IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 244

CASE NO 202203112/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 17 February 2023

Before:

LADY JUSTICE MACUR DBE
MR JUSTICE FRASER
MR JUSTICE CAVANAGH

REX
V
MARK DONOGHUE

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MR N GEDGE appeared on behalf of the Appellant

J U D G M E N T

REPORTING RESTRICTIONS AND ANONYMISATION APPLY:

Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainants shall be included in any publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case.

MR JUSTICE FRASER:

1. This is an appeal against sentence, leave having been granted by the single judge. The appellant has been represented before us today by Mr Gedge, who represented the appellant at trial. We are very grateful to him for his submissions and for his assistance. Section 1 of the Sexual Offences (Amendment) Act 1992 applies in this case. No matter relating to any complainant shall be included in the publication during their lifetimes if it is likely to lead members of the public to identify them as the persons against whom offences were committed. Reporting restrictions therefore apply in this case and we shall refer to the complainant simply as "C" for this reason.
2. On 3 December 2021 in the Crown Court, after a trial before His Honour Judge Richard Williams and a jury, the appellant was convicted of a single count of paying for sexual services of a child, contrary to section 47(1) of the Sexual Offences Act 2003. That offence was charged as having taken place between 5 and 8 August 2019 on a single occasion. He was acquitted of another count of a similar offence said to have taken place on a different date between 1 and 4 August 2019, by order of the trial judge.
3. On 29 September 2022 after a pre-sentence report had been prepared he was sentenced by the same judge. The judge found him to be dangerous within the meaning of the Sentencing Act 2020 and passed an extended sentence upon him pursuant to section 279, comprising a custodial term of nine years together with an extended licence period of three years. The total sentence passed was therefore one of 12 years.
4. A Sexual Harm Prevention Order ("SHPO") was also imposed until further order, together with the appellant being made subject to the notification provisions of Part 2 of the Sexual Offences Act 2003 indefinitely.
5. The facts of the offence are as follows. C was aged 15 at the time of the offences. He

had been placed in foster care and was considered vulnerable to exploitation. His foster parents were told by social services not to allow him to have access to a telephone due to concerns about his behaviour generally. However, C managed to get hold of a mobile phone and used it to set up an account on the Grindr dating app in which he indicated that he was willing to engage in sexual activity with older men for payment. He initially purported to be 17.

6. There was an exchange of messages with the appellant on a number of occasions whereby the appellant discussed and indeed then agreed to meet C so that he could engage in sexual activity with him (the appellant) and also the appellant's male partner. The appellant is in his late fifties and his boyfriend/partner at the time was a Thai national in his twenties. Explicit discussions took place about the type of activity that would be performed and how much C would be paid for this.

7. This activity did subsequently take place. The appellant and his boyfriend/partner arranged to meet C who was collected from a car park and driven to the appellant's home. C admitted being 15 rather than 17 and asked if the appellant was all right with that. On that occasion C became so intoxicated that he had no real memory of what took place. That is the activity in respect of which the appellant was found not guilty on direction of the trial judge.

8. The appellant then arranged to meet C a second time with the intention of having joint penetrative sexual activity with C and the appellant's partner/boyfriend, what is colloquially called a "threesome". The appellant got C drunk on vodka before he and his partner took turns having oral and penetrative anal intercourse with C. During the course of the offending the appellant lubricated C's anus, masturbated him and ejaculated. C was then paid a sum of money and dropped off at the car park. C then took a train back

to his foster placement.

9. This activity came to light after C's foster carers discovered a mobile telephone in his possession which contained messages indicative of him being involved in sexualised contact with older males. The police were informed and an investigation led to the appellant.

10. The appellant was arrested on 22 January 2020. He denied any offending against C, blaming his partner for the messages, he being no longer in the country. The appellant's companion cannot be found. Indeed the appellant continues to deny his offending to date and is seeking to appeal against his conviction. That is a separate matter but in those circumstances it is clear that there is no remorse.

11. The prosecution submitted at the sentencing hearing that this activity should be categorised as Category 1A. The defence agreed with this at the time and indeed Mr Gedge makes a similar concession before this court. This is because penetration took place which would put the case into harm Category 1 and Culpability A due to the offending act taking place together with another person. The starting point for Category 1A in the guideline is four years with a range of two to five years, those ranges being for a victim aged 16 or 17 and for an offender for one offence with no previous convictions. For a victim aged 15 the correct guideline to use is not the offence-specific guideline for the offence in this case but that of sexual activity with a child. For a Category 1A offence the starting point is five years with a range of four to 10 years.

12. The pre-sentence report stated that the appellant was at low risk of re-offending. The appellant is a retired commercial airline pilot and had a stable background, living on the proceeds of his property rental business and owning a number of residential properties. The report stated, and we quote:

i. "Despite the serious nature of this offence, I would assess Mr Donoghue as posing a medium risk of harm to children in the future due to the existence of significant restrictive measures with which he will be required to comply in the form of notification requirements and a SHPO.

ii. Furthermore, the defendant has described being able to resume his employment and access independent accommodation, implying a degree of social capital which will enable him to make and maintain positive changes to his lifestyle. Engagement with focused interventions both in custody and following release will assist him in developing a greater understanding of the issues which culminated in the commission of the offence and will serve to mitigate any future risks."

13. The report also said, and again we quote:

> "The defendant's denial of the offence is not untypical of offenders who commit and are convicted of sexual offences. The best predictor of future offending is previous offending behaviour therefore, I have taken into consideration that Mr Donoghue has no previous convictions. Nonetheless the index offence suggests a risk of serious harm posed to others if the behaviour were to be repeated. However, I have no evidence to indicate predatory behaviour and although the offence is denied, I suggest it is unlikely to occur again, the defendant's arrest and imprisonment has been a shock and has in my view been sufficient to deter any repetition of such risky behaviour associated with his use of the Grindr app for sexual contact. Evidence supporting this opinion is based on the results of the risk assessment tools used, together with the defendant's presentation in interview; also, the fact that the defendant is no longer in contact with [his boyfriend/partner]."

14. The judge had a victim personal statement from C before him but that concentrated more upon the effect the trial had had upon him rather than, as other statements do, reflecting necessarily on the effect of the offence itself upon the victim.

15. In the sentencing hearing the judge observed that he had identified four high culpability factors, namely it was a planned offence, the appellant acted with another, there was

alcohol used, as he put it, to facilitate the offence and there was a significant age disparity. He also stated the victim was vulnerable due to his unsettled situation and placement in foster care. The judge said the lack of previous convictions did not justify any reduction because the offence was so serious and also said that any mitigation was more than offset by the absence of remorse and continual denials of responsibility. The judge noted these conclusions of the pre-sentence report in his sentencing remarks but also said that he was not bound by them. Notwithstanding the conclusions in the report he stated that the risk that the appellant posed must be judged against what he had done. There was evidence about his sexual appetite for what he knew to be a 15-year-old boy and that he had intended, as the judge put it, "to take part in voracious sexual activity with a kid". The judge stated there was a material risk that the appellant was only telling others, such as those who had written him references, what they wanted to hear and that he was hiding behind a facade that obscured troubling sexual appetites in relation to teenage boys.

16. The judge said the attitudes and issues which underpinned the offence were not adequately reflected in the risk assessment and the pre-sentence report conclusions. He said there were proper grounds for finding that the appellant posed a significant risk of causing serious harm by the commission of further offences. He was satisfied the test for dangerousness was made out and found the defendant dangerous. He therefore passed an extended sentence with a custodial term of nine years and an extended licence period of three years, the total period being therefore one of 12 years as we have already explained.

17. There are numerous grounds of appeal. They can be grouped into two headings. First, with regard to the finding of dangerousness, it is said the learned judge gave no or insufficient weight to the views relating to risk and dangerousness in the pre-sentence

report, gave no or insufficient weight to the fact that the findings in the pre-sentence report were reached with the use of probation's statistical analytical tools, gave insufficient reasons for disregarding the views in the pre-sentence report, took no or insufficient account of the Sexual Harm Prevention Order and the effect it would have on managing or limiting risk, took no or insufficient account of the appellant's lack of previous convictions, gave no or insufficient weight to the appellant's character evidence, gave too much weight to the appellant's continued denials and erred in principle in finding that the appellant was dangerous in accordance with the Sentencing Act.

18. Secondly, it is said further or in the alternative that in adopting the sentence of nine years as the appropriate custodial term, the learned judge gave too much weight to the aggravating features of the case, gave no or insufficient weight to C's age being at the upper end of the age range dealt with in the sentencing guidelines, conflated the issues of absence of previous convictions with good character, gave no weight to the absence of previous convictions, gave no weight to the appellant's good character and adopted a custodial term that was in all the circumstances manifestly excessive.

19. This appellate court will only interfere with a sentence passed below if that is either wrong in principle or manifestly excessive. Also, this court recognises that the trial judge is usually in a better position than this court to make balanced judgments and consider the necessary weight to give to all of the different features of any offending and both aggravating and mitigating factors.

20. However, in our judgment, there is some force in at least some of the numerous grounds of appeal and we deal with them under each of the following two headings: dangerousness and the custodial term.

Dangerousness

21. The sentencing judge chose not to follow the assessment performed in the pre-sentence report which used conventional modelling techniques. It is correct that no sentencing judge is bound by the recommendation in any report of this nature, but so far as the risk of offending in the future is concerned, there must be a justifiable basis for coming to a completely different assessment. Here, the judge used the facts of the single offence itself to justify a finding that the appellant was at high risk. There is no doubt that this offence is exploitative and damaging to the victim and the motive for committing it will be repugnant to the public. However, in this case, on these facts, the view the judge took that the statistical tools used by the Probation Service were flawed in their conclusions or had omitted to consider a relevant factor or had considered factors that were not relevant, is not justified. In our judgment, the judge failed to give sufficient weight to the findings in the report of the risk of future offending. He was not obliged to follow the conclusion but in order to conclude that there was "a high risk" of future offending, more was required than excessive reliance upon the facts of the offence itself. This was the first offence of any type committed by this 59-year-old man, who was of otherwise good character. To conclude he was at high risk of re-offending and causing significant harm required factors additional to those that were present here.

22. We would add additionally, that it is of course correct that a finding of dangerousness can be made based on the facts of the index offence alone, but in this case on these facts that was not justified. We would also observe that the resulting sentence of 12 years in aggregate passed upon the appellant is very close to the maximum sentence permitted in law for a victim of 15 years old, namely a sentence of 14 years' custody. We are persuaded in all the circumstances that the finding of dangerousness cannot be supported on the facts of this case and that in those circumstances the judge erred in making that

finding.

The custodial term

23. As we have explained, given the age of the victim the relevant guidelines are that for sexual activity with a child. It was agreed, as we have explained, that the categorisation was 1A which has a starting point of five years with a range of four to 10 years. The sentencing judge moved very close towards the top of that range in passing a custodial term of nine years. To move to a custodial term of that level the starting point needs to be increased by some significant aggravating factors. Here, although there were such factors, in our judgment they were not sufficient to justify moving so close to the top of the range. We are persuaded by Mr Gedge that it was wrong to discount the appellant's good character entirely in the way that the sentencing judge did. Nor was there any evidence that the undoubted vulnerability of the victim in terms of his personal circumstances was known to the appellant, although of course the sentencing judge was correct to take that into account. The appellant did know that the victim was 15 years old and he must be sentenced for that. Indeed, that is the offence itself, but that is taken account of in the guidelines that are specific to the age of the victim.

24. In all the circumstances, we are persuaded that the custodial term when considered in isolation from the overall sentence is manifestly excessive in the circumstances of this case. In our judgment, taking all the relevant aggravating factors into account and giving the relevant discount for the appellant's mitigation and positive good character, the sentencer should have moved from the starting point of five years upwards to a term of seven years. We therefore quash the finding of dangerousness, quash the sentence of 12 years' extended sentence passed by the judge, and substitute a sentence in the determinate figure of seven years' imprisonment. For the avoidance of doubt we do not

disturb any of the terms of the Sexual Harm Prevention Order or the reporting restrictions imposed below, which continue as ordered. To that extent therefore this appeal succeeds.

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

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