Neutral Citation Number: **[2020] EWCA Crim 592**

Case No. 2020/01046/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

ATTORNEY GENERAL'S REFERENCES UNDER SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Thursday 30th April 2020

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(The Lord Burnett of Maldon)

MRS JUSTICE CUTTS DBE

and

MRS JUSTICE TIPPLES DBE

_____

R E G I N A

- v -

CHRISTOPHER MANNING

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Mr B Lloyd appeared on behalf of the Attorney General

Mr R Morgan-Jones appeared on behalf of the Offender

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J U D G M E N T

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THE LORD CHIEF JUSTICE:

1. This is an application by Her Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which he considers to be unduly lenient.

2. The offender is Christopher Manning. He is aged 49 years, having been born on 30th June 1970.

3. On 24th February 2020, in the Crown Court at Bristol, the offender, who had previously pleaded guilty to four counts of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003 (counts 1 to 4), and to one count of Causing or inciting a child to engage in sexual activity, contrary to section 10(1) of the same Act (count 5), was sentenced by His Honour Judge Lambert to a suspended sentence order of 12 months' imprisonment, suspended for 24 months. He imposed a tagged curfew for nine months between the hours of 9pm and 6am, with the purpose significantly to restrict the offender's liberty. In addition, he imposed a Rehabilitation Activity Order for 30 days, which included one-to-one work with an offender manager, and a requirement that the offender undertake the MAP for Change Treatment Programme. A number of ancillary orders were made, some of which we mention. A restraining order was imposed for five years which prevents the offender contacting his victim or her family. A strict Sexual Harm Prevention Order was also imposed for seven years which, amongst much else, provides comprehensive protection for young people and also inhibits the freedom of the offender to use his computer or other devices in the ordinary way. He was ordered to pay £7,500 in compensation, together with £1200 towards the costs of the prosecution. Both sums were paid within a fortnight.

4. The victim has statutory anonymity for life. There must be no reporting of this case which is likely to lead to her identification.

5. Before turning to the facts, we shall identify the principal issue that was raised before the learned judge at the sentencing hearing and was advanced as the main argument in the Final Reference, dated 20th April 2020. It is no longer pursued.

6. The offence of causing or inciting a child to engage in sexual activity covers potentially a very wide range of conduct and outcomes. The child in this case was 15 years old. The offender was charged with and pleaded guilty to inciting her to have sexual intercourse with him. No sexual intercourse occurred. Before the judge, the prosecution argued that for the purposes of the relevant definitive guideline, the incitement offence should be located within category 1 for harm. That is described in the guideline as:

> "
>
> - Penetrating of vagina or anus (using body or object)
>
> - Penile penetration of mouth
>
> In either case, by, or of, the victim".

7. It was agreed, for reasons to which we shall return, that culpability fell within category A in this case. In those circumstance, the prosecution argument was that the starting point for the incitement count was five years' custody, with a category range of four to ten years' custody. The contention advanced was that the fact that no such activity occurred should be treated only as a mitigating factor.

8. The judge emphatically rejected that submission. He concluded that it fell within category 3, namely, "other sexual activity", which, when linked with culpability at level A, has a starting point of 26 weeks' custody and a category range of a high-level community order to three years' custody.

9. The principal authorities which bear on this question, most unfortunately, were not drawn to the attention of the judge or set out or referred to in the Final Reference. We provided them to counsel in advance of this hearing. *Attorney General's Reference No 94 of 2014 (R v Baker)* [2014] EWCA Crim 2752; [2016] 4 WLR 121, concerns an offender who incited a 13 year old girl to engage in sexual activity, namely, penetration of her mouth with his penis. That sexual activity never took place. The issue we have identified was raised in the course of that Reference. In giving the judgment of the court, Sir Brian Leveson (President of the Queen's Bench Division) said this at [34]:

> "In our judgment, what happened here did not fall within category 1 at all. In the circumstances, because the offending did not proceed beyond incitement, it was 'other sexual activity' within category 3. That accords not only with the judge's rejection of the suggestion that the offender's behaviour justified a starting point of five years but also provides appropriate headroom between the sexual suggestion and any actual activity without necessarily engaging upon the exceptional basis for departing from the Guideline."

That offence was a single, high culpability offence. The offender had been sentenced to 180 days' imprisonment, which this court considered to be "entirely appropriate".

10. In *R v Cook* [2018] EWCA Crim 530; [2018] 2 Cr app R(S) 16, the same point was argued, and the position was re-affirmed by Treacy LJ in giving the judgment of this court at [8] by reference to *Baker* and to a number of other cases, where the same point had been considered.

11. Mr Lloyd, who appears on behalf of the Solicitor General, realistically recognises that in the face of the weight of that authority, the first and principal argument advanced on behalf of the Solicitor General in the Final Reference cannot be sustained. In the alternative, he submits that the custodial term arrived at by the judge was substantially too short and, in any event, should have been longer than two years, even taking account of mitigation and guilty pleas. In those circumstances, he submits, the question of suspending the sentence should not have arisen.

The Facts

12. The girl and the offender met through their shared interest in darts. She was and is a talented darts player. She met the offender in October 2017 at a competition in which both were competing. At that time she was only 14 but, because of her exceptional skills as a darts player, she was playing in an adult team. The offender was then aged 47. The girl reached her fifteenth birthday on 15th July 2018. He became attracted to her. In September 2018, he asked her out via a text message. He had already told her that he "fancied" her.

13. On Sunday 29th September 2018, they arranged to meet, alone, at a social club. The girl did not tell anyone that she was meeting the offender. On that occasion, they kissed four or five times. It is that conduct which is comprised in count 1.

14. A week later, the offender arranged to meet the girl on an industrial estate. Once more, no one knew she was there. Again, they kissed. On this occasion, the offender placed his hand on the girl's breast, over her clothing. That is the conduct comprised in count 2.

15. They arranged to meet again on Friday 12th October. By this time, the offender had sent texts which both understood to refer to the possibility of penetrative sex. On that Friday, the offender again kissed the girl and placed her hand over his clothing, on top of his erect penis. That conduct comprised count 3. She withdrew her hand and "felt awkward".

16. That evening, further messages were exchanged during which the offender explained how much he had enjoyed the touch from her. The following morning, at the offender's request, the girl sent him a picture of herself in a bikini.

17. Later that day, they met once again at the industrial estate. They kissed and the victim placed her hand once more on the offender's erect penis through his trousers. That was the conduct comprised in count 4.

18. By this time, the girl's parents were concerned that something was wrong as a result of her odd behaviour at home. They tracked the location of her mobile phone and followed her to the industrial estate. They came across their daughter with the offender in his car. He drove off, but later stopped to let the girl out.

19. The following day, the girl provided a detailed video-recorded statement of what had been going on.

20. Count 5 related to the incitement to engage in penetrative sexual activity which did not take place. The incitement occurred over the period of the substantive offending and was evidenced not only by the escalating activity, but also the content of text messages which showed the offender's clear desire to have penetrative sex with the girl.

21. The basis of plea to count 5, which was accepted by the prosecution, was that the offender's behaviour amounted to intentional incitement to penetrative sexual activity, not in the immediate future, but at some point, before the girl's sixteenth birthday.

22. Evidence before the judge, not only from the girl herself but also from her family, suggested that in the immediate aftermath of these events she had a significant adverse reaction. She self-harmed after these events, and her eating and sleeping were significantly disturbed. She suffered from nightmares. In the weeks that followed these events, her work at school was adversely affected. She saw a mental health nurse and was diagnosed with post-traumatic stress disorder and depression. There had been some problems beforehand.

23. Sexual offending very commonly has an adverse impact on victims. To an extent, that is taken into account in the guideline. But an exceptional impact may, as the guideline itself recognises, be an aggravating feature. The judge referred, albeit obliquely, to the other problems which the victim had and which are referred to in the papers that are before us. The evidence of the immediate impact is contained in two short statements taken less than a month after the conclusion of the events. It provides an insecure foundation to conclude that there was "severe psychological or physical harm" for the purposes of the guideline.

25. The offender had no previous convictions. Material placed before him, led the judge to conclude that the offender was of positive good character. He lived at home with his parents. He had some disabilities and was considered to be naïve and immature.

26. Before us, Mr Morgan-Jones, who appears for the offender, summarised the position by

saying that the offender is "emotionally and socially inadequate". Since his teenage years, he has had only three short relationships, but has always remained living with his parents.

27. A psychiatric report identified a generalised anxiety disorder. It appeared to be substantially associated with the immediate difficulties that the offender faced.

28. The judge provided a succinct assessment of the offending. In his sentencing remarks he said this:

> "Your offending arises from what was initially a virtuous friendship. It should have stayed that way. You and your victim played sport together, but, as you became better acquainted, what was a virtuous friendship turned into a sexual relationship. You were somewhat naïve and not very worldly wise, but you are the adult in all this and there is one person to blame and one person only, and that is you. You took advantage of a 15 year old girl, and [the] victim impact is severe in this case.
>
> I also saw elements of manipulation and cunning in what you did, and there was a significant element of grooming behaviour which took place here. …"

29. In sentencing the offender, as was common ground before him, the judge placed the contact offences (counts 1 to 4) in category 3A. He described the culpability as being "well within culpability band A, given the disparity in age, the severity of impact upon your victim and the grooming behaviour that took place. It must be recalled that this was multiple offending as well."

30. Count 5 also fell within category 3A. The judge thus determined to impose concurrent sentences, with the total sentence reflecting the overall criminality. He then explained his sentence in this way:

> "Given the severity of the harm concerned, I took the firm view that your offending was so serious [that] only a custodial sentence could be justified. I stepped back, wondering in the end, given your risk and prospects of rehabilitation, whether it had to be an immediate custodial sentence. Not without some hesitation, I decided you could be spared immediate custody, but it comes at considerable cost. If this had been a contested case, 15 months' imprisonment would be right for your overall [sentence]. Giving you 20% credit for plea, a somewhat generous assessment, then 12 months would be the right sentence, suspended for two years."

31. Mr Lloyd submits that, taking account of the multiplicity of offending reflected in the five counts, the starting point at which the judge arrived, namely, 15 months' imprisonment, was too low by a substantial margin. He submits that each of these offences was serious within the context of category 3A of the guideline, given the aggravating factors to which the judge

referred. Each offence, he submits, committed in isolation, should have attracted a sentence of about two years' custody. In the round, he submits that the starting point should have been about four years' custody, before any reduction for the guilty pleas.

32. Mr Morgan-Jones submits that the judge was right to reject the contention that the incitement count should be sentenced as a category 1 offence. It was his submission before the judge that a suspended sentence order was an available sentence, given all of the circumstances of the case. He reminds us of the mitigating factors to which the judge referred, and in particular to the possibility of rehabilitation. He also submits that the risk assessment in this case was actuarily assessed as being low and continues to be a low risk to members of the public. He accepts that the pre-sentence report described a high risk to "a known child", but the Sexual Offending Prevention Order protects against and mitigates that risk. He submits that the judge was very familiar with the case because he had case-managed it for some time. An early trial had to be adjourned because the offender was in hospital. The judge saw the offender in court on a number of occasions and he also took part in a familiarisation visit by the complainant to the court.

33. Mr Morgan-Jones submits that even if the view is taken that this sentence was in all the circumstances a lenient one, it is not possible to suggest that it was unduly lenient for the purposes of the relevant legislation.

34. The starting point for a category 3A offence is six months' custody. A community punishment may be appropriate, but the range extends to three years' custody. The width of the category range reflects the fact that, as in this case, the circumstances of the offending can range very widely indeed. We see an escalation in the offending. It started with kissing which, in our view, on its own might well not lead to a custodial sentence at all. Although touching the breast over clothing, and then the much more serious invitation to the girl to place her hand on the offender's penis through his clothing would almost certainly do so.

35. All this was part and parcel of a calculated journey upon which the offender had embarked and was seeking to take the girl with him. In the absence of the detection which occurred, no doubt further offences would have been committed. The judge was clearly right to decide that the custodial threshold had been passed.

36. That said, we accept Mr Lloyd's submission that the 15 month starting point was unduly lenient. We do not accept that, taking the five offences together, a starting point of four years would have been appropriate, as he suggested. There were four distinct contact offences and the incitement was serious We consider that the proper starting point in this case should have been in the region of 30 months' imprisonment.

37. The real issue, as it seems to us, is whether it was open to the judge to suspend the sentence, assuming that the custodial term, having regard to all matters, including the guilty pleas, could have been two years or less. The starting point we have identified, when the discount for the guilty plea is applied, would lead to a custodial term of two years.

38. In considering this question, we have regard to the guideline on the imposition of community and custodial sentences. We do not accept that it was wrong in principle for the judge to consider suspending the sentence in this case. There is, for example, a realistic prospect of rehabilitation.

39. Events since the offender was sentenced, which are spoken to in two supplementary reports

from the Probation Service, show that he is motivated to address his offending behaviour by engaging in focused work within supervision appointments. He has continued to engage throughout the intervening period with his supervisors. He has started the MAP for Change Course. We would add that at the time of the offending, and indeed of his being sentenced, the offender had been in steady work for many years. His work has been interrupted not only by his offending, but also by the Covid-19 emergency. His employers remain supportive. His mitigation was strong. True it is that the risk that he poses is a factor which would weigh in considering whether a suspended sentence was appropriate; but for the reasons submitted by Morgan-Jones the approach to risk in this case suggests that it is limited.

40. Furthermore, the ancillary orders attached to the suspended sentence in this case are of importance. The curfew in particular, which extends for nine months, acts as a significant restriction on the offender's liberty, albeit, as matters stand and as Mr Lloyd reminded us, the national lock-down would inhibit his movements to some extent anyway.

41. We would mention one other factor of relevance. We are hearing this Reference at the end of April 2020, when the nation remains in lock-down as a result of the Covid-19 emergency. The impact of that emergency on prisons is well-known. We are being invited in this Reference to order a man to prison nine weeks after he was given a suspended sentence, when he has complied with his curfew and has engaged successfully with the Probation Service. The current conditions in prisons represent a factor which can properly be taken into account in deciding whether to suspend a sentence. In accordance with established principles, any court will take into account the likely impact of a custodial sentence upon an offender and, where appropriate, upon others as well. Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be. Those in custody are, for example, confined to their cells for much longer periods than would otherwise be the case – currently, 23 hours a day. They are unable to receive visits. Both they and their families are likely to be anxious about the risk of the transmission of Covid-19.

42. Applying ordinary principles, where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended. Moreover, sentencers can and should also bear in mind the Reduction in Sentence Guideline. That makes clear that a guilty plea may result in a different type of sentence or enable a Magistrates' Court to retain jurisdiction, rather than committing for sentence.

43. Returning to the circumstances of this application, in the light of our conclusions, we give leave for the Solicitor General to refer the sentence to this court. We allow the application to the extent only that we substitute for the custodial term of 12 months, a custodial term of 24 months. The sentence remains a suspended sentence. All the other orders made by the judge are unaffected.