IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2020/02156/B4

[2021] EWCA Crim 828

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 25th May 2021

LORD JUSTICE HOLROYDE

MRS JUSTICE MAY DBE

THE RECORDER OF REDBRIDGE
(His Honour Judge Zeidman QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v –

SHIRAAZ KUREEMBOKUS

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Mr N Aullybocus appeared on behalf of the Applicant

J U D G M E N T

Tuesday 25th May 2021

LORD JUSTICE HOLROYDE:

1. This applicant pleaded guilty to an offence contrary to section 14 of the Sexual Offences Act 2003. He was sentenced to 18 months' imprisonment. An application for an extension of time of 41 days in which to apply for leave to appeal against conviction was refused by the single judge. It is now renewed to the full court. An application for leave to appeal against sentence, which was also refused by the single judge, has been abandoned.

2. The relevant facts can be stated briefly. In May 2020 the applicant was a graduate student reading for a doctorate. He entered into a conversation on the Grindr app with a user who gave the name "Seb". That was, in fact, a profile created by an undercover police officer. At the outset of the conversation "Seb" said that he was only 14. The applicant replied, "That's cool. I'm 27, not too old for you?" At "Seb's" suggestion they left the Grindr site and began to exchange messages and photos on WhatsApp. "Seb" repeated that he was a 14 year old schoolboy and said that he did not have a lot of sexual experience. They arranged to meet. When asked by "Seb" what he wanted to do, the applicant said that he wanted to kiss and to engage in oral and anal sex. "Seb" said that was "cool" and he was glad the applicant did not mind his age.

3. When the applicant attended the agreed meeting place on the following evening, he was arrested.

4. The applicant was represented by a solicitor at the police station. On advice he made no comment when interviewed under caution. He entered no plea when he appeared before a magistrates' court and was sent for trial to the Crown Court at Oxford.

5. At a hearing in the Crown Court on 11th June 2020 the applicant pleaded guilty to an indictment charging him with an offence contrary to section 14 of the 2003 Act, the particulars of which were that he "intentionally arranged or facilitated an act which he intended to do which would involve the commission of an offence under any of sections 9 to 13 of the Sexual Offences Act 2003, namely penetrative sexual activity with a child under 16". Sentence was adjourned and a pre-sentence report was directed.

6. The applicant told the author of the report that he had used the Grindr app because he felt isolated and lonely, being an overseas student in university accommodation during the Covid-19 lockdown. He said that he knew sexual activity with a child under 16 was illegal, but that he thought "Seb" was an older person pretending to be a child. He said that he continued the conversation "out of curiosity", but denied that he would have engaged in any sexual activity if "Seb" was, in fact, a child.

7. At the sentencing hearing on 23rd July 2020, Her Honour Judge Lamb was, understandably, concerned that the account given by the applicant to the author of the pre-sentence report was effectively a denial of the offence. She allowed the applicant to speak to counsel who then represented him. He confirmed that he did not wish to apply to change his plea. The hearing then proceeded.

8. The judge placed the offence in category 1A of the relevant sentencing guideline, with a starting point of five years' custody and a range from four to ten years. She adjusted the starting point downwards because she felt that only one higher culpability factor was present; made a further reduction to reflect the personal mitigation, including the applicant's previous good character and the difficulties facing prisoners during the pandemic; and gave 25 per cent credit for the applicant's guilty plea. Thus, she arrived at the sentence of 18 months' imprisonment,

which she said must be served immediately as the offence was too serious to allow for a suspended sentence.

9. The grounds of appeal against conviction have been set out in considerable detail in writing by Mr Aullybocus, who now acts on the applicant's behalf, and have been supplemented this morning by helpful and focused oral submissions. They are, in summary, as follows:

> 1. The applicant received inadequate and erroneous advice from his former legal representatives.
>
> 2. He was not advised of a viable defence which was available to him, in that his instructions were that he did not believe that "Seb" was 14 and did not intend to have sex with a child under 16.
>
> 3. Elements of the offence charged were not made out.
>
> 4. The behaviour of the undercover officer was akin to entrapment, in that the officer incited the meeting and induced the applicant to come up with sexual activities in which to engage, but the applicant was not advised of this defence.

There is a degree of overlap between the first three of those grounds of appeal.

10. We begin by referring to the relevant statutory provisions. By section 14 of the 2003 Act, so far as is material for present purposes, a person commits an offence if

> "(a) he intentionally arranges or facilitates something that he intends to do … and
> (b) doing it will involve the commission of an offence under any of sections 9 to 13."

11. By section 9(1), so far as material:

> "A person aged 18 or over (A) commits an offence if —
>
> (a) he intentionally touches another person (B),
>
> (b) the touching is sexual, and
>
> (c) either —
>
> B is under 16 and A does not reasonably believe that B is 16 or over
>
> …"

12. In relation to grounds 1 to 3, the essence of Mr Aullybocus' submissions is that the applicant's instructions have always been that he did not believe he was exchanging messages with a child under 16, would not engage in sexual activity with a child under 16, did not intend to do so, and, accordingly, did not intend to do something which would involve the commission of an offence.

13. A number of arguments are advanced in support of that defence. It is suggested, for

example, that the applicant had in mind that a 14 year old schoolboy would be unlikely to be arranging to meet after 9pm. Mr Aullybocus submits that the applicant, therefore, had a valid defence to the charge and should have been advised to that effect. Instead, it is submitted, the applicant was advised that he had no defence to the charge and had no alternative but to plead guilty, as otherwise he faced four to five years' imprisonment. Mr Aullybocus submits that this argument is reinforced by documents which have been provided following a waiver of privilege.

14. It is also submitted that the applicant was advised that if he pleaded guilty he was likely to receive a community sentence or a suspended sentence, which would not affect the continuation of his university studies. It is submitted that the advice was wrong and has resulted in a clear injustice, because the applicant has not only lost his liberty, but has also suffered very severe consequences for his studies and for his future career. Moreover, it is submitted that the undercover officer knew that she was acting unlawfully by impersonating a child, because Grindr's terms and conditions prohibit use of the App by anyone aged under 18 and prohibit users from impersonating any other person. Mr Aullybocus suggests that that is why the conversation was moved at an early stage from Grindr to WhatsApp. The evidence against the applicant was, he submits, therefore unlawfully gathered, and the applicant should have been advised that he could apply to exclude it. In those circumstances, it is argued, the applicant was deprived of any proper legal advice and deprived of any real freedom of choice as to his plea. On that basis, it is submitted that the conviction is unsafe, notwithstanding the guilty plea.

15. As to ground 4, Mr Aullybocus refers to *R v Looseley* [2001] 4 All ER 897. He submits that the conduct of the undercover officer amounted to an incitement of the applicant, who was vulnerable because of the mental health impacts of the Covid pandemic but who was acting lawfully, to commit an offence. It is submitted that the officer preyed on the applicant, learned from the exchange of messages that he felt lonely and isolated, and incited him to engage with a child. Such conduct, it is submitted, should have led to the prosecution being stayed as an abuse of the process.

16. Given that the application is based on criticisms of the former legal representatives, the applicant has, as we have already indicated, waived his legal professional privilege. The former legal representatives have provided, amongst other things, the attendance note completed in respect of the first attendance at the police station. It records that the applicant's initial instructions were that he did not believe "Seb" was really a child. However, he later accepted that he knew that "Seb" was 14, understood it was wrong, but was feeling lonely, was curious to meet "Seb" and wanted to see him for sex. The former representatives have also referred to a conference on 21st May 2020, at which the applicant was advised that section 14 creates a preparatory offence, which is committed with the intention that sexual activity will take place, and that the offence is complete when the arrangement is made; it does not depend upon the completed offence taking place, or even being possible. The applicant was clearly concerned about the consequences of a conviction for his studies, but was advised that he must raise that with his university. He indicated that he intended to plead guilty.

17. At the hearing on 23rd July 2020, when the judge allowed time for him to speak with his counsel, the applicant was advised that it was entirely a matter for him how he wished to plead, and that a guilty plea would be an acceptance that he intended to engage in sexual activity with a child. He confirmed that he did not wish to apply to change his plea, and endorsed counsel's brief to that effect.

18. In a Respondent's Notice the prosecution resist all the grounds of appeal.

19. We have considered all the written submissions and Mr Aullybocus' oral submissions. It is unnecessary to rehearse them all. We emphasise, however, that we have taken all the submissions into account. We can state our conclusions briefly.

20. The fact that a defendant has pleaded guilty to an offence is not a complete bar to an appeal against conviction for that offence. It is, however, a very relevant factor. A defendant who pleads guilty makes a formal admission in open court that he is guilty of the offence. The general rule is, therefore, as was stated in *R v Asiedu* [2015] 2 Cr App R 8 at [19]: once a defendant has admitted facts which constitute the offence by an unambiguous and deliberately intended plea of guilty

> "… there cannot then be an appeal against his conviction, for the simple reason that there is nothing unsafe about a conviction based on the defendant's own voluntary confession in open court. A defendant will not normally be permitted in this court to say that he has changed his mind and now wishes to deny what he has previously thus admitted in the Crown Court".

21. There are limited exceptions to that general rule. In particular, a conviction may be unsafe if a guilty plea was entered on the basis of incorrect or inappropriate legal advice. However, as *R v Boal* (1992) 95 Cr App R 272 (at 278) makes clear, the setting aside of a conviction on such a basis is a most exceptional course which will only be taken if the legal advice has deprived the defendant of a defence which would quite probably have succeeded and the court concludes, therefore, that a clear injustice has occurred.

22. We have considered the first three grounds of appeal in the light of those principles. First, it is, in our view, wholly unrealistic to regard the exchange of messages between the applicant and "Seb" as anything other than an arrangement to meet for sex.

23. Secondly, "Seb" clearly stated that he was 14 and more than once gave the applicant opportunities to end the exchange and abandon the idea of a meeting. But the applicant, nonetheless, continued the conversation, pursued the arrangement to meet and went into some detail as to precisely what he wanted to do when they did meet.

24. Thirdly, the applicant did not at any stage question whether "Seb" really was a child. On the contrary, he expressed himself to be untroubled by "Seb's" stated age. It follows that, taken at face value, the applicant in the exchange of messages was arranging to do something which he intended to do, namely to have penetrative sex with a boy who was and whom he believed to be aged 14, thereby committing an offence contrary to section 9 of the 2003 Act.

25. Fourthly, on the account now given in his instructions to Mr Aullybocus, the applicant would have had in law a defence to the charge, albeit one which would have depended on the proposition that his messages to "Seb" did not mean what they said. Those instructions are contradicted by the account given by the former legal representatives as to what was said to them. As we have noted, the record of the solicitor's first meeting with the applicant at the police station records that, although the applicant initially said that he did not believe "Seb" to be a child, he shortly afterwards admitted that he knew that "Seb" was only 14, but still wanted to meet him for sex. We can see no apparent reason why the solicitor concerned should have misunderstood or mis-recorded those instructions, which were the basis on which she advised the applicant to make no comment when interviewed.

26. Fifthly, when given an opportunity at court to reconsider his position, the applicant

maintained his guilty plea, which he must surely have understood was an admission of all the ingredients of the offence. The very words of the charge to which he pleaded guilty make that abundantly clear.

27. In those circumstances, it is not, in our view, arguable that the applicant was in fact given incorrect legal advice. Nor is it possible to argue that he was deprived of a defence which would quite probably have succeeded.

28. As to ground 4, it suffices to say that, in our view, it is misconceived. There was no basis for an application to stay the proceedings as an abuse of the process. It is not arguable that the undercover officer did anything more than present the appellant with an unexceptional opportunity to commit a crime, which he chose to do.

29. We are grateful to Mr Aullybocus, who has been good enough to act pro bono in this matter and who has gone to considerable lengths to present the argument on the applicant's behalf. We nonetheless agree with the single judge that there is no ground on which it could be argued that the conviction is unsafe. If we had thought otherwise, we would have been willing to grant the extension of time sought. But as it is, no purpose would be served by our doing so.

31. The applications accordingly fail and are refused.
