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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT ST ALBANS
HHJ ROQUES T20220068

CASE NO 202302483/B3-202302244/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 30 July 2024

Before:

LADY JUSTICE MACUR
MR JUSTICE PICKEN
SIR ROBIN SPENCER

REX
V
DEREK HALSALL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

NON-COUNSEL APPLICATION

APPROVED JUDGMENT

SIR ROBIN SPENCER:

1. Following refusal by the single judge, this is a renewed application for an extension of time in which to apply for leave to appeal against conviction and a renewed application for leave to appeal against sentence.

2. On 10 February 2023, in the Crown Court at St Albans, the applicant (now aged 76) was convicted by the jury of two offences: count 1, attempted sexual communication with a child, contrary to section 15A of the Sexual Offences Act 2003; count 2, attempting to arrange or facilitate the commission of a child sex offence, contrary to section 14 of the Sexual Offences Act 2003.

3. On 9 June 2023, the applicant was sentenced by the trial judge (HHJ Roques) to a term of 4 years' imprisonment on count 2 (which was the lead offence) and to 9 months concurrent on count 1.

4. The applicant is now unrepresented, but we have considered carefully the extensive volume of written submissions he has sent to the Criminal Appeal Office over the past 12 months. He was represented by counsel and solicitors at trial.

5. Despite the delay in lodging the appeal against conviction, which means that an extension of 136 days is required, we have considered the merits of that proposed appeal as well as the merits of the appeal against sentence.

The facts

6. Grindr is an online dating application predominantly for gay men and members of the LGBT community. In November 2020, an undercover police officer created a series of Grindr profiles pretending to be a 14-year-old boy, as part of an operation to detect offending against children on the Internet.

7. On 16 November 2020, one of the profiles was set up with the user names "Fun", purporting to be a 14-year-old boy called "Kai". The profile photograph was described as showing a bare-chested young man on a bed. That profile was closed down and another was set up named "Fun, Fun, Fun" using the same photograph.

8. The applicant, using the profile "Dave", began to communicate with the undercover officer, believing him to be the 14-year-old boy, Kai. Within 10 minutes of the conversation starting the applicant was told that Kai was only 14; the applicant was 72 at the time but he told Kai he was 40.

9. Thereafter, and over a period of days, the conversation between the applicant and Kai became sexual, with both of them talking about what they would like to do with and to each other. For example, within three days of the first contact, the applicant told Kai that he wanted to "rim" him and wanted Kai to ejaculate in the applicant's mouth.

10. Count 1 on the indictment required the prosecution to prove that, for the purpose of sexual gratification, the applicant attempted to communicate with Kai, believing him to be a child under 16 and that the communication related to penetrative sexual activity.

11. In their extensive exchanges there were several messages about anal and oral penetrative sexual activity. We need not go into more detail, save to say that the applicant was describing enthusiastically what he would like to do to Kai and what he would like Kai to do to him.

12. The conversation developed as to how they would meet for sexual activity, agreeing that the best place for it would be in a car. They arranged to meet on 4 December, in a park in Stevenage. The applicant duly attended by car at the appointed time and place but, of course, there was no "Kai" - he was fictitious, a decoy. The police were at the scene. They could identify the applicant because he was driving the car he had told Kai he would be driving and wearing the clothes he had told Kai he would be wearing. The applicant was arrested. The applicant had in his possession a condom and lubricant.

13. The applicant was interviewed. He chose not to have a solicitor present. He told the police that he thought Kai was 18 because you need to be 18 to have a profile on Grindr and a credit card is needed to set up an account. He said that the way Kai was communicating in the online exchanges made him think it was someone older. He thought there was something fishy about him. In addition, he thought that in his profile picture Kai looked over 18. He said that at the meeting he was going to confront Kai and tell him off but he did not actually think Kai would attend.

14. Count 2 required the prosecution to prove that the applicant arranged to do an act with another person involving the penetration of the applicant's or the other person's anus or

mouth, believing that the other person was under 16.

15. The prosecution case was that the applicant communicated with Kai believing him to be a 14-year-old boy. That communication was sexual and part of their communication involved arranging to meet in order to engage in penetrative sexual activity. To prove their case, the prosecution relied on the communications between the applicant and Kai on Grindr and the circumstances of the applicant's arrest, in particular his possession of a condom and lubricant.

16. The defence case was that the applicant was aware that Kai was not really a child. A number of items were seized from the applicant and nothing of evidential value was found on any of them. For example, there were no search terms of concern on his phone or other devices and no child pornography.

17. The applicant gave evidence at the trial. He was 72 at the time of his communications with Kai. He said he had been on Grindr to speak to people. He was not interested in sexualised chat unless he was going to meet someone face-to-face. He did not get any sexual gratification from sexualised chat.

18. The applicant said he did not think Kai was 14. There were several reasons: Kai said he had been banned from Grindr on two or three separate occasions but had returned the next day, whereas the applicant knew that a ban is for at least 48 hours; the language Kai used was more mature than a 14 year old's; everyone he had previously spoken to on Grindr was aged between 18 and 40, and none of them spoke with the explicit sexual maturity that

Kai did. He said that the photograph of Kai showed only his neck down to the torso and, in his experience of Grindr, people aged between 18 and 30 had bodies similar to Kai's body in the profile picture.

19. The applicant explained that when communicating on Grindr he often mirrored or matched the sort of conversations people were directing to him. For example, if someone said he was interested in dressing up, the applicant would say he was interested in it too. He thought around 50 per cent of people on Grindr lied about their age. The applicant agreed that he had said he was 40 when in fact he was 72. The applicant said that other than the first communication between them, it was Kai who had initiated all other contact.

20. The applicant said he had travelled to the vicinity of the meeting only because he was driving in the area to visit McDonald's, but whilst he was there he thought he might as well see whether Kai had turned up. He said that the condom and lubricant were in his trouser pocket from a couple of weeks earlier. They had been for use with an adult female. He happened to put on those trousers that day and forgot the items were in his pocket. He did not know they were there.

The proposed appeal against conviction

21. It is evident from the observations of the applicant's trial counsel and solicitor following waiver of privilege, that the applicant was advised there were no grounds for an appeal against conviction. He therefore lodged the appeal himself.

22. In the written grounds of appeal which he prepared himself, the applicant sets out numerous

arguments as to why the jury reached the wrong verdicts. The grounds are summarised fully in the reasons given by the single judge in refusing leave and refusing the extension of time.

23. The matters advanced are mostly jury points. For example, the applicant says it was well-known that Grindr used a two-stage verification process to ensure that only people over 18 were allowed to participate. It was partly for that reason that he believed he was dealing with someone over 18. He raises, for the first time, in his grounds of appeal the suggestion that because he suffered from prostate trouble, he could not have performed the sexual acts described. He complains that the indictment specified only a 6-day period, whereas the communications lasted for 20 days. He says he had stopped talking to Kai initially but Kai followed him online and the applicant responded.

24. The applicant complains in his grounds of appeal about the performance of his counsel and solicitors. He says they provided no proper strategy for the trial. The barrister was instructed only the day before the trial. Not enough was made of the applicant's exemplary character. He felt intimidated by his barrister and was unable to convey his own account to the jury effectively. His solicitor did not check the content of the chat on the applicant's phone against the evidence, or for the whole period of communication with Kai. He did not obtain character references.

25. We have a Respondent's Notice settled by prosecution counsel at trial. We also have full and detailed responses from the applicant's trial counsel and solicitor to the complaints made against them.

26. It is plain to us from all those documents that there is no substance to the applicant's complaints. It was a straightforward case, with simple factual issues which were addressed properly. There had been a lengthy conference well before the trial, with counsel then instructed and an experienced partner in the solicitors' firm. The applicant's good character was brought out effectively at trial. Counsel came into the case as a late return, but he had 27 years' experience as a barrister and had ample time to master the case and present it effectively. With the applicant's agreement the solicitors had not probed the material on the applicant's phone outside the indictment period by requesting a full download, as that might have revealed further damaging evidence.

27. The applicant has subsequently sent to the Criminal Appeal Office a large number of letters repeating and advancing various arguments.

28. The first (dated 9 October 2023) was a nine-page letter refuting paragraph by paragraph the points made in the responses of counsel and solicitors.

29. The second was a four-page letter refuting paragraph by paragraph the points made in the Respondent's Notice.

30. The third was a four-page letter in response to the decision of the single judge and the reasons he gave for refusing leave to appeal against conviction and sentence. We note that at one point in that letter the applicant wrote:

> "I can only profusely apologise for my deplorable behaviour and

conduct. I also apologise for trying to evade convictions."

31. In shorter letters dated 4, 5, 16 and 19 July, the applicant has taken issue with the Criminal Appeal Office summary.

32. We have read and considered carefully all this material. We do not propose to rehearse the material in any detail. For example, the applicant says he did not think he needed to provide or give evidence as to his lack of sexual performance and was too embarrassed to disclose it. In fact he says, he was unable to ejaculate or get an erection and this had been the case for 10 years. We find it surprising in the extreme that the applicant did not think to mention this at trial given the nature of the allegations he was facing. We also note that for the most part the penetrative sex being discussed in the online exchanges was mutual oral sex involving ejaculation rather than anal penetration.

33. We are quite satisfied that none of the material the applicant has submitted affords any arguable ground of appeal.

34. There is no complaint about the judge's summing-up, nor could there be; the judge's directions of law were impeccable; his summary of the evidence was fair and balanced.

35. One of the issues that arose at trial was the refusal of the prosecution to disclose to the defence or produce for inspection by the jury the image which was put on Grindr as a profile picture of Kai. The judge was unimpressed by this stance. The issue arose in cross-examination of the civilian investigator who had liaised with the undercover police officer. The judge directed the jury, at that early stage in the trial, that they should give the

applicant the benefit of the doubt in his explanation in interview that he thought from the photograph that Kai looked over 18. The applicant had said that Kai looked to be perhaps 18 to 20 years old. There was even a submission of no case to answer at the end of the prosecution case based upon this point, which the judge rejected because there was ample other evidence in the content of the online messaging from which the jury could safely infer the applicant believed Kai to be under 16.

36. In the summing-up (at page 7F to H), the judge referred to this issue about the photograph. He told the jury that the civilian investigator would have been perfectly entitled not only to see the image but to put it before the jury because it was evidentially of relevance in the case. At page 11B to D, when reminding the jury of the applicant's police interview, the judge went on to direct the jury, as he had done earlier during the prosecution case, that whatever they made of this area of the evidence relating to the photograph, they must give the applicant the benefit of any doubt.

37. At the very end of the summing-up, the applicant's counsel raised with the judge, in the presence of the jury (at page 15E to F) the description of the profile picture which had been given in evidence, namely:

> "... a selfie style image of a young white male lying on a bed. The male is wearing red jogging bottoms and is bare-chested. His face is partially visible in the image."

38. In retirement (at page 18 of the transcript) the jury asked a question: "Why did the defence not push for the photo?" By agreement, after discussion with counsel, the answer the judge

gave was that there had been no evidence one way or the other about this, but the jury should not assume that the defence had not asked for the photograph.

39. We have dealt with this point in some detail because, several months after the applicant's trial, this Court gave guidance on the question of the prosecution's duty of disclosure in relation to the provenance of profile pictures in decoy cases such as this: see *R v BNE* [2023] EWCA Crim 1242; [2024] 1 Cr App R 9. In that case, the decoy profile images had been disclosed to the defence and were shown to the jury but the prosecution had declined the defence request to disclose the true age of the person shown in the images. The Court held that this should be disclosed. If it was a photograph of a real person, the jury were entitled to know the person's true age in order to assess the genuineness of the defendant's professed belief that the decoy was under 16. If, on the other hand, the decoy image was digitally created or modified, the position was different. But the prosecution should at least disclose the fact that images had been digitally manufactured, altered, or modified.

40. Although no ground of appeal based on the guidance in *BNE* has been advanced, we have carefully considered whether any arguable ground of appeal arises as a result, bearing in mind that the applicant is unrepresented. We note that in his various letters to the Criminal Appeal Office the applicant has touched on the issue of the photograph, for example, in his letter dated 9 October 2023, at page 9 he said:

> "In my opinion, seeing images of a male chest only, cannot be easily gauged to be a certain age."

In his letter dated 19 November 2023, at page 2, he said:

> "A lower resolution image of a naked neck to waist torso is difficult to determine the age of that person, even if the images are actually believed."

41. It is regrettable that the profile image of the decoy Kai was not disclosed to the defence as it should have been, and regrettable that it was not made available to the jury. However, we are satisfied that in the particular circumstances of this case, it gives rise to no arguable ground of appeal because of the favourable direction the judge gave the jury, as we have outlined. The jury were directed to give the applicant the benefit of the doubt when he said that the image looked to him like a person over 18 and therefore not someone aged under 16. The applicant could not have done better than that had the photograph been disclosed. We are also satisfied, for the same reason, that the recent decision in *BNE* affords no arguable ground of appeal.

42. For all these reasons, we are quite satisfied that there is no arguable ground of appeal. The issues were stark. The judge rejected the applicant's evidence. They did not believe him. We agree with the single judge that the convictions are unarguably safe. It is not arguable that the trial was in anyway unfair. We therefore refuse leave to appeal and consequently also refuse the extension of time.

Appeal against sentence

43. We turn to the appeal against sentence. The applicant was aged 74 at the date of conviction. He had no previous convictions. There were favourable character references. There was no pre-sentence report. None was necessary because the offence in count 2 was so serious that a lengthy period of immediate imprisonment was inevitable.

44. In passing sentence, the judge said that it could not be clearer that the applicant believed he was communicating with a 14-year-old child, advising him not to tell anyone else his age because that would stop his profiles on Grindr from working, and telling him that it would be better if he was 15 rather than 14. Believing that he was communicating with a 14-year-old child, the applicant had discussed the best place to meet and engage in sexual activity. The judge said he wholly rejected the applicant's explanation that he had forgotten he had the condom and lubricant with him from an earlier occasion. It was clear the applicant was anticipating penetrative intercourse taking place.

45. The applicant had written a letter to the judge before the hearing, still insisting he believed he was communicating with an adult not a 14-year-old child. The judge took from this that the applicant expressed no remorse for his behaviour.

46. The judge correctly identified that the most serious offence, count 2, facilitating a child sex offence, required him to look at the Sentencing Council guideline for the offence of sexual activity with a child. Plainly it was penetrative sexual activity with a child that was being considered. The messages exchanged made it abundantly clear that the applicant was anticipating oral penetration and, at least potentially, anal penetration as well. That made it a category 1A offence under the guideline, with a starting point of 5 years' custody. There was category A culpability because there was a significant degree of planning: the applicant had lied about his age and there was a huge disparity in age between the applicant and the child with whom he thought he was communicating.

47. The judge regarded count 1 as an aggravating feature of count 2, so that a concurrent

sentence was appropriate. The judge took into account the applicant's personal mitigation, in particular his age and good character, including references from members of his family.

48. Because this was a decoy case and the sexual acts did not actually occur, the judge said it was appropriate to reflect that in a modest reduction from the starting point, in accordance with Sentencing Council guideline which adopted the guidance of this Court given in *R v Reed* [2021] EWCA Crim 572; [2021] 1 WLR 529. The judge allowed a reduction of 6 months on this account. He allowed a further 6 months' reduction for the applicant's personal mitigation. The resulting sentence was 4 years' imprisonment on count 2, with 9 months concurrent on count 1.

49. In his grounds of appeal, the applicant complains that the judge did not sufficiently take into account his age and good character; his counsel failed to mention that the applicant had seen a psychiatrist, and that he was partly deaf; the judge did not take sufficiently into account that the applicant's other devices were checked and found to contain no offending material. He complains that there was no pre-sentence report. In later correspondence with the Criminal Appeal Office, the applicant asserts that public figures have received community sentences and custodial sentences much shorter than his.

50. We have considered all these submissions carefully and the submissions in the Respondent's Notice. We are satisfied that the judge applied the relevant guideline correctly and fairly. These were serious offences. The judge made an ample reduction of 12 months from the starting point of 5 years to reflect personal mitigation and to reflect

the fact that no sexual activity actually took place. We agree with the single judge that the total sentence was just and proportionate. It is not arguable that the sentence was manifestly excessive.

51. Accordingly, the renewed application for leave to appeal against sentence is refused.