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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2023/03001/B4

On appeal from Newcastle Crown Court
(His Honour Judge Bindloss)

Neutral Citation Number: [2024] EWCA Crim 992

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 19th July 2024

B e f o r e:

LADY JUSTICE ANDREWS DBE

MRS JUSTICE CUTTS DBE

HER HONOUR JUDGE MUNRO KC

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

CARL TONER

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Non-Counsel Application

J U D G M E N T

Friday 19th July 2024

LADY JUSTICE ANDREWS: I shall ask Mrs Justice Cutts to give the judgment of the court.

MRS JUSTICE CUTTS:

1. This applicant renews his application for an extension of time of 891 days within which to apply for leave to appeal against conviction, and 911 days within which to apply for leave to appeal against sentence, following refusal by the single judge.

2. In seeking to explain the need for an extension of time, the applicant states that he struggled with issues of homelessness and was attempting to find employment upon his release from custody. Once he found housing, he made the applications before the court.

3. This is, in our view, an inadequate explanation for such a lengthy delay which fails to explain why the applicant did not seek leave to appeal whilst serving his prison sentence. We have, nonetheless, considered the applications on their merits.

4. On 22 February 2021, in the Crown Court at Newcastle Upon Tyne, the applicant pleaded guilty to an offence of attempting to incite a child to engage in sexual activity, contrary to section 1(1) of the Criminal Attempts Act 1981. He was sentenced to 20 months' imprisonment. Ancillary orders were made, including a Sexual Harm Prevention Order for a period of ten years.

5. There is unfortunately no transcript of proceedings at the lower court as the recording equipment failed for the whole day. It is, however, possible to ascertain the facts of the case from the prosecution note for sentence and from documents prepared by those representing

the applicant at the time.

6. On 19 May 2020 the applicant's landlord picked up the applicant's mobile telephone as the applicant was doing a job for him. On his phone he found messages indicative of sexual activity with children and reported the matter to the police.

7. The applicant was arrested and his phone seized and examined. Messages were found between the applicant and two girls named "Jill" and "Sam" who said that they were 13 years of age (12 at start of the chat). In the course of the messages, they discussed explicit sexual activity and arranged to meet the following day at a metro station in order that Jill could engage in sexual activity, including sexual intercourse, with the applicant.

8. Following his arrest, the applicant accepted that the phone was his but made no further comment in interview.

9. There was no evidence that Jill was not a fictitious person or decoy. For this reason, the offence was charged as an attempt, as opposed to the completed offence. The offence carries a maximum sentence of 14 years' imprisonment.

10. The applicant was aged 56 years at the time of sentence. He had five previous convictions in the 1980s, but none for like offending.

11. The judge had the benefit of a pre-sentence report on the applicant. The applicant told the author that he had first established contact with Jill on Facebook when she sent him a friend request. Their conversation spanned a period of four to five months. He did not know her age in their early conversations. Some months into their conversation she told him her age and said that she was at school. He told her that they must stop discussing sexual

matters, but contact did not cease. The applicant said that he then began to communicate with Jill's mother, "Deb", although he came to suspect that they were the same person. He conceded that he became sexually aroused by the fantasy they created. His online conversations helped to relieve his boredom and enabled him to achieve a sense of intimacy which was otherwise absent from his life.

12. The applicant acknowledged the seriousness of the offences and realised that he would receive a custodial sentence. It is worthy of note that at no time did the applicant tell the author of the report that he was not guilty of the offence with which he was charged.

13. There is no transcript of the judge's sentencing remarks.

14. By reason of the applicant's complaint about his counsel's conduct, he has waived privilege. His counsel has explained that the judge placed the offence at the top of the range for category 3A within the relevant guideline on the basis that the communication related to three children. This has a starting point of 26 weeks' custody, with a range of a high level community order to three years' imprisonment. Credit for the appellant's guilty plea was applied, which together with his mitigation reduced the sentence to one of 20 months' imprisonment.

15. The applicant seeks leave to appeal against his conviction on four grounds:

(1) His counsel told him to plead guilty, which was wrong. He did not properly defend him in court and supplied the prosecutor with information to use against him;

(2) The prosecutor did not have adequate justification and his actions were

egregious;

(3) He was dissatisfied with the "judicial decision" when there was only hearsay and no evidence of a crime; and

(4) He has the right to a fair trial.

16. We find no merit in any of these grounds. The evidence against the applicant was overwhelming, recorded as it was in its entirety on his telephone. The fact that those with whom the applicant was speaking may not have been children was catered for by the applicant being charged with an attempt, rather than the completed offence. It is clear from the contemporaneous attendance notes that we have seen that the applicant was carefully and properly advised as to his plea. He accepted to his representatives that he was asking someone he believed to be a child to have sexual intercourse with him, and another to give him oral sex, amongst other requests. As his representative noted, "That is pretty much inciting a child to engage in sexual activity". The applicant offered no resistance to pleading guilty at the time. We can see no basis for any contention that his guilty plea was equivocal. There is no other proper basis for considering that his guilty plea was anything other than an acknowledgement by the applicant of his guilty to the offence alleged.

17. As was said by Lord Hughes in *R v Asiedu* [2015] EWCA Crim 714 at [19]:

"A defendant who pleads guilty is making a formal admission in open court that he is guilty of the offence. ... A defendant will not normally be permitted in [the Court of Appeal] to say that he has since changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court."

18. Turning to sentence, the applicant submits: that the judge wrongly applied the sentencing

guidelines; that there was no evidence that he committed a crime; that that fact was not taken into account by the judge; and that the sentence is wrong in principle or manifestly excessive.

19. There is again no merit to any of these grounds. The applicant had pleaded guilty and in so doing accepted his guilt. It is plain from the sentence imposed that the judge fairly applied the guidelines. In the event, he did so in a way that was favourable to the applicant. Other judges could properly have placed the offence within category 1A, as opposed to 3A within the guideline, with a starting point of five years' imprisonment.

20. The sentence was not wrong in principle and was far from manifestly excessive.

21. For these reasons we refuse leave for the extensions of time in which to apply for leave to appeal against both conviction and sentence, as to grant them would serve no useful purpose.

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

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