In the St. Helena Court of Appeal

Citation: SHCA 3/2020

Criminal

In the matter of an appeal against sentence

Appellant

Jerome Coleman

Judgment on appeal against sentence

Heard on 11th September 2020

Before: Sir John Saunders, President; HHJ R Mayo, Member; and HHJ L Drummond, Member

1. The Appellant appeals with leave against a sentence of 15 months' immediate custody imposed by the Supreme Court (Chief Justice Ekins) on 14 August 2020, having pleaded Guilty on 20 July 2020 to a single count of Inciting a Child to Engage in Sexual Activity contrary to section 10(1) of the Sexual Offences Act 2003. The Appellant was made subject to a Sexual Offences Prevention Order of 5 years' duration which is not the subject of an appeal.

2. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. 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 that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

3. The Appellant is now aged 19. He was born on 14 February 2001 and was of previous good character. The victim, AF, was aged 11 at the time and was described by the prosecution as a *"vulnerable girl from a disordered background, lacking in stability*" who used "*over confidence and adult behaviours to adapt and cope*". Initial contact was made in August 2019 via Facebook and subsequently through an associated Social Media application known as Messenger Lite. The Appellant responded to a Friend Request from AF. Some months later, during the evening of 23 November 2019, AF sent a photo of herself sitting in a bath fully clothed. The Appellant responded with *"Come sit on me"*" and *"But I want you to sit on me"*. There were references to oral sex, the Appellant describing himself as being "*horny*". On the same evening, arrangements were made for them to meet and the Appellant requested that AF take a picture of herself for him "…*so then I know you getting ready"*. She sent a picture of herself wearing bra and trousers and a further image of her face. Within these exchanges, the Appellant sent messages inciting AF to masturbate him, to perform oral sex on him and have him perform the same on her and to have penetrative sex. At about 11pm, AF and her cousin (then aged 15) travelled to Jamestown and sat with the Appellant in his vehicle. There was flirtatious conversation between the three and at one point, AF's cousin left AF and the Appellant alone in the vehicle. It was agreed by the prosecution that no physical or sexual activity of any kind actually took place. The suggestive messages and incitement therefore all occurred within a very narrow compass of time.

4. The Appellant was arrested in early December 2019 and remanded in custody from 12 to 28 December. He was then admitted to bail but remanded again from 31 December to 26 March 2020 following a successful appeal by the prosecution against the decision to release him on bail.

5. A Pre-Sentence report was available to the Judge for the sentencing hearing. The writer indicated that the Appellant showed an understanding of why there is an age of consent and why it is illegal to engage in any manner of sexual activity with a child under the age of sixteen, recognising that this could have both a physical and psychological impact. There were expressions of regret and a willingness to engage with the Probation Service to address his offending behaviour and make reparation for this. It stated that the Appellant's "*…experience on remand appears to have provided a salutary lesson for him and he is clearly keen to avoid returning to the prison environment and to work on improving his personal circumstances to return to an offence-free lifestyle."* He was assessed as posing a medium likelihood of further offending with a medium risk of harm to children. A community order with focussed one-to-one intervention and community service as a punitive element were recommended.

6. It does not appear that a Victim Personal Statement from AF was available to the Judge at the sentencing hearing. This court had requested such a document, but it seems that none was sought from AF.

7. The Judge was referred to the relevant Sentencing Guideline. The Prosecution placed the offending within Category 1A. Category 1 Harm because penetration by the Appellant of the victim was referred to in the messages and Culpability A because at least one of the factors listed in the Guideline (Significant disparity in age) was present. In the Guideline, the starting point for an adult after a trial is 5 years' custody, with a sentencing range of 4 to 10 years. In mitigation, Mr Jackson acknowledged that Harm Category 1 was the appropriate bracket, but submitted that the culpability should be placed outside "*the top bracket*". Counsel prayed in aid the Appellant's relative youth and the fact that he was showing signs of maturity by the date of sentence. The

Appellant's remorse, his response to custodial remand and the steps taken by him to achieve rehabilitation having been released on bail were also referred to in mitigation.

8. In arriving at the sentence for the single offence, the Judge made specific reference to the Appellant's good character and the lack of aggravating circumstances. He said this: "W*hilst you subsequently met up with this girl and her slightly older cousin, you did not pursue the incitement although it seems that there were flirtatious sexual elements of the conversation you engaged in when face to face. Finally, it does not appear, outwardly at least, that this girl has manifestly suffered as a result of the behaviour you engaged in"*. The Judge placed emphasis on the age of the victim and ruled out a non-custodial penalty in these terms: "*There has to be a message to the community that 11 year old girls must be protected and those who behave as you did will go to prison. With no satisfaction at all I consider it my duty to ensure that that is indeed the message that is received. No other sentence I am satisfied could be justified particularly considering the guidelines*". The Judge made no explicit reference to the Imposition of community and custodial sentences Guideline.

9. The Judge determined that the appropriate starting point, before reduction for a Guilty Plea was one of four years' custody. He deducted one third for an early plea of Guilty, resulting in a preliminary sentence of 32 months' custody. He further reduced the sentence by 17 months to reflect what he described as "*mitigating factors in your case*" and the time spent between arrest and sentence, including the time he had spent on remand. He expressly agreed with the submissions of Counsel that the Guidelines were "*somewhat artificial for the special facts of this case*".

10. In his written grounds, Mr Jackson submitted that the appropriate level of Culpability was B. The appropriate sentencing range, he argued, would therefore

have been a high level community order to 2 years' custody. In short, it was argued that once a full one-third discount was allowed for an early Guilty Plea, the sentence of 15 months was outside the range available to the Court in any event or was a custodial term which could properly be suspended.

11. It is of considerable regret that the Judge was not referred to the Judgments of the England and Wales Court of Appeal Criminal Division in ***Attorney General's Reference No 94 of 2014 (R v Baker)*** **[2014] EWCA Crim 2752; [2016] 4 WLR 121,** or ***R v Cook*** **[2018] EWCA Crim 530; [2018] 2 Cr app R(S) 16**. These decisions were referred to in the more recent decision of the same Court by the Lord Chief Justice in ***Attorney General's Reference No 36 of 2020 (R v Manning)*** **[2020] EWCA Crim 592**. This Court has requested that copies of these decisions be supplied to the Attorney General and to Mr Jackson.

12. We were informed shortly before today's hearing that Ms Hurley the Solicitor General and Mr Jackson's agreed position is that this offending fell within Category 3A. As a rider to this, if the age disparity was purely chronological, Mr Jackson submitted that the Court also should take into account the relative immaturity of the Appellant. He referred to the contents of the Pre Sentence Report and the fact that the Appellant had spent 99 days in total in custody before sentence. Mr Jackson generously offered an apology to this Court for failing to alert the Judge to the authorities which we shall refer to in detail in a moment. This Court agreed with the proposition that the online Guidelines were somewhat misleading where the categories of Harm were listed: circumstances where no actual sexual activity occurred are not dealt with in the Guideline which has not been updated following the ***Manning*** decision. This Court will be sending a copy of this Judgment to the Council.

13. Judgment in the ***Manning*** case was given on 30 April 2020, some four months before the date of the sentence which gives rise to this appeal. The case was an application by the Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to the Court a sentence considered to be unduly lenient. The Offender had pleaded Guilty to *inter alia* one count of Causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the Sexual Offences Act 2003. The Lord Chief Justice stated this (at Paragraph 6):

> "*The offence of causing or inciting a child to engage in sexual activity covers potentially a very wide range of conduct and outcomes. The child in this case was 15 years old. The offender was charged with and pleaded guilty to inciting her to have sexual intercourse with him. No sexual intercourse occurred. Before the judge, the prosecution argued that for the purposes of the relevant definitive guideline, the incitement offence should be located within category 1 for harm….*"

14. It had been agreed by the parties that culpability fell within category A. The Crown argued that the starting point for the incitement count was five years' custody, with a category range of four to ten years' custody. The contention advanced was that the fact that no such activity occurred should be treated only as a mitigating factor. This was "emphatically rejected" by the sentencing Judge who concluded that it fell within category 3, namely, "other sexual activity", which, when linked with culpability at level A, has a starting point of 26 weeks' custody and a category range of a high-level community order to three years' custody. Two prior decisions of the Court of Appeal had not been drawn to the Judge's attention (nor were they set out or referred to in the Final Reference). The section 10(1) count concerned incitement to engage in penetrative sexual activity which did not take place. The incitement occurred over the

period of other more serious offending which involved actual contact and was evidenced not only by the escalating activity, but also the content of text messages which showed the offender's clear desire to have penetrative sex with the girl. The basis of plea to that particular count, which was accepted by the prosecution, was that the offender's behaviour amounted to intentional incitement to penetrative sexual activity, not in the immediate future, but at some point before the girl's sixteenth birthday. The submission made to the Court of Appeal by the offender was that the Judge had correctly rejected the Crown's contention that the incitement count should be sentenced as a category 1 offence. The Court concluded that it had not been wrong in principle for the judge to consider suspending the sentence in that case. Their Lordships also took into account the impact of the emergency provisions which had sprung from the state of lock-down as a result of the Covid-19 emergency. A total sentence of 24 months' imprisonment, suspended for the same operational period, was imposed in substitution for a suspended sentence of 12 months' duration.

15. The Court referred to the Judgment in ***Baker***, where Sir Brian Leveson (then President of the Queen's Bench Division) said this at [34]:

> "*In our judgment, what happened here did not fall within category 1 at all. In the circumstances, because the offending did not proceed beyond incitement, it was 'other sexual activity' within category 3. That accords not only with the judge's rejection of the suggestion that the offender's behaviour justified a starting point of five years but also provides appropriate headroom between the sexual suggestion and any actual activity without necessarily engaging upon the exceptional basis for departing from the Guideline*."

In ***R v Cook*** the same point was argued, and the position was re-affirmed by Treacy LJ in giving the judgment of the court at [8] by reference to ***Baker*** and to a number of other cases, where the same point had been considered.

16. We have no hesitation therefore in applying those conclusions to the facts of this case: the activity *incited* by this Appellant may well have included penetrative acts, but the prosecution's case was that no such serious activity in fact occurred. The Judge in our view was therefore misled by both prosecution and defence into placing the offending into Harm Category 1 when in reality the appropriate Category was 3. Having made that determination, the next step for the Judge to take was to decide which level of Culpability was appropriate. For a category 3A case, the starting point in the Guideline is 26 weeks' custody, with a sentencing range of a high level community order to 3 years' custody. For 3B, the starting point is a medium range community order with a range extending to a high level community order.

17. That said, in our judgment, the offending here was far from harmless flirtation: there was a significant age difference. Whether or not the Appellant knew the victim was 11 years old, he knew she was under 16 and of a vulnerable age. There were elements of grooming, albeit unsophisticated. The impact of such activity (which the Judge clearly felt was a growing problem on the Island with the rapidly increasing availability - and misuse - of Facebook and other Social Media amongst the small community in the jurisdiction) was a factor outwith the particular scope of the Sentencing Council Guidelines which apply in England and Wales.

18. The six aims of sentencing of general application include the aim to *reduce crime*

by preventing the offender from committing more crime and putting others off from committing similar offences. With these factors in mind, we conclude that this Appellant's offending fell within the higher category of Culpability, namely 3A.

19. We therefore approach the sentencing Judge's task afresh. This Appellant was aged 19 on conviction and 18 when the offence was committed. Strictly, the Judge did not therefore have to apply the Sentencing Council's definitive guideline setting out overarching principles in relation to the sentencing of children and young people, but he did explicitly reduce the sentence to take account of his relatively young age. We agree it was appropriate to take that into account as the Appellant is only just over the age at which a sentencer would be required to adjust the sentence downwards. If there is to be a deduction to be applied to a preliminary starting point to take into account the relative youth of an offender, such discount should properly be applied before the further deduction for a Guilty plea – see the Judgment of the Court of Appeal Criminal Division in ***R v RB, JS and HG*** **[2020] EWCA Crim 643** (and in particular paragraphs 25 and 26).

20. Having considered the matter with care, our conclusion is that the correct preliminary sentence, taking into account the aggravating and mitigating factors was one of 26 weeks' custody. Applying subsequently a reduction for the Appellant's age would reduce that sentence to one of 21 weeks. The Appellant was then entitled to a further discount of one-third for an early Guilty plea. This yields an ultimate sentence of 14 weeks' custody. We have considered whether this was a sentence which ought to have been suspended, allowing the Court to add a period of Probation supervision and possibly Community Service Hours as a punitive measure. However, we concur with the Chief Justice that a sentence of immediate custody was called for here. Moreover, our view is that the time spent on remand, together with the positive steps

taken by Mr Coleman at rehabilitation mean that it would not be appropriate to suspend any custodial term and combine this with Probation or Community Service.

21. We therefore quash the sentence of 15 months' custody and substitute therefor a sentence of 14 weeks' custody. The consequence is that the Appellant will be released immediately. 14 weeks equates to the period of 99 days which the Appellant had spent on remand and we were told that this would include any period on licence. The Sexual Offences Prevention Order of 5 years' duration with the particular prohibitions made by the Judge will stand. To that extent, this appeal is allowed.