[2022] EWCA Crim 79

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202101741/A4 & 202101878/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 25 January 2022

Before:

LADY JUSTICE CARR DBE
MR JUSTICE WALL
HER HONOUR JUDGE DHIR QC
(Sitting as a Judge of the CACD)

REGINA
V
DENNIS BOWIE
ALICE McELHINNEY

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MR R JENKINS appeared on behalf of the Appellant Bowie

MISS N DARDASHTI appeared on behalf of the Appellant McElhinney

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J U D G M E N T

LADY JUSTICE CARR:

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 the provisions of the Act.

Introduction

1. We have before us two appeals against sentence: an appeal by Dennis Bowie ("Bowie"), now 49, and Alice McElhinney ("McElhinney"), now 34. Both appellants, of previous good character, were adult volunteer members of the Sussex Army Cadet Corps, Bexhill Detachment. Bowie was at one point a detachment commander and McElhinney was a sergeant. Both appellants pleaded guilty to multiple sexual offences involving a then 14-year-old female cadet, whom we shall called "V".

2. For the very purpose of preventing the type of offending in question, one on one contact between adults and cadets in the Corps was strictly forbidden. Adults were forbidden from corresponding directly. The only contact which was permitted was via on open forum Facebook page. Adults were forbidden from touching cadets unless to do so was a necessary part of training or for safety reasons, and even then only in the presence of others.

3. Despite what were the clearest of rules, during the course of 2018 the appellants groomed V, plying her with alcohol and sending her sexual messages. They progressed to actual sexual activity with V, involving kissing her and groping her breasts and bottom over her clothing. The appellants would send messages to each other about these activities demonstrating their general sexual interest in female cadets under their command.

4. Bowie was sentenced on 28 May 2021 by Her Honour Judge Waddicor, sitting in the Crown Court at Lewes, to an overall sentence of five years and two months' imprisonment made up as follows:

   i) a single count of sexual communication with a child, contrary to section 15A(1) of the Sexual Offences Act 2003, 13 months' imprisonment (count 5);

   ii) two counts of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, seven months' imprisonment (count 7) and three years and three months' imprisonment (count 8);

   iii) three counts of making indecent photographs of a child, contrary to section 1(1)(a) of the Protection of Children Act 1978, 10 months' imprisonment (count 10), five months' imprisonment (count 11) and one month's imprisonment (count 12).

   The sentence on count 8 was ordered to run consecutively to the sentence on count 5, to which the sentence on count 7 was to run concurrently. The sentence on count 10, to which the sentences on counts 11 and 12 were ordered to run concurrently, was ordered to run consecutively to the sentences on counts 5 and 8.

5. McElhinney was sentenced on the same day by the same court to an overall sentence of

three years and nine months' imprisonment made up as follows:

i) a single count of sexual communication with a child, contrary to section 15A(1) of the Sexual Offences Act 2003, nine months' imprisonment (count 2);

ii) two counts of sexual activity with a child, contrary to section 9(1) of the Sexual Offences Act 2003, six months' imprisonment (count 3) and count 4, three years' imprisonment (count 4).

Although the judge did not say so in terms, the sentence on count 4 must have been ordered to run consecutively to the sentence on count 2, with the sentence on count 3 running concurrently.

The facts

6. On 17 November 2018 police were called to McElhinney's workplace following a visit by V's older sister, she having discovered messages between V and McElhinney on V's telephone. The police seized McElhinney's telephone. McElhinney commented to officers at the time that they would find some messages but they were just banter and that "it looks worse than it is".

7. Investigations revealed messages between the appellants between February and November 2018 demonstrating their sexual interest in cadets and suggestive of previous sexual activity involving alcohol with them. V told police that Bowie had bought her alcohol and that this had led to McElhinney kissing her. She also said that when Bowie found out that McElhinney had kissed her, he took her into another classroom and himself hugged and kissed her twice.

8. On around 9 November 2018, McElhinney had contacted V reprimanding her for having spoken to another cadet and telling her to be careful because if people found out what had been going on McElhinney could be thrown out of the cadets or arrested.

9. On Remembrance Day 2018, V and the other cadets were given alcohol. They then returned to the Bexhill detachment. V said that whilst there, McElhinney kissed her and held her. V at this stage was under the influence of alcohol. It happened once or twice more. She described being touched by McElhinney on the waist and on her face at the time of the kissing. McElhinney, she said, would often message V and say to her that she had been drinking and the sexuality of her messages would increase. McElhinney would invite V to come to cadets early to help her set up. On one occasion V did so and McElhinney kissed her again, also touching her breasts and her bottom.

10. V told police that Bowie had taken her into a classroom at that cadets and kissed her twice whilst holding onto her waist, lower back and bottom area. She pulled away from him and said that she had not wanted it to happen again. Bowie had told her he was jealous of her relationship with McElhinney. V said that Bowie had touched her on at least six occasions, all in October and November 2018, and mostly on the range at army cadets. The touching had involved Bowie touching V's bottom and groping and squeezing her breasts.

11. Police seized Bowie's telephone and discovered a number of indecent images, along with the messages we have already referred to between him and V of a sexual nature. There

were four images at Category A, nine at Category B and six at Category C.

12. V has suffered significant trauma as a result of these events. Amongst other things she commenced self-harming and attempted to take her life on several occasions. She has also felt guilty.

Grounds of appeal

13. For Bowie, Mr Jenkins raises a single ground of appeal, namely that the sentence imposed on count 5 should not have been ordered to be served consecutively to the multi-incident count 8. His simple point is that a sentence term of 39 months, whilst justified on the multi-incident count 8 itself, fully took account of all aggravating features, including the messaging the subject of count 5. When that is understood, combined with the mitigation available to Bowie, the overall sentence imposed, because of the consecutive nature of the sentence on count 5, was simply manifestly excessive.

14. In similar vein, Miss Dardashti for McElhinney argues that the sentence on count 4 should have been imposed concurrently with the sentence imposed on count 2. Again, the four-year term taken by the judge on the multi-incident count 4 was sufficient to take account of the overall criminality of McElhinney. A consecutive sentence of nine months' imprisonment n count 2 was not necessary to reflect the overall gravity of the criminality involved.

Discussion and analysis

15. The principle of totality comprises two elements. First, all courts when sentencing for

more than a single offence should pass a total sentence which reflects all of the offending behaviour before it and which is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Thus concurrent sentences will ordinarily be longer than a single sentence for a single offence. Secondly, it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences. It is necessary to address the offending behaviour together with the factors personal to the offender as a whole.

16. There is no hard and fast rule governing whether sentences should be structured as concurrent or consecutive in their components. The Sentencing Council Guideline on Totality confirms that the overriding principle is that the overall sentence be just and proportionate. The Guideline goes on to state by way of general approach that concurrent sentences will ordinarily be appropriate where, amongst other things, there is a series of offences of the same or a similar kind, especially when committed against the same person. It also states that consecutive sentences will ordinarily be appropriate where offences are of the same or similar kind, but where the overall criminality will not sufficiently be reflected by concurrent sentences.

17. In both of these cases the messaging and the sexual activity could be said to be part of a series of offences of a similar kind committed against the same person, given their sexual nature. However, we are unsympathetic to these appeals. True it is that the offending in counts 5 and 8 for Bowie and counts 2 and 4 for McElhinney involved the same victim, but that is not determinative. It is clearly open to a judge when sentencing for sexual crimes involving a single victim to impose consecutive sentences, provided that the

overall sentence is not manifestly excessive: see for example R v AD [2013] EWCA Crim 1017. The messaging here was part of the grooming behaviour and planning, but it was a separate kind of activity and there is no indication in the judge's careful sentencing remarks of any impermissible double-counting in the custodial terms arrived at by her on count 8 for Bowie and count 4 for McElhinney. Those terms were fully justified without taking into account any of the messaging communications.

18. Even proceeding in the appellants' favour on the basis that the sentences should have been concurrent, the judge was clearly considering in the case of each appellant what was a just and proportionate overall sentence. In our judgment the final sentences reached in relation to each appellant were precisely that. The judge was entitled to take the view that the appellants' overall criminality would not sufficiently be reflected by concurrent sentences. Putting it another way, she may well have increased her sentences on count 8 for Bowie and count 4 for McElhinney had she taken the decision to pass concurrent sentences on the communication offences. She stated in terms when dealing with McElhinney that the total sentence being passed was the least sentence that she could impose to justify the gravity of the criminality.

19. The judge took the appellants' relevant mitigation into account, including McElhinney's fragile mental state. However this was very grave, repeat offending, involving what the judge rightly described as a "massive breach of trust", perpetrated over a period of months, involving significant age disparity, planning, joint activity with both appellants acting in concert, the use of alcohol, with significant long-term damage being caused to V. Further, McElhinney tried to prevent V from disclosing what had happened. The

appellants had deleted incriminating telephone messages (although the police were still able to recover them) and the background context which the judge was entitled to take into account was a highly troubling general sexual interest in female cadets. There must always be an element of deterrence in sentencing those who choose ostensibly to look after children and then use their positions to perpetrate sexual abuse.

20. Put simply, whilst the overall resulting sentences could be said to be severe, they were not manifestly excessive. For these reasons both appeals will be dismissed.

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