Neutral Citation Number: [2017] EWCA Crim 191

Case No: 201601454 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM BRADFORD CROWN COURT
His Honour Judge Rose
T20157291

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2017

Before:

LADY JUSTICE RAFFERTY
MR JUSTICE SWEENEY
and
RECORDER OF SHEFFIELD - HIS HONOUR JUDGE GOOSE QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

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Between:

ADAM JOHNSON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Eleanor Laws QC for the **Appellant**
Kate Blackwell QC and Dan Thomas for the Respondent

Hearing date: 28th February 2017

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Approved Judgment

Lady Justice Rafferty:

Those reading or listening should remind themselves of reporting restrictions.

1. On 10 February 2016 in the Crown Court at Bradford on the first day of his trial the applicant Adam Johnson (29) changed his plea to guilty to Counts 1 and 2. On 2 March 2016 he was convicted of Count 3. On 24 March 2016 he was sentenced as follows: Count 1, meeting a child with intent following sexual grooming, s15(1) Sexual Offences Act 2003, 4 months imprisonment, Count 2, sexual activity with a child under 16, s9(1) Sexual Offences Act 2003 (kissing) twelve months imprisonment, Count 3, sexual activity with a child under 16, s9(1) Sexual Offences Act 2003 (digital penetration) five years imprisonment. The first two terms were concurrent inter se, the third consecutive, the total loss of liberty six years. He was acquitted of Count 4 (Sexual activity with a child under 16, s9(1) Sexual Offences Act 2003)

2. He renews his applications for leave to appeal against conviction and sentence after refusal by Openshaw J.

3. The applicant was a professional footballer. The complainant, X, aged fifteen, would often stay after matches to have items signed by or photographs taken with him. He accepted her as a "friend" on social media shortly before New Year's Eve 2014. He secured her mobile number to arrange to give her a signed shirt. Thereafter they used "WhatsApp."

4. He knew she was 15. He asked her to delete their increasingly flirtatious messages but she kept them. On 17 January 2015 as arranged they met for 10 minutes in his car, in private after dark. He signed things for her and dropped her nearby.

5. Messaging continued. He said she owed him a kiss, and was "*after a little bit more than kissing…a bit of feeling*." He repeated the instruction to delete.

6. Their planned second meeting on 30 January 2015 lasted per him 15-20 minutes, per the Crown 45 minutes. What happened was in dispute but it was accepted they kissed passionately (Count 2) and that from the end of December 2014 until the police were called he had groomed her (Count 1) and had intended sexual activity.

7. Post-meeting at his suggestion she downloaded "Snapchat" on which messages were deleted after 10 seconds unless saved. Only one was retrieved. As asked she sent a picture of herself in a bikini and he replied, "*Send one with the bikini off*."

8. On 31 January 2015 she told school friends of her sexual contact with him. Rumours spread. On 25 February 2015 he cancelled their meeting. That evening she went to his home though she later denied it. Abusive messages were sent to her on social media. She told her parents and next day the police.

9. On 2 March, arrested, he lied about the extent of their contact. He lied to his girlfriend, the mother of his infant, that X told him she was 16. Interviewed he admitted he knew she was 15, that they had kissed passionately and he had run his hands over her but denied other sexual activity. He knew kissing her was wrong.

10. In a subsequent interview, by now aware of the "WhatsApp" messages he had thought deleted, he answered "no comment" to almost all questions. In a prepared statement he inter alia denied oral sex but accepted sending the messages and his knowledge of her age. A reference to her appearing "*turned on*" went to the kiss not to vaginal penetration. He had withdrawn from contact.

11. The Crown's case was that his motive was from the outset sexual activity with a girl he knew to be underage. In the second meeting he moved his car to conceal their activity which included kissing (Count 2), repeated digital penetration of her vagina (Count 3) and penetrating her mouth with his penis (Count 4, acquitted).

12. It submitted that he had not fully outlined his defence in interview, in particular failing to produce a document dealing with departure of the team bus on 30 January.

13. The Defence case accepted grooming and kissing but relied on his realising he was wrong and ceasing contact without further sexual activity. She he claimed had been angry when he cancelled their third meeting and embarrassed about the rumours. His internet searches about the age of consent he claimed related to a documentary he had seen. Telephone records he said supported their second meeting as lasting 15-20 minutes.

14. At trial he produced a document notifying the team that on 30 January the team bus was to depart the stadium at 1830. As he had not been fined he must have been at the stadium by 1800. The timing of his plea he said was in reliance on legal advice.

RULINGS
The timing of guilty pleas

15. The Crown wanted to explore why he had lied to the world for a year. He had denied guilt until 10 February thus, it argued, implying X was untruthful and in interview making that suggestion explicit.

16. Leading counsel for the applicant was concerned lest it be suggested that the applicant had not earlier pleaded guilty because he knew if he did he would be sacked. This, counsel said, was not the case.

17. The Judge concluded that as it had been put to the complainant on his behalf that he accepted he had wronged her, whether that were genuine remorse was for the jury as was timing of his plea.

18. The Judge allowed the Crown to cross-examine as to the timing of his plea.

Grounds of appeal

19. Miss Laws QC who did not appear below advanced two grounds.

Timing of plea

20. The judge erred in permitting the Crown to cross-examine as to the timing of his guilty pleas and to explore theories as to his reasons for pleading guilty when he did. The line of cross-examination was misleading. The effect was prejudice, creating the impression that timing was an attempt to save his job and mislead his football club,

the Crown, Court and public. The judge should have stopped cross-examination on irrelevant matters, not reminded the jury of them but directed the jury to ignore them. He gave the jury no help on how to deal with the late guilty plea.

Adverse inference

21. The judge misdirected the jury when he gave a s34 Criminal Justice and Public Order Act 1994 adverse inference direction on failure to mention that the meeting on 2 March could not have lasted longer than 15 minutes since he had to reach the stadium by 1800 and would have been fined if late. In interview the applicant had mentioned having to be at the Stadium by 1800.

Our conclusion

22. The inevitability of a plea to Counts 1 and 2, admitted in interview, was regardless of challenge to X's truthfulness about parts of her account. The question is thus the relevance to guilt on Counts 3 and 4 of the late plea to Count 2. The applicant concedes that his remorse, if any, put in issue by a question from his own counsel, meant that the judge's decision to permit cross-examination was not an impugnable exercise of discretion.

23. That said, cross-examination was permitted on, for example, Dubai, free kicks, money, name-calling - topics unlikely to help the jury on the central issue of credibility. It would have been wise to preclude them or, on reflection, in summing-up to urge the jury to ignore them.

24. The jury also had no help in how to approach the late plea. Having permitted cross-examination the judge ought to have distilled its relevance. There was no direction, for example, that a conviction should not hang upon the delay in admitting guilt on Counts 1 and 2. All this was unfortunate. It did not however imperil the safety of the conviction.

25. More troubling is the direction on adverse inference. The Crown sought to separate arrival time at the stadium from a fine for lateness. It sought the inference on the latter not the former.

26. Before giving evidence in chief the Applicant had not raised the relevance of a fine (or absence thereof) upon which he relied in an exercise in deductive reasoning. Were he late he would have been fined. He was not fined so could not have been late. If he were not late he could not have spent as long in the car with X as the Crown suggested.

27. The judge directed the jury in terms of insufficiency of time to do the alleged sexual act.

28. It would have been wiser to avoid a S34 direction all together. The Applicant had in interview explained the scheme governing arrival time at the stadium, and had thus set up the line of reasoning upon which he later relied when introducing the non-existent fine. He had mentioned stadium, time, onward journey, and penalty. This was adequate to protect against a S34 direction.

29. That said, the error does not imperil the safety of the conviction. The jury had to be sure that he committed the sex act pleaded. Whether he had available to him 10 minutes or 45 minutes he had time to complete it. That is an end to the point.

30. The renewed application for leave to appeal against conviction is refused.

Renewed application for leave to appeal against sentence

31. The judge in extensive sentencing remarks reminded himself of all possible relevant issues.

32. Count 1 (grooming) reflected communication over 2 months because he intended sexual activity notwithstanding her age. Messages were part of a grooming process. When he gave her a signed shirt he was satisfying himself that the dark and quiet place was suitable for future meetings. On 30 January he kissed her "with tongues" (Count 2) and then penetrated her vagina with his fingers 3 times (Count 3) messages thereafter showing he wanted more sexual activity. His research into the age of consent was to discover when sexual intercourse would be legal. He had frequent sexual encounters with multiple partners, compulsive sexual behaviour in the view of an expert. He made a decision to ignore X's age.

33. He had lied in interview about the nature and extent of contact and continued to lie for months. He did not plead guilty until late in the proceedings and X had been regarded as a liar with predictable consequences. The late pleas earned a 10% reduction.

34. Limited admissions in interview were set against his unwillingness to plead guilty, his remorse against his denial of the most serious offence. X had to give evidence and was deeply distressed. His future as a professional footballer was in doubt. There would be irreparable damage to his family. He was 28 and of previous good character. All this was his own fault.

35. Count 3 (digital penetration) was category 1 harm and category A culpability because of significant planning, abuse of trust, soliciting of sexual images and the disparity in age. The starting point was 5 years the range 4-10 years. Aggravating matters were the dark secluded location and timing, efforts to dispose of /conceal evidence, steps to prevent reporting, *and* severe psychological harm.

36. Mitigating was his good character. The Judge said this was simultaneously an aggravating factor because he had used it to facilitate the offences. It could not be completely disregarded. It could not be said that the offences occurred in isolation. He lacked maturity. He had engaged in very frequent sexual activity with a great number even whilst in a relationship. He had a high libido and a tendency to sexual activity to a compulsive degree. He had used his status to obtain sexual partners. He was not a significant risk to children. The starting point was 5 years' imprisonment.

37. Count 2 (kissing) was category 3 harm, category A culpability and the aggravating features were the same. The starting point was 26 weeks' custody with a range of a community order to 3 years custody. His plea was taken into account along with the fact that the offence had occurred on the same occasion.

38. Count 1 (grooming) represented every opportunity he had taken to encourage her to meet him and his choice not to end matters. It was over a long period and a consecutive sentence was required to reflect the gravity. Raised culpability was reflected by abuse of trust, use of a gift and communications indicating desire for penetrative sex.

39. It was a category 2 offence with a starting point of 2 years and a range of 1 -4 years' custody. The aggravating features (disposal of evidence and steps to prevent reporting) had already been taken into account. 2 years was appropriate but totality reduced the term to 12 months.

40. Refusing leave the single judge wrote:

> *"Count 3 alleging digital penetration of a child was plainly a category IA offence, with many aggravating features, including, grooming, the significant degree of planning, the significant disparity in age, the deliberate seeking out of some private place to commit the offences, and the soliciting of digital images (although these were not in fact supplied). Furthermore the applicant misused his position of influence to manipulate and exploit a girl who was to his knowledge acutely vulnerable because of her age and impressionable because of his perceived status as a celebrity. Since the digital penetration alleged was a course of conduct on the same occasion, the judge was quite entitled to find that there had been three separate penetrations. When set against these aggravating factors, his otherwise good character counted for little; indeed, as the judge correctly pointed out, it set the scene for the commission of the offences. I accept that perhaps the judge could have structured sentence differently, perhaps by increasing digital penetration to 6 years and by making the sentence of the grooming offence concurrent. Although a sentence of six years may be stiff, even severe, I do not consider it to be arguable that it was manifestly excessive."*

41. We agree.

42. We would not have used the phrase "abuse of trust" nor would we have suggested his good character aggravated the matter. The true descriptor of the first was that he capitalised upon his celebrity. His good character was of reduced assistance to him as a consequence.

43. Neither of those comments impugns the overall sentence. Its structure was appropriate and avoided double-counting. The discount for plea was adequate.

44. This renewed application is refused.