Neutral Citation Number: [2008] EWCA Crim 2954

Case No: 200802171

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM SOUTHWARDK CROWN COURT
His Honour Judge Stone QC
T20070854

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2008

Before :

LADY JUSTICE HALLETT
MR JUSTICE STADLEN
and
HIS HONOUR JUDGE ROOK QC
(SITTING AS A JUDGE IN THE COURT OF APPEAL CRIMINAL DIVISION)

- -

Between :

Regina	**Appellant**
- and -	
Geoffrey David Dennis	**Respondent**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Carne (instructed by **Cremin Small & Co**) for the Respondent

Hearing dates: 21 October 2008

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Judgment
As Approved by the Court

His Honour Judge Rook QC

1. On 19th December 2007 at Southwark Crown Court this appellant, now aged 48, pleaded guilty to 2 sexual offences – attempting to cause or incite a child to engage in non-penetrative sexual activity/attempting to meet a child following sexual grooming.

2. On 14th March 2008 he was sentenced by HH Judge Stone QC to imprisonment for public protection. A minimum period of 9 months imprisonment (concurrent on each) less the 161 days spent on remand was specified under s.82A of PCC(S) 2000. The learned judge also imposed a Sexual Offences Prevention Order under s.104 Sexual Offences Act 2003.

3. Having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply indefinitely with the notification provisions of Part 2 of the Act.

Leave

4. The appellant's original application for leave to appeal was refused by the Single Judge. However on 2nd October 2008 the full court granted leave to appeal against sentence. In giving leave, Lord Justice Moses stated:

> "What he contends is that an indeterminate sentence for public protection should not have been passed in the circumstances where so low a minimum sentence was passed of a period of 9 months. Following a change in the law in July 2008 such a sentence would not be possible, but he contends even before then there was ample guidance to suggest that such an indeterminate sentence was inappropriate where the tariff or punishment for the offence was so low. We take the view that such an argument may well be sustained before the full court."

5. There is no criticism of the length of the custodial term, only that a determinate sentence should have been passed.

The facts

6. The police launched an undercover operation which was a proactive internet investigation where a trained officer created an online profile of a 14 year old girl "Helen." The profile was posted on various chat rooms and social networking sites which were known to be assessed from time to time by predatory paedophiles.

   The appellant accessed the site on 29th June 2007. He identified himself and asked if she was a virgin. During the course of the ensuing conversations he became very sexually explicit and became very excited at the thought of meeting her. He went into great personal detail about what she did with her private parts and offered to teach her things. The way he talked to her on occasions led the officers to believe he was masturbating during the course of the conversations.

In July the appellant tried to meet "Helen" in a park. He did turn up. She did not as arrangements had not been confirmed.

In September 2007, whilst conversing with her, he encouraged her to masturbate herself as he was masturbating himself.

The appellant did arrange to meet "Helen" in the park on 3rd October 2007 having described what he would be wearing. When the applicant arrived at the park, he was arrested by the police.

When interviewed, the appellant conceded that his behaviour towards a person who he thought was a 14 year old girl was inappropriate but maintained he had only travelled to meet her because he thought she was bouncy and bubbly and he wanted to meet her for a drink in a café and a walk.

The appellant pleaded guilty on the basis that he had arranged to meet the girl with a view to manual masturbation. This basis of plea was accepted by the Crown.

Sentence

7. When it came to pass sentence the judge had to decide whether the appellant posed a significant risk of serious harm by virtue of the commission of further specified offences. He stated:

> "I have 2 reports to assist me. The psychiatric report concludes that there is a moderate risk of re-offending, a risk that could be reduced by participation a sex offender treatment programme. The pre-sentence states that by the oasis approach you score a low risk of committing further offences. The risk matrix as applies to you puts you within the low risk for reconviction for sexual offence. However the PSR writer goes on to say as professional judgment that he considers you pose a high risk of committing further offences. I have to consider those matters, but the matter that gives me greatest concern is the Norfolk incident in 2003 which led to you receiving an insight informal warning from the Norfolk police for contacting a 12 year old girl on the internet and then going on to meet her. I have come to the conclusion that the evidence before me does demonstrate a substantial risk of serious harms to young girls, and I therefore have to pass a sentence of imprisonment for public protection."

8. We pause to point out that in fact the judge had set the threshold too high in that the then mandatory provisions of the Criminal Justice Act 2003 required a judge to decide if there was a significant risk of serious harm from further specified offences statute.

Grounds of Appeal

9. In written submissions on behalf this appellant, Mr. Roger Carne argues that the judge was wrong in imposing a sentence for public protection as :

i) there was not a significant risk of the applicant committing further specified offences bearing in mind:

a) his plea of guilty at the PCMH.

b) his character

c) the fact that his first experience of prison had been a salutary lesson to him

d) his behaviour had resulted in him losing his job and family

e) character witnesses indicated his actions were totally out of character

f) his shock and disgust and high level of remorse and regret

g) his computer showed no images of or communication with young girls, only adults, suggesting that this was not a regular occurrence, in fact just the opposite.

ii) The psychiatric report stated there was only a moderate risk of him committing further offences although the author was under the mistaken impression the appellant received a caution rather than a warning in 2003. The probation officer placed too much reliance on the fact the appellant had received a warning in 2003.

iii) There had been no harm to any victim, no background of any coercion or drugs.

iv) As it was considered the appellant would respond to the Sex Offender Treatment Programme, a determinate sentence should have been imposed with a condition that the appellant should undergo such treatment.

10. The judge was faced with a difficult sentencing exercise in that the information relating to the assessment of risk did not all point in the same direction.

11. There was a psychiatric report from Dr. Duke Igwilo. He formed the following opinion on the appellant:

> "When assessing the level of risk posed by Mr. Dennis, it is important to note that it is difficult to be precise in such assessment. Although there is no significant offending history, Mr Dennis demonstrates a level of denial and minimisation

> which caused concerns. When this weighed on a balance of Mr. Dennis' personal and family history, it would be fair to predict that Mr. Dennis has a moderate risk of re-offending. This risk could be reduced through the Sex Offender Treatment programme and the Victim Awareness programmes that are available within prison."

Dr Igwilo also stated:

> "…His apparent willingness to further explore the impact of his behaviour suggests that he would benefit from engaging in a Sex Offender Treatment programme within the prison service."

12. The pre-sentence report addressed the issue of risk. A detailed analysis of the appellant's current circumstances using the Offender Assessment System (OASys) led to the conclusion that the appellant fell into a category of offenders with a low risk of committing further offences. The Risk Matrix 2000, a risk predictor developed for use with men who sexually offend indicates that Mr Dennis falls within the low risk category for re-conviction for further sexual offences

13. However, the author of the report, points out that these assessments are based on static factors such as age (onset of offending), number of previous convictions, as well as dynamic factors. He notes that there was a clear escalation of the seriousness of the appellant's behaviour from talking to being prepared to execute a fantasy. His intentions were to take the girl somewhere else. Furthermore, the applicant demonstrates a level of denial and minimisation in relation to his offending behaviour. His own professional view is at odds with the OASYS conclusion and the risk matrix. He opines that the appellant poses a high risk of committing further offences and a high risk of serious harm to prepubescent and pubescent young girls at this time.

14. He acknowledges that the risk of reconviction in the community may be reduced if the appellant engages in the Sex Offender Treatment Programme whilst in custody, and he considers that he will respond to the intervention of such a programme.

15. The appellant has no previous convictions. However, the judge was clearly greatly influenced by the reference in the pre-sentence report to the fact that the appellant was originally warned by the Norfolk Constabulary for this type of behaviour. As was pointed out in *Considine and Davis* [2007] EWCA Crim 1166, [2007] 3 All ER 621, the court is entitled to take into account any information about the offender available to it when assessing whether he is dangerous, but when reaching a conclusion adverse to a defendant, the judge should not rely on any disputed fact unless he is satisfied that the issue can be resolved in a manner that is fair to the defendant. (We understand that the behaviour that led to the warning behaviour is in dispute to the

extent that the appellant contends it related to an 18 year old girl and so would not have been illegal, and accordingly we disregard it.)

Discussion

16. The critical test was whether there was, firstly, evidence to conclude that there was a significant risk of him committing further offences of the kind which might give rise to psychological damage and secondly, that there was a significant risk of him causing serious harm by so doing.

17. Clearly many sexual offences against children carry with them a significant risk of serious psychological damage.

18. In assessing risk it is appropriate to consider what other measures may reduce risk. No complaint is made in respect of the far-reaching terms of the sexual offences prevention order imposed in this case. The restrictions which it contains are relevant to the decision as to whether the statutory criteria for the imposition of a sentence of imprisonment for public protection were satisfied. We take the view the apt and effective restrictions which clearly address the degree of risk and the seriousness of any harm will significantly reduce the risk in this case.

19. Furthermore the risk of further offences can be reduced by the appellant receiving appropriate treatment. Dr Igwilo confirms this. The author of the pre-sentence report shares the view that the risk of the appellant re-offending within the community would be reduced by a Sex Offender Treatment Programme and he would respond to such a programme.

20. We have now received a report from HMP Wandsworth stating that the appellant has now successfully completed a sexual offender treatment programme attending 39 sessions equating to approximately 80 hours of group contact. The appellant is said to have been highly motivated from the start to understand the factors which contributed to his offending behaviour. He is said to have made good progress in understanding how he might manage such factors in the future, and how intends on managing himself differently in future.

21. We have also received a report from Sarah Wallis of the National Probation Service dated 8th December 2008 which confirms the safeguards in the shape of the risk management plan (including the proposed additional licence conditions) that are considered appropriate should the appellant be released.

22. Sarah Wallis invites us to consider making an order under Section 28 of the Criminal Justice and Court Service Act 2000 disqualifying the defendant from working with children. However we note that is an existing term of the sexual offences prevention order that the appellant is prevented for life from working with children under eighteen years of age in either an employed or voluntary capacity.

23. Taking all these matters together, we are satisfied that the appellant's successful completion of such a course combined with the proposed risk management plan and the Sexual Offences Prevention Order have so reduced the risk that it cannot no longer be said that he represents a significant risk of serious harm from further specified offences. We feel that if the sentencing judge had been faced with the situation as we find it to be today in the special circumstances of this case, he might well have concluded that the dangerousness statutory criteria were not made out.

24. Accordingly we quash the sentence of imprisonment for public protection with a minimum term of 9 months, and substitute the determinate prison sentences that the judge indicated in his sentencing remarks he would have imposed in the absence of imprisonment for public protection, namely a 6 month term in respect of the attempting to cause or incite a child to engage in non-penetrative sexual activity and a consecutive 12 month sentence for attempting to meet a child following sexual grooming making a total of 18 months. As before there should be a deduction of the 161 days he had already served when sentenced at Southwark Crown Court on 14th March 2008.

25. To this extent this appeal is allowed; the ancillary orders remain. By virtue of S82 of the Sexual Offences Act 2003 the appellant will now automatically be subject to notification for 10 years from the date of his conviction.