.

9. The judge had a personal statement from X which described the serious psychological effects upon her of the appellant's actions, including considerable anxiety and distress at the possibility that she could be pregnant. The appellant had no previous convictions. He had one caution in 2012 for an offence of assault.

10. The author of the pre-sentence report noted that the appellant took full responsibility for his actions and for the impact of these offences upon the young victim. The author noted that the appellant tended to socialise with people who were not “age-appropriate” for a male of 19 years of age. He was assessed as posing a high risk of harm to children and to the general public, with a significant risk of sexual assaults against women, which needed to be addressed.

11. Passing sentence upon him the judge observed that the appellant was almost 19 when he had committed the first of three acts of sexual activity with a child. He referred to the facts. The appellant had met X via a social network. He discussed sexual matters with X via this social network and had effectively “groomed” her for sex. When he met her and had that sexual activity the judge considered that there was a significant degree of planning within the meaning of the 2014 Sentencing Guidelines and, further, that there was grooming behaviour within the meaning of the Guidelines. The judge considered that there was also a significant disparity in age, because the appellant was almost a third older than the victim. X was a young teenager on the threshold of becoming a woman and he was already an adult with a job and a vote.

12. The judge accepted that X had gone along with what happened, but she was inexperienced and naive as a 14-year-old girl. The appellant had taken advantage of her naivety. The law was there to protect young girls from being exploited and used for sex when they were still children.

13. The judge went on to refer to X's personal statement and noted that she had suffered considerable harm as a result of what the appellant did to her, and she was ashamed of herself. Her relationship with her parents had suffered. She had started to self-harm and her academic progress and psychological stability generally had been impaired. The sexual activity would leave its mark on her for some considerable time and might well affect her own relationships and her trust in men in the future.

14. The judge stated that the appellant had acted solely for his own gratification and there was no excuse for it. There were favourable character references placed before the court and the judge accepted that the appellant was in most respects honest and decent, but he had let himself down and had to pay the price, partly as punishment and partly to make other young men realise that they must leave children to develop into adults in an innocent way, without having sex thrust upon them in such an unwelcome and damaging manner. He would receive credit for his guilty plea, entered at an early stage, and the sentence was therefore 40 months' detention on each count concurrent.

15. On behalf of the appellant Mr Conley submits, essentially, that the judge erred in placing this series of offences within category 1A of the 2014 Sentencing Guidelines, where the starting point is one of 5 years' imprisonment and the range is between 4 and 10 years. He submits that these offences properly fell within category 1B of the Guidelines, with a starting point of 12 months and a range between a high level community order and 2 years' imprisonment. Notwithstanding the fact that this was a series of offences, rather an isolated incident, allowing credit for his early plea of guilty Mr Conley submits that the sentence of 40 months was significantly in excess of the upper end of the sentencing range for category 1B and was therefore manifestly excessive.

16. He also submits that the judge erred in concluding, on the facts of this case, that there was a significant disparity of age between X and the appellant. He suggests they were both teenagers, engaged in an immature sexual relationship, and that they were sufficiently close in age to have mutual friends and acquaintances.

17. Similarly, while the meeting in Maldon in August required some planning, that did not constitute a significant degree of planning of the kind envisaged by the Guidelines. Nor could the appellant be said to have engaged in "grooming behaviour" of the kind contemplated in the Guidelines. They met through mutual friends and communicated through a social network, as all of them did. After the first offence in May, the appellant had contacted X again in the hope she would agree to meet again. She did agree and they met in August when the other two offences were committed.

18. For these reasons Mr Conley submits that the judge was wrong to sentence the appellant on the basis that the offences fell within category 1A. Realistically he accepts that, if they did properly fall within category 1A, the sentence of 40 months' detention was not excessive.

19. We have considered Mr Conley's submissions carefully and we have also been assisted by the written and oral submissions of Mr Casey, on behalf of the Prosecution. Our attention has been drawn to a number of documents, including various authorities, consultation papers and definitions of "grooming behaviour" in other contexts.

20. However, we do not propose to attempt any definition of "grooming behaviour" or indeed of "planning", terms which are not themselves defined in the Sentencing Guidelines. In previous cases this court has observed that "grooming" involves trying to obtain the confidence of the intended victim and to break down that person's inhibitions. See for example R v HG [2010] EWCA Crim 1693, at paragraph 16. We agree and would add that, in our judgment, the essence of this sort of conduct seems to us to involve, to a greater or lesser degree depending on the facts, elements of manipulation and control, the offender treating the victim as an object for his own self gratification.

21. Cases such as these will always fall to be determined on their own individual facts. The Guidelines cannot, and do not attempt to cater for all the different circumstances that may arise. Whether in any particular case the facts reveal behaviour which could

properly be described as “grooming” will always fall to be considered on the specific facts involved in each case.

22. These offences were, in our judgment, serious offences committed by a young adult, aged 18 and 19, against a child of 14. We consider that the judge was right to place the offences within category 1A of the Guidelines. Age disparity involves consideration of maturity and responsibility, as well as the chronological ages of the respective parties. While this appellant was said to have a tendency to socialise with persons younger than himself, the character references placed before the court on his behalf indicated that he was a hard working, reliable and responsible young adult. In our view, he was sufficiently mature to be well aware that what he was doing was wrong. The judge was right, in the particular circumstances of this case, to regard the disparity in age as significant.

23. In addition we consider that there were elements of grooming and planning in this case. The appellant undoubtedly had his own self gratification in mind when suggesting sexual activity between them initially, in May, and then in persuading X to meet him again 3 months later. In August he clearly used his influence to overcome her initial reluctance to meet him and agreed to her request that there should be no sexual activity between them, while he was no doubt intending that such activity would take place.

24. X was obviously reluctant throughout both the sexual acts which occurred in August. The appellant would have been well aware of her discomfort and reluctance and yet he persisted. After the act of oral sex, following which she gagged, he had vaginal intercourse with her from behind, even after she had initially said "no" because he did not have a condom. This was, in our judgment, manipulative and controlling behaviour by a young adult male, who took advantage of X's naivety as a 14-year-old girl. His conduct indicates a high degree of culpability.

25. The personal statement provided by X reveals the serious effects of the appellant's actions upon her. Quite apart from her fear of being pregnant, she felt ashamed and confused. She had feelings of guilt and felt that it was all her fault. There were incidents of self-harm. The judge was right to stress that the law is there to protect young girls from themselves and from being exploited and used for sex in this way.

26. For all these reasons we consider that the judge was entirely right to sentence as he did. In our judgment the term of 40 months' detention cannot be said to be manifestly excessive or wrong in principle and this appeal is therefore dismissed.