NCN [2019] EWCA Crim 1669
2019/02027/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 3rd October 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE CHEEMA-GRUBB DBE

and

HER HONOUR JUDGE DHIR QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

MIDANA BIGNA

Computer Aided Transcript 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)

Miss D O'Donovan appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 3rd October 2019

LORD JUSTICE SIMON: I shall ask Mrs Justice Cheema-Grubb to give the judgment of the court.

MRS JUSTICE CHEEMA-GRUBB:

1. On 6th March 2019, in the Crown Court at Norwich, the appellant, who is aged 32, having been born on 9th January 1987, pleaded guilty to three sexual offences for which, on 29th April 2019, he was sentenced by Her Honour Judge Bacon QC. The total sentence imposed was eight years' imprisonment. He was made the subject of a Sexual Harm Prevention Order, and his mobile phone was forfeited.

2. The appellant now appeals against the custodial sentence by leave of the single judge.

3. The Sexual Offences (Amendment) Act 1992 applies to these offences. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of the offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

4. The offences were: count 3, Making an indecent photograph of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978, for which a sentence of six years' imprisonment was imposed; and counts 5 and 6, both of Sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, on each of which a sentence of eight years' imprisonment was imposed. All of the sentences were ordered to run concurrently with each other, and a victim surcharge order was made.

5. Counts 1 and 2, both offences of rape, were ordered to remain on the file in the usual terms. No evidence was offered against the appellant on count 4 (meeting a child following sexual grooming). Thereafter, a not guilty verdict was entered pursuant to section 17 of the Criminal Justice Act 1967.

6. The appellant was a man of previous good character. The offences all concern a 15 year old girl, "TW", with whom he made contact over Facebook in early January 2019. They exchanged messages. She told him her true age; but he lied to her and said that he was 23. The communications spanned just two weeks, but quickly became intimate. He sent her a photograph of his naked body. They discussed meeting in person and arranged to do so on 16th January. In advance of that day, the appellant asked TW what size she was. He said that he wanted to buy lingerie for her, but she declined his gift.

7. On 16th January, TW met the appellant in a supermarket car park with a friend of her own age, "M". As soon as they got into his car, he gave TW vodka to drink. He drove the girls to his flat, which was some distance away. The afternoon was spent listening to music, during which he and TW exchanged a number of text messages of which M was unaware. In the messages, which the prosecution later described as "seduction by text", the appellant told TW that he wanted to engage in sexual activity with her. It was clear that no such activity would take place while M was present.

8. After he dropped the girls back and M left TW, TW (who was described by M as "already tipsy") met up with the appellant again. She was now on her own. The time was then about 6.30pm. During the following 90 minutes or so, the appellant continued to ply the girl with more alcohol until she was very heavily intoxicated. He then had sexual intercourse with her

vaginally (count 5) and orally (count 6) on the back seat of his car. He did not use a condom. Without her knowledge, he filmed what he was doing on a mobile phone. The activity came to an end when TW was violently sick. She left him and returned home without her underwear, crying uncontrollably and in abdominal pain. She was unable to remember the detail of what had happened.

9. The appellant was readily identified and arrested the following day. The footage he had filmed, which showed TW's face and the sexual activity in the car, was found on his phone. During it, and while he was penetrating her vagina, he had asked her old she was. That was plainly not for information but for his sexual gratification. Regrettably, the appellant told a pack of lies to the police. He said that TW had told him that she was 19 or 20; that he had not planned to have sex with her when they met on 16th January; and that it was she who instigated the filming.

10. A toxicological analysis indicated that TW would have been heavily drunk at the time of the sexual activity. The appellant was charged with two counts of rape, an offence of grooming, and making indecent images.

11. Shortly before the case reached the Crown Court, counts 5 and 6 were added. The appellant asserted his innocence of any offence, but the plea and trial preparation hearing, listed on 18th February, was not effective. No arraignment took place. He was told then that any credit that would have accrued to him had he entered guilty pleas that day would not be extinguished by the delay. He pleaded guilty on 6th March, as we have said, although he maintained that he only discovered TW's age during the sexual activity in his car. The initial messages between the two of them demonstrated this to be untrue. It was unnecessary to resolve the dispute by a *Newton* hearing. Somewhat generously, in light of this feature and indeed the stage at which the guilty pleas had been indicated, the prosecution agreed, and the learned judge affirmed, that full credit would be set against the sentence.

12. In both her recorded Achieving Best Evidence interview and her Victim Personal Statement, TW described the deep shame she felt at allowing herself to be taken advantage of. She felt that she had been used as a toy and was stricken at the thought that others would have to watch the footage from the appellant's mobile phone during the course of the proceedings. The immediate aftermath of her complaint to the police included her having to wait 24 hours before she could shower; being told that she had to take medication, having contracted a sexually transmitted disease from the appellant; and having to be tested for HIV. She has suffered nightmares, social ostracization among her peers, panic attacks and she does not like to be left alone. She feels vulnerable. Four months after the offences, she remained scared to walk to the supermarket, even in company. She reported a loss in her self-esteem and confidence.

13. To a probation officer, the appellant minimised his offending. He claimed that he had impulsively engaged in sexual activity and equally spontaneously decided to film it. He could not account for lying about his age to the girl he knew to be just 15 years of age. He continued to deny that the recording was for his own sexual gratification. He appeared to display little insight into the inherent power imbalance he had exploited with a drunk child, or genuine remorse.

14. It is argued on behalf of the appellant that the total sentence of eight years' imprisonment was excessive. The principal point in the appeal is that, although this was an episode of offending which bore a number of aggravating features, the imposition of a sentence of eight years' imprisonment after allowing full credit for the guilty pleas meant that the judge must have reached a provisional sentence after trial of twelve years' custody, which is outside the category

range and close to the maximum sentence for the offence in counts 5 and 6 of fourteen years' custody. A subsidiary point is made that the sentence of six years' imprisonment on count 3 places that single offence of making an indecent photograph of a child at the top of the category range and, also betrays unjustified harshness.

15. Section 125(1) of the Coroners and Justice Act 2009 mandates every judge to have regard to a relevant Sentencing Council guideline. The judge was required to impose a sentence within the offence range in the Sexual Offences Guideline, although the law allows a judge to depart from a guideline where justice demands that she does so. It follows that there must be a good reason to depart from a guideline. Axiomatically, the good reason (or good reasons) should be articulated, because the court is required to explain how the duty to apply a guideline has been discharged.

16. The transcript of the sentencing hearing demonstrates that the judge principally considered the Sentencing Council guideline for sexual activity with a child. She took a conventional course and passed an aggregate sentence on counts 5 and 6 to reflect the totality of the offending, and a concurrent sentence on count 3. In respect of the sexual activity, she identified a number of elements which placed the case into the highest category, 1A. These were: the degree of planning; the use of alcohol to facilitate the offending; grooming of the child; the recording and retention of sexual images during the activity; lying about his age; and the significant actual disparity in their ages. These are fully six of the fourteen high culpability factors set out on page 46 of the guideline. The starting point for a single offence is five years' custody, within a category range of four to ten years. The judge also noted that the separate guidance on page 76 for the offence of making an indecent image also placed the appellant's case in the highest category, with a starting point of six years' custody, within a range of four to nine years. The same features aggravated that offence, of course.

17. While recognising that the appellant was to be sentenced for one occasion, the judge said that the preponderance of the features highlighted served to "augment" the sentence she imposed. Thereafter, the judge did not explain why the features she had identified justified a provisional sentence, before credit for the guilty pleas, which was outside the offence range.

18. We have carefully considered whether a departure from the guideline was justified in the particular circumstance of these offences. As the guideline makes clear, a case of particular gravity, reflected by multiple features of culpability or harm, can merit an upward adjustment from the starting point, before further adjustment for aggravating or mitigating features. The degree of adjustment may conceivably be beyond the category range. But such a departure must be capable of rational explanation, even whereas here, there is little mitigation.

19. In our judgment, the proliferation of serious features of this offending identified by the judge, without controversy, required a firm sentence. But we are persuaded that the judge went beyond that and passed a manifestly excessive sentence.

20. The subsidiary argument in respect of count 3 is also made out in principle by the same reasoning.

21. In our judgment, a sentence within the category range was required. A term of six years' imprisonment for all the offending against TW was appropriate. This is reached from a provisional nine year term, before the guilty plea discount is applied. Nine years' custody represents an uplift from the guideline starting point of four years, to reflect the multiplicity of high culpability factors, but remains, within the category range. As the offence in count 3 is reflected in the gravity of the sexual activity, a proportional reduction is made to the sentence

passed for that offence too.

22. Accordingly, this appeal succeeds to the extent that the sentences on counts 5 and 6 are reduced from eight years' imprisonment to six years; and the sentence on count 3 is reduced from six years' imprisonment to four years. All terms will continue to run concurrently, making a total of six years' imprisonment.
