

No: 201902098 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019] EWCA Crim 1819

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 6 September 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE MCGOWAN DBE

MR JUSTICE FREEDMAN

R E G I N A

v

DEREK KENNETH LIDDIARD

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Mr I Sheikh appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. MRS JUSTICE MCGOWAN: Derek Kenneth Liddiard, who is 38 years of age, pleaded guilty to three offences on indictment on 19 March 2019 in the Crown Court sitting at Maidstone.
2. On 9 May, at the same court, he was sentenced for those three offences. The first was an offence of attempting to arrange an act involving the commission of an offence under sections 9 to 13 of the Sexual Offences Act; specifically penetrative sexual activity with a child. On that offence he was sentenced to a term of 3 years' imprisonment.
3. On count 2 of the same indictment, again, an attempt to arrange an act involving the commission of an offence under sections 9 to 13 of the Sexual Offences Act 2003, on this occasion a non-penetrative sexual act with a child. On that he was sentenced to a term of 2 years' imprisonment.
4. Count 3, attempting to communicate in a sexual manner with a child under section 16, contrary to section 1(1) of the Criminal Attempts Act. On that he was sentenced to a term of 1 year's imprisonment. All terms were ordered to run concurrently, making a total of 3 years' imprisonment and a sexual harm prevention order without limit of time was also made.
5. The facts can be stated very simply. Police were investigating social media correspondence. A police officer was assigned to pretend to be a 13-year-old girl called Ruby. Communication was established on the internet between the police officer purporting to be Ruby and this appellant. They exchanged messages and there was clearly a course of conduct which amounted to grooming through which the appellant purported to gain the trust of this young girl. It was stated in clear terms by the officer purporting to be Ruby that she was 13 years of age.
6. The appellant sent large numbers of messages. On occasions when Ruby did not respond he sent further messages saying how much he missed her and was thinking of her. He told her that he was single and that he loved her.
7. On 4 November, Ruby replied saying that she wished she was older. The appellant responded to that, saying, "If you like me and fancy me then no harm in doing something you want". He told her he was a great kisser and would like to suck her tongue. He then sent pictures of himself topless.
8. On 8 November, Ruby supposedly sent a picture of herself. The appellant said he fancied her and that she had an incredible figure.

9. Over the next few days he continued to conduct a sexualised conversation, telling Ruby that he would like to touch her and snog her. The suggestions that he was making became increasingly explicit until towards the end of the exchanges he discussed full penetrative sex and oral sex.
10. The conversations then turned to practical arrangements about how and where they would meet, the appellant saying that they would have a drink together, make love, kiss, snog, everything.
11. On 12 November, he sent a particular message saying, "A week on Saturday I'll be in your bed with you".
12. The contact continued, the appellant still attempting to arrange a meeting and continuing to be sexually explicit. A meeting point was fixed, the appellant attended and was arrested. On that occasion he was found to be carrying presents supposedly to be given to Ruby: alcohol and condoms. When he was interviewed he made full admissions.
13. He pleaded guilty in following investigations as to his mental state and whether he was fit to plead and was then given 25 per cent credit for those guilty pleas.
14. Reports were commissioned. The appellant had a damaged personality because he himself had suffered prolonged and serious sexual abuse as a child. He was suffering from a number of complex post-traumatic stress disorders which had never been identified or treated in the past.
15. In passing sentence, the learned judge said that she took into account the appellant's difficulties and the fact that a prison sentence for him given those difficulties would be all the more difficult. She was urged by the prosecution to place these offences into category 1A of the relevant guideline in the definitive guideline from the Sentencing Council dealing with sexual activity with a child.
16. Such categorisation was recommended to the court by the Crown because it was said that the offences intended to have been committed were penetrative, either of vagina or anus or penile penetration of the mouth. That identifies the harm circumscribed within category 1 because of the completed act.
17. First, it is clear that these were attempts. But, secondly, and much more importantly, there was no child on the other end of these electronic communications.

18. It is submitted to us today that the categorisation of these offences as being in category 1 in respect of harm was an error. Although the judge in passing sentence dealt with the fact that these were attempts, she did not refer to the absence of a real victim. Category 1 identifies the aspects of harm as already outlined. Whilst there is no doubt that this appellant intended and attempted to commit these offences against a real victim, the fact is that the person with whom he was in contact was not a 13-year-old child.
19. The court did not have its attention drawn to the line of authorities dealing specifically with offences of this sort. In particular, this court in the case of R v Cook [2018] EWCA Crim 530 said:
- i. "The grounds of appeal urge that the judge fell into error in putting the case into Category 1A when the case should have been classified as Category 3A ..."
20. The decision in R v Gustafsson [2017] EWCA Crim 1078 applies:
- i. "That decision was merely one of a series made in recent years holding that where the case involves inciting rather than causing sexual activity and where there was no physical contact with or any communication with a real child, Category A is the correct category."
21. It was a serious failing in the court below that neither counsel nor the judge was aware of this line of authority. Accordingly, a man who is deeply vulnerable, who has a very limited IQ and many psychiatric and mental problems has been in custody since November of last year. Had the court's attention been directed to the correct categorisation of this offence then the alternatives to custody or custody of this length might have been made apparent and some therapeutic form of treatment might have been considered to be appropriate.
22. There is, in the view of this court, little that can be done at this stage to afford therapy to this particularly vulnerable appellant.
23. We accept the submission that this case was incorrectly categorised in the court below and should have been identified by all parties as a category 3A case. Had that been the position, the starting point would have been one of 26 weeks' custody with a range from high-level community order to 3 years' custody.
24. Dealing with the case in September 2019 of a man who has been in custody since November 2018, there is little that this court can do other than to alter the sentence

in a way that reflects what should have happened in the court below but without the power or facility to be able to order any form of therapy or rehabilitation.

25. Accordingly, dealing with count 1, which was undoubtedly the most serious of these offences, we adjust the term to take account of the total offending in this case.

26. Accordingly, we quash the sentence of 3 years on count 1 and substitute a term of 1 year. On count 2, we also quash that term of 2 years and substitute a term of 1 year. Count 3 remains unaltered. All terms to run concurrently, making a total term of 1 year's imprisonment, which we understand will bring about the appellant's immediate release.

27. To that extent, this appeal is allowed.

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

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