CO/3588/2008

Neutral Citation Number: [2008] EWHC 2976 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 18 November 2008

B e f o r e:

LORD JUSTICE LATHAM
MR JUSTICE SULLIVAN

- - - - - - - - - - - - - -

Between:
TOLHURST

Claimant

v

DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

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(Official Shorthand Writers to the Court)

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Mr Himsworth appeared on behalf of the Claimant
Miss P Lees appeared on behalf of the Defendant

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J U D G M E N T

1. LORD JUSTICE LATHAM: This is a claim for judicial review of a decision of the Crown Prosecution Service ("CPS"), which was conveyed by letter dated 8 November 2007, to continue with a prosecution of the claimant for an offence under Section 5 of the Sexual Offences Act 2003.

2. The position was that in December 2006, when this claimant was two-and-half months short of his 18th birthday, he had sexual intercourse with a girl who was 12. It is right to say that she was almost 13, but she was 12 at the time. The intercourse, it is accepted by all, was consensual. The consequence of that sexual intercourse coming to light was that the claimant was charged with the offence under Section 5 of the Sexual Offences Act. The matter came before the Chelmsford Crown Court for plea on 30 May 2007 when he pleaded guilty on a basis of plea set out in a document signed by his counsel. In that basis of plea he admitted having sexual intercourse. He stated that he had only had sexual intercourse with the girl on that one occasion. He thought that she was about 15 years old as a result of the way she dressed and presented herself and the fact that she was friends with other girls of about the ages of 14 and 15.

3. That basis of plea was originally not accepted by the prosecution. Sentencing was adjourned. It was accepted on 26 September 2007.

4. After the claimant changed counsel so that he was then represented by Mr Himsworth - who has appeared before us today and has put his submissions with great clarity and extremely ably - he sought to persuade the judge to permit his client to change his plea. That was subsequent to having failed to persuade the prosecution to amend the indictment so that it no longer included the count under Section 5 for an offence under Section 9 and Section 13 which is, essentially, sexual activity with a child under 13 by a young person under 18.

5. It was as a result of those requests on behalf of the claimant that the letter conveying the decision of the prosecution to pursue the charge under Section 5 came to be written. In that letter the CPS indicated that the matter had been considered in the light of the code for Crown prosecutors and included, as a factor in the decision, the fact that the claimant had on a previous occasion been interviewed by the police in relation to his sexual relationship with another girl who was under 16 at the time and who became pregnant as a result of that sexual relationship.

6. It is plain - it follows from the express reference to that - that the CPS must have taken into account the fact that this young man had indeed had what has been described in the course of the hearing before us as a shot across the bows as to sexual intercourse with girls who were under the age of 16. That puts in context a question and answer in his interview. He was asked:

> "Q What was your understanding at the time? How old was [D]?
>
> A I didn't know. I hadn't asked. I didn't ask her."

7. The application to change his plea being unsuccessful, Mr Himsworth then advised his client to bring these proceedings by way of judicial review. They come to us today after leave had been granted in April 2008.

8. The first thing that has to be said is that applications for judicial review should very rarely be inserted into the criminal process unless there is very good reason to do so. The policy behind Section 29 of the Supreme Court Act, which effectively precludes challenges to decisions by the Crown Court in relation to trials on indictment, was explained clearly in R v Director of Public Prosecutions ex p Kebiline [2002] 2 AC 326, 370 to 371. Applications for judicial review interfere with the process of the ordinary criminal trial and interrupt it in a way which may indeed lead to injustice. In the present case it has led to great delay in bringing this particular trial to an end. It exemplifies the vice which Section 29 was intended to meet. By that I do not seek to suggest that this court has no jurisdiction to intervene in an appropriate case. It is clear that a decision made by the CPS is - at least subject to cautionary words, again in Kebiline - capable of being the subject of judicial review.

9. The question in the present case is whether this is indeed the sort of exceptional case in which judicial review could be said to be appropriate. Mr Himsworth has sought valiantly to persuade us that it is. His basic submission is that the letter of 8 November was an inadequate and indeed flawed response to the request for reconsideration of the Crown's position in this trial. In particular he submits that it failed adequately to deal with the issues which the code for Crown prosecutors indicates as the factors which are to be taken into account when deciding whether or not to prosecute young offenders. Those are essentially set out on page 15 of the code.

10. The difficulty it seems to me for Mr Himsworth is that he cannot point to any particular factor in this case which is so clearly one which should have been, but was not, taken into account entitling this court to intervene in the way in which that decision was taken. Indeed most of the factors tell against Mr Himsworth's client. There was a significant difference in age between the two of them. Although the sexual activity was with the consent of the girl, it was opportunist sexual activity on the part of the claimant, not in the context of an on-going subsisting relationship and - although there was no exploitation, coercion, deception, grooming or manipulation of any relationship - this was penetrative sexual activity in circumstances which, from a reading of the victim's mother's statement, has given rise to very real distress in the family whatever may be the position of the girl herself.

11. When one adds to that the factor to which I have already alluded, namely the fact this young man had had a shot across his bows, it is difficult to see how - if one was looking at this decision in the context of whether it was a reasonable decision or not - this could be described in any way as a perverse decision. It was a decision fully capable of being justified on the facts as we know them.

12. For those reasons I would dismiss this claim.

13. MR JUSTICE SULLIVAN: I agree.