NCN: [2020] EWCA (Crim) 301
No: 202000227 A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 11 February 2020

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE EDIS

MR JUSTICE CHAMBERLAIN

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
DANIEL VASILE IVAN

Ms J Ledward appeared on behalf of the **Attorney General**
Ms R Hill appeared on behalf of the **Offender**

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(Official Shorthand Writers to the Court)

J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General seeks leave to refer a sentence, passed in the Crown Court sitting at Winchester on 19 December 2019, under section 36 of the Criminal Justice Act 1988, as being unduly lenient.

2. The offender is Daniel Ivan, aged 22, and the sentencing judge was His Honour Judge Cutler. The offender was charged with six offences of engaging in sexual activity with a child contrary to section 9 of the Sexual Offences Act 2003. On 8 November 2019, at a hearing shortly after the plea and case management hearing, the offender pleaded guilty to four of the offences on a written basis. The other two charges were left to lie on the file on the usual terms.

3. On 19 December he was sentenced concurrently on each count to a term of 15 months' imprisonment, suspended for 24 months, with a rehabilitation activity requirement of up to 20 days. A sexual harm prevention order was made for a period of 5 years.

4. The victim of these offences was F. At the relevant time she was 13 and in Year 8 at school. She was born in Romania (as was the offender). She met him while out with friends in Aldershot, her local town. Following their initial meeting there was contact on Facebook and they began messaging each other via Facebook messenger. They began to meet, usually in his car, before and after school. On one occasion one of her friends accompanied them, and saw them kissing and hugging. F considered that the offender was her boyfriend and described him as such to her friends. After two or three weeks the offender asked F to have sex with him. She told him that she was only 13 and that she

was too young. He responded by telling her she looked older, that she looked 18. She did not want to have sex with him but felt pressurised into doing so as she loved him and did not want him to break up with her.

5. They agreed he would collect her in his car before school as usual. She was wearing her school uniform. He then took her to a secluded carpark near a local swimming pool, he undressed her lower part by removing one leg of her trousers and underwear and then penetrated her vagina with his penis. He wore a condom and continued until he ejaculated. F found the experience painful and she bled from her vagina. He told her that he loved her and dropped her off by her school (count 1). This occurred on three further occasions with the same arrangements each time over a period of a few weeks (count 2 - 4). The last occasion was on 8 March 2018. The offender told her he would not leave her like other boys would. He also asked her to send him photographs of her naked breasts and vagina but she refused. The soliciting of indecent images was opened, advanced as a fact irrelevant to categorisation and not challenged in mitigation or on the basis of plea in the Crown Court. This is a matter to which we will return later.

6. Matters came to light when a boy in F's year at her school saw the offender dropping F off at school and kissing her in his car. He alerted teachers, who contacted her parents. When they confronted her she told them what had happened. They went to the police.

7. She was video interviewed on 10 March 2018 and provided an account of what had taken place.

8. The offender was arrested and interviewed on the same day. He answered "no comment" to all questions asked. He was issued with a Child Abduction Warning Notice in which he was told by the police not to have any further contact with F.

9. By the time F was first spoken to by the police she had deleted the Facebook and other messages between her and the offender. However, messages were recovered later from the mobile telephone of a friend of hers which she had used when contacting the offender after his initial arrest. These later episodes became the subject of counts 5 and 6 on the original indictment, left to lie on the file. The messages included F referring to the offender as her "King" and he responding by referring to her as "my Queen", they both saying they missed and loved each other. Numerous heart emojis and other affectionate messages and symbols were exchanged. The messages made clear that F considered herself to be in a romantic relationship with the offender and to have formed an emotional attachment to him. When asked why she had engaged in further contact with him which she did not tell the police about, she said at the time she felt she loved him and could not stop herself. She thought that he felt the same way. As a result of this further contact the offender was re-arrested and interviewed on 1 May 2018. In a prepared statement he denied any further contact with F.

10. He was interviewed voluntarily on 29 May 2018, on which occasion he answered questions. He accepted having sexual intercourse with F but claimed she had told him she was 18 and that he had never had cause to disbelieve this. He accepted dropping her off at school but said she had told him she worked as a cleaner. He had found out her true age from a friend much later and he had not had sex with her after this.

11. He was charged by way of postal requisition in September 2019 with four offences contrary to section 9, relating to the penile penetration of the victim's vagina and two further offences relating to allegations of non-penetrative sexual touching in April 2018.

12. He first appeared on 17 September 2019 and indicated that he would plead not guilty to all six charges: the defence to be advanced was belief the victim was aged over 18.

13. At the plea and trial preparation hearing on 16 October he pleaded not guilty to all counts and the matter was set down for trial on 16 December. Subsequently the offender's representatives made contact with the Crown Prosecution Service offering a plea of guilty to counts 1 to 4 (the four charges relating to penile penetration) on the basis of that plea which read as follows:

> [F] contacted me on Facebook after we had seen each other in Aldershot. I am unsure quite how she located me, but we are both part of the Romanian community in Hampshire.
>
> Whilst I initially believed [her] to be 18 years old (as her Facebook profile indicated) I accept that I later discovered she was 13 years old. I learnt this before I had sex with her.
>
> I had sex with her four times from the 1st January 2018 to 8th March.
>
> Although I knew that [she] was not old enough to have sex with me, at no time did I force her to have sex with me. She was a willing participant in all sexual activity.

14. The proposed pleas and basis of plea were acceptable to the Crown and the matter was re-listed on 8 November for the offender to be re-arraigned. As already indicated, he pleaded guilty to counts 1 to 4; and a pre-sentence report was ordered.

15. The offender had no previous convictions in this country or in his native Romania. A pre-sentence report, dated 17 December 2019, was before the court. The offender told the author of the report that he did not know the victim's age, had no reason to suspect her to be a child and that he only pleaded guilty "to get rid of the mess" - in other words the court proceedings. The author of the report noted that he refused to take responsibility and lacked any insight into the motivation for or the impact of his offending, and failed to show any evidence of a commitment to desist as he was not engaging with any support agencies. He posed a medium risk of further sexual offending.

16. A victim personal statement from F, dated 3 October 2019, was before the court and read out. In the statement she said she was left with a sense of deep shame because she considered herself to be "guilty of the entire situation". She was ashamed in front of her parents and, at school many children had made fun of her behind her back saying she had a "lover" who was much older. She still struggled with feelings of shame and guilt and the incident had forced her to grow up more quickly. She was now much more reserved and cautious in her interactions with other boys.

17. For the Solicitor General, Ms Ledward submitted that by reference to the Sentencing Council Definitive Guidelines for section 9 offences, the offending fell within category 1A. It was category 1 harm because of the penetration of the vagina. It was category A culpability because there was a significant degree of planning so as to avoid detection, grooming behaviour and solicitation of sexual images. Category 1A offending has a starting point of 5 years and a range of 4 to 10 years. There was in addition the aggravation of there being four offences, disparity in the ages of the offender and his

victim, and ejaculation.

18. Ms Ledward acknowledges the mitigation of his previous good character and his guilty pleas.

19. She submits that the sentences were unduly lenient because the judge erred in placing the offending in category 1B of the guidelines, with a starting point of 12 months and a range of a high level community order up to a term of 2 years' custody. There were enough high level culpability factors to place this offending above the starting point for category 1A offending, not least because there were four offences. Alternatively, the offending was so serious as to place it at least above the level of category 1B sentences. She also submitted that the judge gave too much weight to the mitigation and that he should not in any event have suspended the sentence.

20. Ms Hill, who appears for the offender, accepts that the sentence was lenient but submits that it was not unduly so. The circumstances included that it was F who had made the initial contact by Facebook, that the offending was confined in time to a period of 2 months or so rather than the longer indicted period, and that the offender exerted no pressure on F in the sexual activity. She submitted that there was not grooming, in the sense of building a relationship of trust or emotional connection with a child or young person for the purpose of manipulating, exploiting or abusing them.

21. She submitted that the credit could properly have been more than 20% given the delays in entering pleas were due to the difficulties in procuring a Romanian interpreter. Prior to

this there had been a delay of 18 months between arrest and charge. Throughout the relevant period the offender had been in employment as a manual labourer, working seven night shifts a week. In addition, she points out that he was 20 at the time of the offending, of good character and, from her contact with him, immature and of low intelligence.

22. Ms Ledward has drawn our attention, to the pre-sentence report:

> Using a maturity tool, it does not appear that Mr Ivan struggles with low maturity, however I do acknowledge that his young age may impact upon his understanding of the seriousness of his behaviour, as well as continued denial. His minimisation may also be impacted upon by his young age.

23. We have seen a supplementary report prepared by the probation service for this hearing. That does not throw much light on the issues we have to decide. It appears that, if there continued to be difficulties with him living with his new partner and her daughter, as there are bound to be, he had indicated that he will return to Romania.

24. It appears that the judge placed the offending in category 1B of the Sentencing Council Definitive Guideline for section 9 offending, a high degree of harm but lesser culpability, with a starting point of 12 months and a category range of a high community order to 2 years' custody.

25. It is clear that this offending fell within the highest category of harm (category 1) in view of the full penetration of the victim's vagina. The issue is whether there were four features identified in the guidelines as indicating higher culpability: first, a significant

degree of planning; second, grooming of the victim; third, solicitation of sexual images; and fourth, significant disparity of age.

26. Whether the culpability of the offending falls within category A or category B has a significant impact on the starting point and this is so whether the harm is category 1 or 2. However, some of the matters identified as potential culpability A factors, a degree of planning and a disparity of the age, are not inherently hard edged criteria. They are made so by the qualifier, the use of the word "significant". It is a *significant* degree of planning and a *significant* disparity of the age that renders the offending of higher culpability.

27. Grooming too involves the exercise of a judgment as to whether the activity of the offender was such as to constitute a high culpability factor as the judge accepted with a view to identifying the purpose of his conduct.

28. In the case of solicitation of sexual images, it is not generally a request that is refused which will make the offender of higher culpability but a request which is accepted.

29. In our view the judge's approach was consonant with the approach set out in the guidelines. He said this:

> I have seen the photographs and pictures of the 13-year-old girl. It is quite clear and obvious that she is underage. I hope you have heard what she has said has been the impact on her of your offences. You should not have done it, you did it for sexual gratification and I accept you put too much pressure on her, that at the time she was vulnerable through her age. All in all you should have known better.
>
> I look at the Sentencing Guidelines and I put your offending in what the

> lawyers have called Category 1 but the culpability I put in Category B. For the knowledge of the barristers involved in your case, I indicate that I do conclude that there has been some degree of planning but limited in its effect. There has been some grooming and I, of course, acknowledge the disparity of age being seven years. But these factors do not, in my view, become significant enough for me to put your culpability in Category A.

30. Ms Ledward further agrees that the judge erred in not treating the disparity of 7 years between 13 and 20 as significant, as sufficient to elevate the offending into category A. She has referred to a number of cases in which this court has addressed the issue: *R v Wigmore* [2016] EWCA Crim 1813; *R v Thompson* [2017] EWCA Crim 527; *R v Hackett* [2017] 2 Cr App R(S) 10; *R v Rashaan Hopkins* [2018] EWCA Crim 353; *R v Pollard and Allen* [2018] EWCA Crim 439; *R v Reuben John Babich* [2018] EWCA Crim 457.

31. The judge set out his approach later in the sentencing remarks:

> What does this mean for your sentence? It means I have starting point, under the guidelines, of 1 year custody. That has to be increased because there are four separate offences and because of the elements that I have mentioned of grooming, disparity of age and ejaculation. Had you been convicted by a Jury who had sat then your sentence may have been slightly in excess of 2 years' custody, as it is, I bear in mind your mitigation. You are now 22 years of age. You have no previous convictions and you were arrested as long ago as May 2018 for these offences. All those particular features play in this way that I put into the mix your basis of plea, the fact that you are in employment and have stability and I reduce the sentence and then take into account a 20% deduction for your plea of guilty.
>
> All this brings me to a conclusion that the sentence that I impose on each of the four counts is one of 15 months. They will be concurrent on each of the four counts. These other factors that I have mentioned about your good character and your employment and those other features mentioned by Miss Hill means that, in your case, I will suspend the sentence. So you will not have to serve the sentence of 15 months unless of course you commit another criminal offence punishable by imprisonment and unless you fail to attend and comply with the requirement that I now make of 20 RAR days.

32. It is clear that the judge assessed the seriousness of the offending and concluded that it warranted a sentence of above 2 years before the offence and offender mitigation, and credit for the plea were taken into account. In other words he placed the overall offending out of the category range of category 1B, although not into the category range of category 1A. He did not take the view that the nature and extent of culpability factors, either individually or collectively, took the offending into category A culpability, or were of comparable culpability with, for example, the use of alcohol or drugs to facilitate the crime or the use of threats or blackmail to procure it.

33. In our view, the judge's overall approach was unobjectionable. Having taken that view of the matter he then had to consider the mitigation. That included the long delay in deciding to prosecute this young offender. We accept there may have been delays due to the prosecution investigating mobile phones but overall the delay was unacceptable.

34. Standing back it might be said that this sentence was lenient but, in our view, the overall sentence was not unduly or objectionably so accordingly, although we grant leave, we will not interfere with these sentences.