Neutral Citation Number: [2020] CA (Bda) 16 Crim

Case No: Crim/2020/3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MRS. JUSTICE SIMMONS
CASE NUMBER 2020: No. 9

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 20/11/2020

Before:

JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

HER MAJESTY THE QUEEN

Appellant

- and -

CHEZ ROGERS

Respondent

Ms. Cindy Clarke of the Office of the Director for Public Prosecutions for the Appellant

Mr. Charles Richardson of the Legal Aid Office for the Respondent

Hearing date(s): 5 November 2020

- -

APPROVED JUDGMENT

BELL JA:

Introduction

1. This is an appeal taken by the Crown against a sentence passed in the Supreme Court on the 15th of July 2020. The Respondent was convicted on his guilty plea on the 1st of July 2020 on two counts, being first the offence of unlawful carnal knowledge of a girl under the age of 14 years, contrary to section 180 (1) of the Criminal Code 1907 ("the Code") , for which offence he was sentenced to a period of 18 months' imprisonment, and, secondly, the offence of luring, contrary to section 182 E of the Code, for which he was sentenced to 12 months' imprisonment. The sentences were ordered to run concurrently, so that the global sentence was one of 18 months. Leave to appeal was granted to the Crown on the 7th of October 2020.

The Underlying Facts

2. The offences occurred between August and September 2019, when the Respondent was 19 years of age, and the child victim was 13. The matters came to light when the victim's mother took her daughter's cell phone as a punishment, and discovered on the phone messages of a sexual nature, sent to the victim by the Respondent, in which the Respondent suggested to the victim that the two should meet, and also suggesting various types of sexual activity. The victim was interviewed by the Police in the presence of a social worker, and admitted having had vaginal and oral sex with the Respondent on two occasions, having left her house for that purpose. The Respondent was subsequently arrested and admitted in his interview with the Police that he had sent sexually explicit messages to the victim, that he had made arrangements with the victim to meet up for sex, had suggested various types of sexual activity, essentially the charge of luring, and had subsequently had both vaginal and oral sex with the victim, on two occasions. He had no previous convictions, and had pleaded guilty at what was effectively the first opportunity.

The Judge's Sentencing Remarks

3. The judge noted that while there was no dispute between the Crown and the defence on the facts, counsel were some distance apart on the appropriate range of sentence. She reviewed the authorities submitted on both sides, noting that the cases provided by the Crown were Court of Appeal cases which were not comparable to the facts of the case before her, and moreover were towards the top end of the sentencing range. She reviewed the facts of those cases. The judge noted that the Crown had sought a range of sentence of three to four years for the offence of unlawful carnal knowledge, and 18 months to three years for the offence of luring.

4. The judge then referred to the terms of the mitigation which had been put forward by Mr Richardson on behalf of the Respondent, when Mr Richardson had referred to the 13 year old victim as a "woman", pointing out that she was and is a child. She also rejected the contention put forward by Mr Richardson that the victim bore some responsibility for the Respondent's "sexual indiscretions and criminality". She rejected the notion that there was a change in the public's view of morality in relation to such offences, and said that it would be fundamentally wrong to reduce a sentence on the basis of Mr Richardson's submissions. I agree with the judge in this regard.

5. The judge then addressed the detail of the cases to which Mr Richardson had referred, pointing out that in relation to each of these cases the Court had been given insufficient information, in

terms of matters such as whether there had been guilty pleas, or whether there were any mitigating or aggravating features.

6. The judge then moved to the appropriate sentence, saying that the starting point was one of two years' imprisonment, in a range of possible sentences of one to four years' imprisonment on the charge of unlawful carnal knowledge. She noted the effect of the crime on the victim, but said that the Respondent's culpability fell at the lower end of the scale when compared with the more egregious conduct by sexual predators such as those referred to in the cases on which the Crown had relied. Taking into account the Respondent's lack of previous convictions and his early guilty plea, she applied a reduction of 30 per cent, which she rounded to a sentence of eighteen months' imprisonment.

7. The judge then moved to the luring offence, noting the pre-planning on the Respondent's part, the use of sexually explicit language, and commenting that in the circumstances the luring was as egregious as the sexual conduct. She found that the appropriate range of sentence was one to three years, with a starting point of eighteen months. Applying the same discount, the judge rounded the sentence down to one of twelve months. She ordered the two sentences to run concurrently, on the basis of the totality principle, and further ordered that the Respondent's details be entered in the Sex Offender Register.

The Grounds of Appeal

8. The grounds of the appeal are that the sentence imposed by the sentencing judge was manifestly inadequate and wrong in principle, in that the judge erred in law in determining that the starting point for the sentence for unlawful carnal knowledge was one of two years' imprisonment. The Crown also contended that the sentence imposed by the judge for luring contrary to section 182E of the Code was manifestly inadequate, and that the total period of imprisonment was too low when considering the total criminality of the offences before the court.

9. Before the sentencing judge, and before this court, the Crown relied on two cases, *R v Brangman* [2019] Bda LR 93, and *R v Rogers* [2015] Bda LR 50. Before this court, the Crown also relied upon the cases of *Gribby* [2016] EWCA Crim 1847, *AG's Ref (No 142 of 2105) (Brown)* [2016] EWCA Crim 80, and *R v Martin* [2010] Bda LR 54. Before the judge, and this court, the Respondent relied upon three authorities, *Aaron O'Connor v R* [2015] CA Bda 30 Crim, *Malik Zuill* [2015] CA Bda 11 Crim and *Taylor v Shawn Gordon Smith* Criminal Appeal 9 of 1999. In relation to these latter three cases, the Crown urges that they should be rejected because those cases related to the less serious offence of unlawful carnal knowledge of a girl between the ages of 14 and 16, contrary to section 181 of the Code. The Crown maintains that that offence has historically received lighter sentences and carries a lower maximum sentence than an offence under section 180(1) of the Code, which applies in the case of a victim under the age of 14 years. In this court the Respondent also relied upon the case of *R v Richardson* [2016] 1 Cr App R (S) 20.

The Competing Authorities

10. In the case of *Rogers*, Baker P commented that, of the authorities to which the court had been referred, none was of great assistance with regard to the appropriate sentence in the case before the court. And although the charge was one of unlawful carnal knowledge contrary to section 181 of the Code, together with three charges of sexual exploitation of a young person contrary to section 182(a)(1)(a) of the Code, when it came to the charge of unlawful carnal knowledge,

Baker P commented that the offence could in reality only be described as the rape of a 13 year old child, saying "Not only was she in no position by virtue of her age to consent but as a matter of fact, plainly she did not consent." He identified a number of aggravating features in the case. First, all the offences occurred whilst the victim was asleep in her own bed in her own house; secondly, there was a significant age disparity between the victim, who was under 14, and the respondent, who was 46; thirdly, the offence constituted a breach of trust, insofar as the respondent was in the house due to his relationship with the victim's mother, and lastly, the respondent had returned to the victim's bed after being disturbed by the victim's mother, and then committed the offence of rape. For those reasons identified by Baker P, the gravity of that case puts it in a completely different category of seriousness when compared to the case before us, as is also demonstrated by the sentence imposed by the court, increasing a sentence of five years' imprisonment to one of seven and a half years.

11. The position is no different in *Brangman*. In that case, the charges were one count of unlawful carnal knowledge of a girl under the age of 14, and two counts of exploitation of a young person in a position of trust. Leave to appeal the sentences of 12 years, 10 years and 11 years (to run concurrently) was refused. In his judgment, Clarke P identified a number of aggravating features, very similar to those identified by Baker P in *Brangman*. The offences occurred over a lengthy period, and the child victim had been only 10 when they had started; the appellant had been in a position of trust, the offences took place in the victim's home; there was a significant age difference of more than 20 years, and the unlawful carnal knowledge occurred despite the victim's resistance. Lastly, the appellant had put the victim through a trial, but did not himself give evidence. As Clarke P commented, in those circumstances, he could claim no mitigation for any plea of guilty, and his apology to the family, given upon the *allocutus*, had something of a hollow ring to it.

12. The case of *O'Connor*, relied upon by Mr Richardson, was again a judgment of Baker P, where the victim had been 14 years and 10 months at the time of the offence, and the defendant had been 20 years and 4 months. Baker P pointed out (paragraph 20) that the offence of unlawful carnal knowledge can cover a variety of different states of mind on the part of the complainant, from active encouragement on the one hand, through reluctant acquiescence to forcibly expressed refusal on the other. He pointed out that the offence exists for the protection of girls under the age of 16, and that it is trite law that the level of penalty is dependent on the particular circumstances of each case.

13. Much of the judgment was concerned with the issue of whether the defendant in that case should have been charged with sexual assault rather than unlawful carnal knowledge, the relevance in that particular case being that the more serious charge could have afforded a defence on the basis of the defendant's belief that the victim was over 16. Baker P took the view that if the defendant had been charged with the more serious offence, there would have been a plea of not guilty, the defendant would have given evidence with a view to taking advantage of such a defence, and would have faced the real risk of conviction on a factual basis far more serious than that on which he pleaded guilty. Quite apart from that aspect of matters, Baker P commented that he considered the prospect of establishing such a defence remote. He dismissed the appeal against the sentence passed of 12 months' imprisonment.

14. In my view the facts of this case demonstrate the danger of seeking to extract some principle which could be of wider application. The facts were unusual, and the defendant could be said to have been fortunate not to have faced a more serious charge, for which no doubt a heavier penalty would have been imposed.

15. In the case of *Malik*, the defendant had pleaded guilty to a charge of two offences of unlawful carnal knowledge contrary to section 181(1) of the Code. His plea had not come at the first opportunity. He had been sentenced to 12 months' imprisonment for each offence, to run concurrently. Significantly, the defendant in *Malik* had only recently attained the age of 17 years at the time of the offence, while the complainant was 14, but very nearly 15 at that time. The Court of Appeal reduced the sentence of 12 months' imprisonment and substituted a term of 8 months.

16. *Smith* is a slightly older case from the Court of Appeal where the judgment of the Court was delivered by Astwood P. The victim in that case was charged on the basis that she was between 14 and 16, being just over 14 years, and the defendant was 28 at the time of the offence. He had been sentenced to 18 months' imprisonment. There was an issue in the case on the facts, because defence counsel had referred to there being "a couple of grey areas", but the Court took the view that the judge had sentenced the defendant on the basis of consensual sex, albeit consent could not legally be given. The Court refused an application for leave to appeal against sentence on the ground that the sentence was manifestly inadequate, rejecting an argument that the judge had sentenced on the basis of more serious facts. That was the issue of relevance in the case.

17. I now turn to the authorities not cited to the judge below. First is *Gribby*, a UK case where the sentence was challenged on the basis that it was too lenient. The defendant had pleaded guilty to two charges of rape of a child under the age of 13, for which he had been sentenced to a term of detention of 2 years, suspended for 2 years. The sentence was increased to 3 years. The offender had been 17 at the time of the offences, and the victim was days short of her 13th birthday. By reason of the victim's age, she was unable to consent to the sexual activity, and the court noted that inability to consent was inherent in the offence, adding that if there is force or violence or threat or coercion, that renders what is already a serious offence an even more serious offence. So "consent" must be looked at on that basis. The underlying statutory rationale of the offence is that under age children require protection for their own benefit.

18. In *Brown*, the offender was 20 years old, and the victim was 12. The recorder had imposed a non-custodial sentence, which the appellate court set aside, substituting a sentence of 42 months, slightly lower than the sentence which the court would have regarded as appropriate had the sentence been imposed at the time of the original sentencing. The case of *Martin* was another case where the seriousness of the facts put it in a completely different category from this case. But the Crown puts *Martin* forward in support of the submission that the sentence for luring should have been ordered to be served consecutively. The Crown accepts that this submission was not made to the sentencing judge.

19. Let me deal with that issue rather out of order, and say that I think the judge was right to order that the sentence for the offence of luring should be served concurrently with that for unlawful carnal knowledge. She obviously viewed the luring charge as a serious matter, describing it as egregious, but viewed it as a matter that was inextricably linked to the charge of unlawful carnal knowledge. As the judge said, without the luring, the sexual conduct would not have happened.

The appropriate sentence in this case

20. The Crown relied upon the much more serious cases of *Brangman* and *Rogers* because they were unable to find a case on all fours with the facts of the case before us, and unwilling to

acknowledge that cases decided on the basis of a less serious charge (section 181 of the Code) could be applied as a sentencing aid when considering a charge under section 180 of the Code. But the aggravating features of *Brangman* and *Rogers* are so marked that they offer little assistance as a guide to sentencing in a case with significantly different facts, such as this one. That there is an important distinction between charges under section 180 of the Code and section 181 is without question. Parliament passed legislation with reference to specific age limits for the particular victim, and this court recognises that. But a sentencing judge must always have regard to the particular circumstances of each case, and an appellate court considering a sentence appeal similarly so. And in my judgment that does not mean that sentences ordered in section 181 cases are wholly without assistance to the court when considering sentence for charges brought under section 180. But the court must always bear in mind the difference in seriousness between the respective charges.

21. In relation to the charge of luring, Ms Clarke for the Crown emphasises the need for this court to give some guidance as to the appropriate range of sentence. It seems to me that the judge took the appropriate view of the seriousness of the luring charge in this case, and the sentence she imposed reflects that, and is in a reasonable range when compared to the more serious charge of unlawful carnal knowledge.

22. In my view this is a case where the sentences, both on the unlawful carnal knowledge and on the luring charge, may be said to have been on the lenient side, but I would not regard them as being so much so that the sentences, taken together and bearing in mind the totality principle, could be described as manifestly inadequate. In the circumstances I would dismiss the appeal.

GLOSTER JA:

23. I agree.

KAY JA (Presiding):

24. I too agree with My Lord's disposition. Accordingly, the appeal is dismissed.