NCN: [2023] EWCA Crim 1106

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO: 202302434/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 22 September 2023

Before:

LORD JUSTICE SINGH
MRS JUSTICE COCKERILL DBE
MR JUSTICE HILLIARD

REX
V
TOMASZ BAGINSKI

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MISS S BAUWENS appeared on behalf of the Appellant

A P P R O V E D J U D G M E N T

MRS JUSTICE COCKERILL:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall, during that person's lifetime, be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

2. This is an appeal against sentence brought with the leave of the single judge. On 10 May 2023 in the Crown Court at Isleworth before Her Honour Judge Holt the appellant was convicted of two counts of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003. On 27 June 2023 before the same judge the appellant was sentenced as follows.

    a. In relation to count 1 to eight months' imprisonment concurrent to;

    b. Count 2, 22 months' imprisonment.

3. The facts of the offending are straightforward. The complainant was aged 14 and lived with his mother and step-father. The appellant was a family friend. The first count occurred on 31 January 2020 when the appellant was invited to the family home by the complainant's parents. He was well-known to the family, being a longstanding friend of the father and had previously lodged in a previous home of the family for at the time some years before.

4. The family had dinner and were drinking. At 8.00pm or 9.00pm the complainant was in his room playing computer games when the appellant, who had excused himself to go to

the toilet, came in. He lay on the bed behind the complainant. The appellant started touching the complainant's back, rubbing his hand up and down. This was at first over the complainant's clothes and then underneath his clothes. There was skin contact with the complainant's back and stomach area. The appellant then started kissing the complainant's head and neck and touched the complainant's penis over clothing. When the complainant told him to stop the appellant put his head down into the complainant's lap and moved his head around, attempting to bite the complainant's penis over his clothes. The appellant said: "*please don't tell anyone. I'm in love with you*."

5. Count 2 occurred on 12 February 2020 when the complainant's parents again invited the appellant to their house for dinner. Again, there was drinking and the appellant excused himself. The complainant was sat on a chair in his own room when the appellant entered and started touching his back and kissing his head and neck. Later in the evening when the appellant was leaving he went to the complainant's room and asked him for a hug. When the complainant hugged him, the appellant put his hand down the back of the complainant's trousers, under his pants and touched his naked bottom.

6. The judge in sentencing concluded that these were Category 3 offences. That conclusion is not contentious. She also concluded that it was a Category A harm case because there was clear abuse of trust, a point which is contentious and is at the centre of this appeal, and that there was a significant disparity in age. A point which was not contentious. The judge flagged the facts that the abuse took place in the complainant's own home and there were some steps taken to prevent reporting but (in line with the prosecution's submissions) discounted those facts because she had counted abuse of trust and she noted there was an overlap which might lead to double-counting. The judge took note of the

mitigating factors, setting them out on page 4 of the sentencing remarks. She then considered suspension, but considered that the offences were so serious that only an immediate custodial sentence was appropriate before pronouncing the sentences outlined.

7. The appeal was in writing advanced essentially on three grounds;

    a. First, that it was wrong to impose a custodial sentence as opposed to a suspended sentence;

    b. Secondly, that it was wrong to significantly aggravate the offence on the basis of the abuse of trust;

    c. Thirdly, that the sentence on count 2 was manifestly excessive.

8. Before us today, Miss Bauwens, who appeared below, and for whose extremely clear and helpful submissions we are very grateful, has made the following points;

    a. She has made clear that she focuses her submissions on the abuse of trust point, rather than on suspension - although the point on suspension is formally maintained;

    b. She emphasised the importance of responsibility in the determination of abuse of trust, drawing a contrast with the case of *Jones* both as to that point and as to the extent of sentence, pointing out how a sentence of a similar length was imposed in that case for more and more serious offending with a more archetypal abuse of trust involved;

    c. She also drew a parallel with the case of *Manning,* saying that the offending here

was less serious than in that case;

d. Touching briefly on the suspension argument, she emphasised again the appellant's good character before and since the offences and the support he gives to his family, finishing with a reference to the case of *Ali*.

9. The starting point is the judge's approach to abuse of trust. The judge stated that this was not in issue. However Miss Bauwens explains that the defence, while acknowledging that the case was a 3A case because of the disparity of age, never did accept abuse of trust and that submissions were made on that basis.

10. We accept the submissions made before us today that the judge's acceptance of the prosecution's case in relation to abuse of trust was erroneous. The guideline makes clear that:

> "In order for an abuse of trust to make an offence more serious the relationship between the offender and victim(s) must be one that would give rise to the offender having a significant level of responsibility towards the victim(s) on which the victim(s) would be entitled to rely."

11. The examples it gives are of situations like teacher and pupil, carer and dependent. Both on the words of the guideline and the examples given this was not such a situation. The appellant had no responsibility to the complainant, let alone a significant responsibility on which the complainant would be able to rely. That being the case, in our judgment the judge was not entitled to aggravate the offence and raise the sentence by reference to the factor of abuse of trust and to do so was, as has been submitted before us, an error.

12. In our judgment both offences were indeed 3A offences with a starting point of 26 weeks and a range of high level community order to three years' custody. The location of the

offence and the limited attempts to prevent the complainant reporting were the main aggravating factors, along with the fact that the offences occurred in drink. Against this aggravation was to be set the mitigation which the judge outlined which included the appellant's good character.

13. The two offences of course could have been sentenced either consecutively or, as the judge did, concurrently, in either event adjusting for totality. Count 2 was certainly more serious than count 1 and would fall to be sentenced above the middle of the 3A range. It did however remain a 3A offence with limited aggravation and some mitigation.

14. Bearing all of this in mind we are persuaded that the error into which the judge fell on abuse of trust did result in a sentence which was manifestly excessive. We consider that the appropriate custodial sentence in this case was not more than 12 months in total.

15. When it comes to the question of suspension of the sentence, persuasively as these arguments were put, the lack of emphasis put on it in oral argument was realistic. An appeal on a question of this sort faces a high bar. Since the decision whether or not to suspend is one which involves a balancing exercise, there is considerable latitude afforded to the sentencing judge and this court will only interfere where it is persuaded that something has gone wrong.

16. This is not such a case. Although the judge did not explicitly identify all the relevant factors in favour of suspension, it can be clearly seen that she did carry out a balancing exercise. She gave a clear explanation of why the offence was such that the balancing exercise tipped in favour of custody. Any detailed consideration of the factors in favour of suspension indicates that while it might be said technically that they are engaged, none

of them are engaged to any significant extent. The judge was perfectly entitled to find that in the absence of any strong weight in favour of suspension the offending was sufficiently serious that it required an immediate custodial sentence, perhaps particularly in circumstances where there was no recognition of the offending and the matter had been contested to a full trial with consequent further impact on the victim. It is conceivable that a different court might have taken a different view, but it was an answer well within the range of answers open to the judge and not an error for her to reach the conclusion she did on suspension. Accordingly, in so far as the appeal relates to the suspension of the sentence, it is dismissed.

17. In all the circumstances, we allow the appeal solely as regards the length of the sentence on count 2. We quash the sentence imposed on count 2 and substitute a sentence of 12 months on that count.

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

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