

Neutral Citation Number: [2019] EWCA Crim 2418

No: 201904429/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 19 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE PICTON QC

(Sitting as a Judge of the CACD)

R E G I N A

v

MALCOLM STEPHENSON

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Mr J Adams appeared on behalf of the **Applicant**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: Malcolm Stephenson, now aged 63 and of previous good character, appeared before a magistrates' court on 24 September 2019 and indicated a guilty plea to a charge of attempted sexual communication with a child. He was committed for sentence to the Crown Court at Newcastle-upon-Tyne where, on 8 November 2019, he was sentenced by a Recorder to 12 months' imprisonment and made subject to a sexual harm prevention order for 10 years.
2. His application for leave to appeal against sentence has been referred to the Full Court by the Registrar. We grant leave.
3. The relevant facts can be briefly stated. On five days in August and September 2018 the appellant engaged in internet chat with someone he believed to be a 12-year-old girl called "Emma". Their chats began with a discussion about shopping but moved onto dating. Emma said she was too young for that and spoke of her 13th birthday the following day. The appellant talked about buying her a sexy dress and underwear. In later conversations the appellant asked Emma if she had ever been kissed, whether he and she were going to "kiss and stuff" and whether she was "okay with being touched". He asked if she had ever played with a boy's penis, whether she wanted to masturbate him and whether she would show him her vagina. He said she could have alcohol as long as he got a kiss. When she mentioned that she was going for a shower he asked her to "take lots of pics". He proposed going for a drive and then "kissing and fooling around" in the back of the car and said he would lick her vagina.
4. The last of the conversations was on 10 September 2018. Thereafter the appellant did not answer any further calls from Emma. He had on three occasions before that date declined offers by Emma to call her on her phone.
5. Emma was in fact a police officer. The appellant was arrested on 22 January 2019.
6. At the sentencing hearing the Recorder was assisted by a pre-sentence report. The appellant had told the author of the report that he was ashamed and embarrassed and accepted that his behaviour was "wrong on every level". He struggled however to accept that the offence was sexually motivated.
7. The report indicated that following the appellant's arrest his wife had left him after 18 years of marriage. In addition, the appellant, who has worked most of his adult life, had lost his job. He was living in a hotel and had accrued substantial debts. He was understandably anxious about the possibility of a prison sentence. The author of the report identified suitable requirements if the court was considering a community sentence.

8. The Recorder accepted in his sentencing remarks that the appellant had voluntarily desisted, that he did not represent a danger to the public and that the offence had already had a significant impact on him. Nonetheless, he said only an immediate custodial sentence was appropriate for such serious offending. The sentence after trial would have been 18 months' imprisonment. Giving full credit for the guilty plea the Recorder imposed the 12-month sentence to which we have referred and made a sexual harm prevention order which would continue for 10 years.
9. In his grounds of appeal on behalf of the appellant, which he has presented in writing and orally before us this morning, Mr Adams submits that the sentence was manifestly excessive in length and that a community order with requirements would have been appropriate. He submits that the Recorder failed to give any or sufficient weight to a number of important mitigating features of the case: the appellant's age; previous good character and employment record; his remorse and shame; his early guilty plea; the fact that no actual harm had been caused because "Emma" was in truth a police officer; the fact that the appellant had ended the conversations; the fact that investigations had shown that the appellant was not in possession of any pornographic images of children; and the shattering of his life which the appellant had already brought upon himself.
10. By section 15A(1) of the Sexual Offences Act 2003, which creates the offence of sexual communication with a child:
 - i. "A person aged 18 or over (A) commits an offence if-
 - (b) for the purpose of obtaining sexual gratification, A intentionally communicates with another person (B)
 - (c) the communication is sexual or is intended to encourage B to make (whether to A or to another) a communication that is sexual, and
 - (d) B is under 16 and A does not reasonably believe that B is 16 or over."
11. In the absence of any definitive sentencing guideline applicable to that offence, and consistently with the Sentencing Council's General Guideline: Overarching Principles, it is appropriate to have regard to the maximum sentence for the offence which, when tried on indictment, is 2 years' imprisonment, and to consider culpability and harm.
12. As to culpability it is important to note that the offence is complete when the communication is made. It is not necessary that any sexual activity should take place. Here the appellant in his chats made it clear that he was prepared to buy things for Emma (which can only have been intended as an inducement to her) and also stated his willingness to engage in masturbation and oral sexual activity with a 12-year-old girl.

However, it was he, not she, who voluntarily ended the chats.

13. As to harm, the appellant's attempted conduct, if successful, would foreseeably have caused the harm which is inherent in causing a young girl to engage in highly sexualised online chat. It is however an important feature of the case that the offence was an attempt, because there was in fact no child victim who could be harmed. It is also necessary to take into account the powerful mitigation which was available to the appellant: in particular, his previous good character, his many years of leading an industrious life and the ruin which he has brought upon himself by his offending. He has brought his marriage to an end, rendered himself unemployed at an age when his future employment prospects must be limited, and is now homeless and heavily in debt.
14. In those circumstances, we accept Mr Adams' submission that the sentence was manifestly excessive. We do not say it was wrong in principle, because the Recorder was entitled to conclude that the offence was so serious that only a custodial sentence would be sufficient punishment. It was however substantially too long. With all respect to the Recorder, it is impossible to say that this attempted offence, by a man of previous good character, merited, after trial, a sentence approaching the statutory maximum for a completed offence. In our judgment, the appropriate term, after giving full credit for the guilty plea, would be 6 months' imprisonment.
15. Furthermore, we regard this as a clear case for the suspension of the sentence. Two of the factors which the Sentencing Council's Imposition Guideline indicates militate in favour of suspension are present, namely a realistic prospect of rehabilitation and strong personal mitigation. In our view, none of the factors identified as pointing to an immediate sentence was present. In particular, in all the circumstances of this case, it cannot be said that appropriate punishment can only be achieved by immediate custody.
16. In the light of the pre-sentence report, but also taking into account the fact that the appellant has been in custody since the date of sentence (nearly 6 weeks ago), we take the view that he should be subject to supervision throughout the operational period of his suspended sentence order and comply with a rehabilitation activity requirement for up to 30 days. All this has a consequence for the length of the notification period which, in our judgment, should also have a consequence for the duration of the sexual harm prevention order. Because of the length of the sentence which we have decided is appropriate, the notification period is 7 years. We conclude that the duration of the sexual harm prevention order should be reduced to the same period.
17. For those reasons, we allow this appeal. We quash the sentence of 12 months' imprisonment imposed below. We substitute for it a sentence of 6 months' imprisonment, suspended for 2 years, with a rehabilitation activity requirement for up to 30 days during that 2-year period. We vary the sexual harm prevention order by reducing its duration from 10 years to 7 years, which mirrors the period for which the

appellant will now be subject to notification requirements.

18. LORD JUSTICE HOLROYDE: Mr Stephenson, can you hear me clearly?

19. THE APPELLANT: Yes sir.

20. LORD JUSTICE HOLROYDE: Do sit down, it is quite all right, sit down. Thank you. I just need to spell out to you what all that means. Your appeal has been successful, and once the necessary steps have been taken, you will be released from prison. Your sentence is now one of 6 months' imprisonment, which will be suspended for the next 2 years. That means that if you commit any further offence during the 2-year period, you will be brought back to court, and it is likely that your sentence will be brought back into operation with the time you have spent in custody so far counting towards the 6-month sentence.

21. Also for the next 2 years, you will be subject to a rehabilitation activity requirement. That means that you must meet with your supervising probation officer as and when you are required to do so and you must attend and co-operate fully with any activities that are required of you. If you fail to comply with this requirement you will be in breach of the order, which means that you will be brought back to court and you will be liable to serve some or all of the prison sentence.

22. Because we have reduced the length of your sentence the sexual harm prevention order will now last for 7 years not for 10, and the requirements of you to notify the police about your address and so on, will also now be for 7 years rather for 10. Is that all that clear?

23. THE APPELLANT: Yes. Thank you very much.

24. LORD JUSTICE HOLROYDE: Thank you Mr Adams, those were very helpful focused submissions.

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