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No: 201901378/A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 13 September 2019

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE FRASER

MR JUSTICE MARTIN SPENCER

R E G I N A
v
DAVID JENKINS

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Miss L French appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

MR JUSTICE MARTIN SPENCER:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to these offences. It follows that no matter relating to the victim, to whom we shall refer anonymously as ER, shall, during her lifetime, be included in any publication if it is likely to lead members of the public to identify her as a victim of the offences.

2. On 22 March 2019 in the Crown Court at Oxford the appellant pleaded guilty to three offences. First, an offence of causing or inciting a child to engage in sexual activity with penetration, contrary to section 10(1) of the Sexual Offences Act 2003, which was count 1 on the indictment. Secondly, an offence of causing or inciting a child to engage in sexual activity without penetration, which was count 2 on the indictment. Thirdly, making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978, which was count 4 on the indictment. For the first of these offences he was sentenced to a term of four years' imprisonment, for the second to two years concurrent and for the third to one year concurrent, making a total sentence of four years' imprisonment. A Sexual Harm Prevention Order was made pursuant to section 103A of the Sexual Offences Act 2003. The appellant appeals against sentence by leave of the single judge.

3. The victim ER was born on 9 September 2000. In April or May 2016, when aged 15, she first began communicating with the appellant online. She entered a search term into Twitter with the letters DDLG, standing for "Daddy Dom Little Girl" and the appellant responded by sending her a private message via Twitter and they then formed an online relationship. ER made it clear to the appellant that she was 15. He told her he was in his forties. His date of birth is 9 July 1960 so he was in fact 55.

4. The online relationship between them developed over the course of the summer of 2016. Initially the appellant represented himself as a caring individual who was seeking to protect ER. Thus, for example, on 21 April 2016 he warned ER to be careful, to be cautious because of the perverts on social media whom he described as 'pack animals'. He posted this to her:

    i. "They will promise you the earth, get a picture of you and then disappear. Do not submit unless you're 100 per cent sure. After that only the Dom can release you. You can request to leave but the Dom as the final say xx."

5. In response to ER's thanks to him for being so, as she put, "nice and genuine", he responds, "It's my pleasure. I get so many subs asking for advice due to bad Doms. I

would hate for someone like you to get hurt the same way." However as observed by the learned sentencing judge, over a period of time, having gained ER's trust, the appellant drew her in, in what the judge described as a classic grooming style, until she began to engage in sexual activity, some of which was photographed and provided to him. Some of the activities were extreme, involving the administration of pain. As the learned judge observed:

i. "The appellant normalised in a child wholly abnormal behaviour."

6. He instigated it, controlled it and placed ER in the position where she thought it was the right thing to do, always for the appellant's sexual gratification.

7. This culminated in a video made by ER on 4 September 2016 when she was some five days short of her 16th birthday. The appellant had asked ER to film herself masturbating. This she did and sent to the appellant an image of her penetrating herself by masturbation and this forms the basis of the first and third of the offences. The second offence covered a range of activity including photographs and messages sent between the appellant and ER including an image of ER's breast with clothes pegs on and the conversation about her touching herself.

8. Although the communications continued after 9 September 2016, they were by law no longer criminal, ER now no longer being a child having attained her 16th birthday.

9. ER's parents noticed a change in her behaviour over the summer of 2016 and matters came to a head in November 2016 when her father found numerous items in her bedroom, including various sex toys and shiny black shoes. Her parents also became aware that money had been transferred into her bank account by the appellant on three separate occasions, although these were all after her 16th birthday. The appellant was traced, arrested and answered no comment when interviewed by the police.

10. The appellant, aged 58 at the date of sentence, was of previous good character. He had previously been a member of the British Army and had served with distinction for 22 years, his conduct being exemplary, as illustrated by the award of the Long Service and Good Conduct Medal in June 1999. He achieved the rank of W01, the highest non-commissioned rank in the army, and he ran the administration in the Chief of the General Staff's Directorate of Military Operations. He was also the office manager in the Directorate of Army Legal Services when the British Forces were assessing the impact of European Legislation on their modus operandi. He was described by his Commanding Officer as "diligent and loyal and his conduct was exemplary."

11. The appellant is a married man with three children. In February 2009 his wife suffered a stroke which resulted in her spending 21 days in hospital. She was left with a subluxated right shoulder, a right side dropped foot, right-sided weakness of the body and a

permanently clawed right hand. She is now wheelchair-bound. As a result, the appellant became her carer, seeing to her dietary requirements, making her drinks, cooking her meals and cutting up her food. He carried out the daily shopping and cleaning of the house and became her primary carer and also the primary carer for the children. He helped his wife with her personal hygiene.

12. His wife described their relationship prior to his arrest as having been as though they were "stuck in a rut". She said she had totally withdrawn and lost any interest in her appearance or surroundings and that they had limited meaningful communication. The irony is that following his arrest their relationship improved dramatically and she describes them as having now a closeness which they had been missing before.

13. In a pre-sentence report the appellant is described as having accepted responsibility for the offences and expressed remorse. He denied that his offending was sexually motivated, and denied having a sexual interest in children. The report stated that the appellant failed to recognise ER as a victim and had limited insight into his offending behaviour. He was assessed as at low risk of general re-offending and at medium risk of serious recidivism. He was considered to pose a medium risk of serious harm to children and a medium risk of harm to himself from suicide or self-harm.

14. In a victim personal statement, described by the learned sentencing judge as harrowing, ER stated that the appellant had made her life a nightmare. She had resorted to self-harming and had an eating disorder. She had developed anxiety and distrust of people. The events of 2016 had interfered with her education and she was scared to go out for fear that something bad might happen or go wrong. She had sleep problems. She had also become distant from her family. She said: "I have suddenly gone from being a happy, carefree, chatty girl to a closed off depressed one." She felt that she had lost her family because of what the appellant had done.

15. Sentencing the appellant, the learned judge considered that count 1 fell within Category 1A of the definitive guideline for sentencing in such cases. This carries a sentencing range of four to 10 years' custody and the learned judge considered that after trial the sentence would have been six years' imprisonment. He gave the appellant full credit for his plea of guilty, thereby reducing the sentence to four years' imprisonment and he imposed concurrent sentences for the other two counts.

16. In sentencing the appellant, the judge was doubtful whether the appellant took full responsibility in that he had sought to apologise to the court, the police, the other family and his own family but not specifically to ER herself.

17. In what we consider to be impressive and well-argued submissions, made both in writing

and orally by Miss Ffrench and for which we are extremely grateful, it is submitted that the sentence was manifestly excessive for two principal reasons. First, the starting point of six years before credit for plea was too high. Secondly, insufficient account was taken of the appellant's personal mitigation.

18. Developing her first point, Miss Ffrench submits that given the way in which the communication between the parties started, with ER asking the appellant whether he has a "sub" and stating in response to a question that she had been a "little" for six months or so, there was no clear evidence of grooming, being a term which, she submits, denotes a form of gaining trust which leads to the erosion of social barriers or morals. She submits that for grooming to be found there must be some gaining of the trust of the victim so that what he or she previously considered unacceptable becomes acceptable and the normalisation of what is abnormal. She submits that this cannot be said to be present here in view of the circumstances of the communication.

19. We disagree. As this court said in Porter [2017] EWCA Crim 1454, grooming is not a term of art and may cover a wide range of behaviour. In our judgment, the learned sentencing judge was right when he described the appellant as drawing ER in, in classic grooming style, until she began to engage in sexual activity with the escalation of the communications to its culmination of the video of 4 September 2016. In the circumstances, we consider that the learned judge correctly characterised this offence and was entitled to adopt the starting point which he did.

20. Miss Ffrench in her submissions conceded that whether or not the court agreed with her submissions in relation to grooming, the case in any event falls squarely within Category 1A because of the sexual images solicited and because of the discrepancy in age between the appellant and his victim.

21. Although the starting point for an offence within this category is five years, we consider that taking into account all the circumstances, as the judge was entitled to do, it was within his discretion within the sentencing range to reach a starting point before reduction for plea of six years and that it was for the judge to take a view as to where in the category these offences fell given his view of what he saw and heard, including his view of ER's victim personal statement.

22. So far as Miss Ffrench's second ground is concerned, as the learned judge stated in cases such as this personal mitigation does not carry much weight as the sentencing guidelines make clear. No doubt the impact of the sentence will be disproportionately large on the appellant's family given his wife's disability but this is the risk which the appellant ran with his eyes open when he engaged in this conduct over the course of the summer of 2016. An immediate custodial sentence was always inevitable in a case such as this and therefore the question was not whether his wife would be deprived of his services but for how long she would be deprived of those services.

23. Whilst we acknowledge that the sentence was perhaps towards the severe end of the range of sentences available to the learned judge, in our judgment it cannot be described as manifestly excessive and in those circumstances the appeal will be dismissed.