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No: 201902671/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 15 October 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE COCKERILL DBE

HIS HONOUR JUDGE BATE

R E G I N A
v
TF

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Mr S Hennessy (Solicitor Advocate) appeared on behalf of the **Appellant**

J U D G M E N T

1. MRS JUSTICE COCKERILL: On 19 June 2019, in the Crown Court at Stoke-on-Trent before His Honour Judge Glenn, the appellant pleaded guilty to one count of causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003 and two counts of sexual activity with a child contrary to section 9(1) of the Sexual Offences Act 2003. On the same date he was sentenced to 2 years and 6 months' imprisonment on each charge, all to run concurrently, as well as the usual Victim Surcharge order.

2. The appellant's victim is entitled to the protection of the Sexual Offences (Amendment) Act 1992. Under the provisions of that Act, where a sexual offence has been committed against a person, no matter relating to that person shall, during their lifetime, be included in any publication if it is likely to lead members of the public to identify him as the victim of that offence. This prohibition will continue to apply unless and until it is either waived or lifted in accordance with the Act. We shall not therefore name the victim but shall instead refer to her by initials.

3. The facts of this case can be briefly stated. The appellant and EB had been related through the marriage of their older relatives and thus were cousins. The appellant and EB had first made contact when the appellant was around 15 years of age and EB was around 12. EB's home circumstances were somewhat difficult as her mother was unwell. When the appellant was 19 years of age and EB was 14 they began to communicate more regularly using messaging platforms and they met at EB's home on one occasion. The appellant subsequently stayed at EB's address. Although some of their communication was in the form of supportive chat, the messages eventually became highly sexualised and involved the appellant and EB explaining what they would like to do to each other sexually as well as swapping both explicit images and videos. The idea for this was the appellant's but the first image was requested by EB. As part of these exchanges the appellant encouraged EB to penetrate her vagina with her fingers (count 1 of which he was charged).

4. One evening, between 7 July 2017 and 10 July 2017, the appellant had been invited over to EB's house by EB's mother. He and EB went for a walk. Whilst they were out EB (encouraged by the appellant) performed oral sex on the appellant (count 2) and the appellant then penetrated EB's vagina with his penis (count 3). EB consented to both events. Subsequently EB disclosed what had been happening to a support worker who had been involved with EB because of her status as a young carer assisting her mother. Thereafter the police were contacted and inquiry commenced.

5. EB gave a very straightforward interview to the police. She did not want to get the appellant into trouble and she made no bones about the fact that she had engaged willingly in the sexual activity. She suggested she thought their levels of maturity to be

comparable. At the same time her evidence pointed to the appellant as the initiator of what she described as a "fling" and she described him as behaving in a somewhat overbearing fashion to her.

6. The appellant was arrested in November 2017 and interviewed by the police. In his interview, he made admissions in relation to the offending and, as noted, he then quickly pleaded guilty to the offences.

7. In sentencing the appellant, the judge noted that he was of previous good character and was entitled to a full one-third discount by his early plea. The judge then outlined the facts of the offence and noted that the appellant had remarked to EB that "apart from the law thing I'm good" which had indicated that the appellant had known what he was doing was wrong. Intercourse had been unprotected and the appellant had ejaculated on EB's back. During intercourse the appellant had referred to EB as a "slut" and a "whore", which terminology understandably caused EB some disquiet.

8. The judge noted both EB's letter and interview. He noted there had been a delay in the case coming to court and said he took account of that in the appellant's favour. He read the references submitted on behalf of the appellant and the pre-sentence report. He noted the appellant was remorseful, was intelligent and had a decent work record. He concluded that all three of the offences involved penetration and so the offending was in category 1.

9. The point which is essential to this appeal is the judge also took the view that the offending was culpability category A. He reached that conclusion on the basis that he was satisfied there had been significant planning and grooming behaviour and there had been an element of abuse of trust. He also noted that it was an aggravating feature that intercourse had been unprotected.

10. Bearing those factors in mind there was no doubt in the judge's mind that the case was so serious that only custodial sentences were appropriate and he therefore ordered sentences of 2 years 6 months, concurrent on all three counts.

11. The issue for this court arises out of that categorisation of harm as category A. It is submitted on behalf of the appellant that the offending should have been categorised as category 1B, which had a starting point of 1 year's imprisonment and a sentencing range of high level community order to 2 years' imprisonment. It is submitted that the judge gave insufficient weight to the contents of the pre-sentence report.

12. On that basis it is then argued that the sentences imposed should not have been

immediate imprisonment but a suspended sentence order or a community order and that the total of 2 years and 6 months' imprisonment was therefore manifestly excessive.

13. Leave was given by the single judge on the basis that the arguments to culpability were worthy of consideration by the Full Court.

14. Before us this morning we have been much assisted by the helpful submissions of Mr Hennessy for the appellant. He emphasised the appellant's early acceptance of his guilt and his early plea, his full co-operation to the police, the appellant's lack of malice throughout the relationship, which he characterised as being an innocent and mutually supportive relationship for much of the time that the relationship existed. He also pointed out that there was no question of coercion or manipulation on the part of this defendant and reminded us of the difficulties which the appellant has suffered in his personal life at the time, the personal losses leading to his being personally isolated leading in terms to his finding solace in his relationship with the victim. He has also drawn to our attention that the rehabilitative elements of the sentence imposed have not yet been commenced.

15. The judge's decision to place the offending in category A seems to us to have rested on three points: what he saw as grooming; what he saw as significant planning and what he saw as an abuse of trust. The latter point can be dealt with most easily. This is an area which has been the subject of considerable thought by this court. We note the caution in the recent case of R v Forbes [2016] EWCA Crim 1388; [2017] 1 WLR 53, where the court said:

    i. "What is necessary is a close examination of the facts and clear justification given if abuse of trust is to be found."

16. In paragraph 17 of the judgment the court also said:

    i. "Whilst we understand that in the colloquial sense the children's parents would have trusted a cousin, other relation or a neighbour ... to behave properly towards their young children, the phrase 'abuse of trust', as used in the guideline, connotes something rather more than that. The mere fact of association or the fact that one sibling is older than another does not necessarily amount to breach of trust in this context."

17. In that case the argument arose in circumstances where Forbes was a family friend who used the access he had to the home environment. The Court of Appeal rejected the contention that this counted as an abuse of trust.

18. We also note that this court in the subsequent case of R v LO [2018] EWCA Crim 1465, said:

i. "It requires a relationship involving inequality of power, often involving a duty of care by an offender in a relationship such as those between teacher, student and parent/child."

19. These points arising from Forbes are also noted in Blackstone at B.3.10.

20. Against that background we are satisfied that this case is not a case of abuse of trust. As to grooming, the judge dealt with this very much in passing. Although we can understand the approach he took, we consider that, in this context, grooming should be understood to mean the concept as legally defined. That means the winning of the confidence of a victim in order to commit a sexual assault on him or her. Given the context in which the relationship arose and the evidence as to the early stages of the relationship, we would hesitate to categorise this as a case of grooming - although once the relationship was established, there might be said to have been some sort of grooming element in the initiation of the game whereby the pair exchanged explicit images which would itself tend to facilitate more intimate contact.

21. As for the third element of planning, it must be recalled that what the guideline requires is "a significant degree of planning" - some limited planning is not enough. We consider that, as this court has had occasion to observe, before, some assistance in calibrating what is intended to be covered under this head and indeed the grooming head, may be afforded by looking at the other matters of culpability that under the guideline result in an offence being placed into category A. Those matters include such things as an offender acting with others to commit the offence, the use of alcohol or drugs on the victim to facilitate the offence, or that the offence is motivated by or demonstrates hostility for particular reasons. Whilst these are self-contained issues that raise culpability they are matters which provide a clear indication of the threshold envisaged to be appropriate in order to create a higher degree of culpability which is requisite before one can say this offence is an example of the most serious sort of sexual offending of this type, so as to fall into category A.

22. When a degree of planning reaches that higher level of culpability which correlates with a significant degree of planning, it has to be a matter of judgment based on all the facts of the case. Many cases will involve a degree of planning but not all planning will be significant. So we can see that where a perpetrator watches the victim for days before taking his opportunity, that would count as a significant degree of planning. The applicability of the term will be less apt where the offence arises more on the spur of the moment. Still less so would it be apt in circumstances such as the present, where the appellant's presence was the result of an invitation from the victim's mother, not the result of any plan by him, and the account of both involved suggests the acts constituting counts 2 and 3 were largely, though not entirely, spur of the moment.

23. We are therefore persuaded that the instant case is not fairly categorised as one involving

a significant degree of planning. Nor, revisiting the position on grooming in the light of the considerations of the factors which are indicative of category A culpability, do we consider that the judge drew the line on grooming in the correct place.

24. It follows that we conclude that the learned judge did err in categorising this case as falling within category 1A; it should rather have been categorised as a 1B offence. Bearing that in mind, the question is where to place the range for that category. We bear in mind the need to sentence for three separate offences. We also bear in mind that otherwise the mitigating factors (remorse, good character, the relative immaturity of the appellant) outweigh the factors which aggravate the offence.

25. In all the circumstances, while the custody threshold is passed and neither a fine nor a community order can, in our view, be justified, we are of the opinion that a sentence of 1 year adequately reflects the criminality involved in this offending.

26. Looking then at the relevant portions of the guideline on the imposition of community and custodial sentences and bearing in mind the appellant's assessed low risk of further offending and the realistic prospects of rehabilitation noted in the pre-sentence report, as well as the personal mitigation so strongly urged on his behalf before us this morning, we conclude that there is no reason why this sentence cannot be suspended for an operational period of 1 year. We therefore allow the appeal, quash the sentence imposed and substitute a sentence of 1 year's imprisonment to be suspended for 1 year.

27. TF, you will, I am sure, be advised and be aware that if you commit any other offence during the period of the sentence, you will be brought back to court and it is likely that sentence will be brought into operation and there will be requirements in terms of being supervised by the probation officer. You will be advised, I am sure, fully of that.

28. The appeal is successful and the sentence is varied to the time indicated.

29. LORD JUSTICE SIMON: Mr Hennessy, we will also specify the time that he has served which should form part of the order.

30. MR HENNESSY: I am very grateful.

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