Court of Appeal

Attorney General's Reference (No 94 of 2014)

Regina *v* Baker (John)

[2014] EWCA Crim 2752

2014 Nov 4 Sir Brian Leveson P, Green J, Sir Colin Mackay

Crime — Sentence — Sexual offences — Inciting child to engage in sexual activity — Proper categorisation of offence when activity not engaged in — Sexual Offences Act 2003 (c 42), s 10

The offender incited the complainant, a 13-year-old girl, to engage in sexual activity, namely the penetration of the complainant's mouth with the offender's penis, although the sexual activity never took place. The offender pleaded guilty to inciting a child under the age of 16 to engage in sexual activity, contrary to section 10(1)(2) of the Sexual Offences Act 2003[1]. The judge sentenced the offender to 180 days' imprisonment with notification requirements under the sex offenders' register for seven years. On behalf of the Attorney General the Solicitor General sought leave to refer the sentence as unduly lenient pursuant to section 36 of the Criminal Justice Act 1988, contending that since the offence involved penile penetration of the mouth by the complainant, the harm was in category 1 for the purposes of the Sexual Offences Definitive Guideline with the consequence that, with aggravating factors, the starting point should have been five years' imprisonment.

On the application for leave—

Held, refusing the application, that where an offender had committed an offence of inciting a child to engage in sexual activity, contrary to section 10(1)(2) of the Sexual Offences Act 2003, the type of activity which the child had actually engaged in would determine the category of harm for the purposes of the Sentencing Guidelines; that, therefore, where the incitement did not lead the child to behave in the manner incited the offence constituted "other sexual activity" within category 3, which, with aggravating factors, had a starting point of 26 weeks' imprisonment and a range of up to three years' imprisonment; and that, accordingly, in all the circumstances of the case, the sentence of 180 days' imprisonment was entirely appropriate (post, paras 31–36).

APPLICATION for leave to refer sentence under section 36 of the Criminal Justice Act 1972

On 1 May 2014 in the Crown Court at St Albans before Judge Gullick the offender, John Baker, pleaded guilty to one count of inciting a child (under the age of 16) to engage in sexual activity, contrary to section 10(1) and (2) of the Sexual Offences Act 2003. On 16 September 2014 he was sentenced to 180 days' imprisonment together with notification obligations under the sex offender register for a period of seven years. On behalf of the Attorney General, the Solicitor General applied, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the sentence to the Court of Appeal on the basis that it was unduly lenient.

The facts are stated in the judgment of the court.

Julian Evans (instructed by *Crown Prosecution Service*) for the Attorney General.

Kate Round (assigned by the Registrar of Criminal Appeals) for the offender.

The court took time for consideration.

[1] Sexual Offences Act 2003, s 10(1)(2): "(1) A person aged 18 or over (A) commits an offence if— (a) he intentionally causes or incites another person (B) to engage in an activity, (b) the activity is sexual, and (c) either— (i) B is under 16 and A does not reasonably believe that B is 16 or over, or (ii) B is under 13. (2) A person guilty of an offence under this section, if the activity caused or incited involved— (a) penetration of B's anus or vagina, (b) penetration of B's mouth with a person's penis, (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or (d) penetration of a person's mouth with B's penis, is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years."

4 November 2014. **SIR BRIAN LEVESON P** handed down the following judgment of the court.

1 On 1 May 2014, in the Crown Court at St Albans, before Judge Gullick, John Baker, who is 34 years of age, pleaded guilty to one count of inciting a child (under the age of 16) to engage in sexual activity, contrary to section 10(1) and (2) of the Sexual Offences Act 2003. On 16 September 2014, he was sentenced to 180 days' imprisonment together with notification obligations under the sex offender register for a period of seven years. The question whether he was to be made the subject of a sexual offences prevention order ("SOPO") was adjourned to a future date. Her Majesty's Solicitor General now seeks to refer this sentence as unduly lenient pursuant to the provisions of section 36 of the Criminal Justice Act 1972.

2 In short, the victim, a girl aged 13 years at the time, was a friend of the daughter of the neighbour's family and so also played with the offender's children. On Sunday, 9 June 2013, the offender invited the neighbour's family to a barbecue and the victim came as well. The offender asked the victim for her number but she said she did not know it. She later accepted him on Facebook and on "WhatsApp". He began to send her a series of text-type messages via WhatsApp. He learnt that she wanted an iPhone and offered to buy her an iPhone if she was "nice" to him. When the victim asked how she could be nice to him, the offender replied by saying "Suck" and then by telling her that he was referring to his "Dick". The victim understood what the offender meant and did not reply further to that invitation. There was further text conversation, which concerned her sexual experience which she said was none of his business. The text conversation ended with the offender saying not to worry about the iPhone, it was a silly idea.

3 The incitement therefore concerned incitement to sexual activity involving penetration of the victim's mouth with a person's penis. The sexual activity never took place. Following his arrest, the offender made full admissions in interview. He later pleaded guilty at the earliest opportunity.

4 It is worth outlining the facts in somewhat more detail. The offender, aged 34, lived at home with his partner and their three children aged eight, six and four. The victim, a girl aged 13, became acquainted with the offender through her 12-year-old friend, who lived opposite the offender when he and his family moved in during late 2012. The two families had become friendly and in the months that followed, the offender's children would play with his neighbour's children and the victim at home and in the street outside.

5 On 9 June 2013, as we have identified, the neighbour's family were invited to a barbecue at the offender's address to celebrate his daughter's first Holy Communion. The victim came too. The offender allowed the victim, and other older children, an alcoholic drink. At one point he asked the victim for her mobile telephone number but she did not give it. The victim later accepted him on Facebook and a telephone application, "WhatsApp".

6 In short, "WhatsApp" enables people who have the application installed on their mobile telephones to communicate with each other in a fashion similar to conventional text messaging. It was understood that in order to permit this communication to occur, the victim would have received a "request" asking her whether she wanted her phone to be linked to the offender's phone and that she would have then "accepted" this request. The application also allows the user to display their "status", which may include personal information.

7 Later that day, the offender contacted the victim via "WhatsApp" asking her if she had got home okay from the party. On the following day he began to send other messages to the victim, continuing for period of about ten hours. The messages sent by the offender became increasingly explicit and flirtatious.

8 The messages from the offender covered a range of topics. He told her that he was in bed and that he had drunk too much. The victim replied, stating that she did not want to go to school. The offender asked her if she needed his help. He sent her a message asking if she had gone to school, and saying that they could have "hung out together".

9 Meanwhile, at some point the victim put on her "status" on "WhatsApp" that she wanted an iPhone. The offender was able to view her status.

10 The offender continued to send a series of messages to the victim, one ending "Night, night, cutie". He then said: "If you need anything, let me know, only if you're nice, though. Lol. Sweet dreams." She replied, "Yes". The offender said, "And how nice would you be"? and the victim replied "1,000%". He asked her for an example of how nice she would be. When the victim asked "how" the offender said that it was "down to her". The victim said, "Oh well I just want an iPhone initt". The offender then asked her how she would thank him and the victim said that she could look after his children for a day. In reply, he said that their mother could do that.

The victim asked, "What then???" and the offender said: "Surprise me—Lol. You have to wait till I get paid. And I'm not asking for your virginity. Lmfao. U can't say where u got it from, thou. Whats the most uv done with a boy? Dont you mean show me lol." The victim replied by saying: "Just want an iPhone, not youuu." The offender said: "So ur do anything for an iPhone. Even suck?" She replied, "Suck what?" The offender said: "What do you think lol." The victim replied: "I can't think, what?" and the offender said: "Dick." The victim said, "What dick?" and the offender replied: "Mine for an iPhone. I would buy u one if ur nice to me as I said. What then as they ain't cheap to buy. Still a lot thou. Im guessing uv never done anything naughty before and I'm 32 btw not 40-odd lol. And what was that? I'd say wanked a guy off."

11 The victim did not reply and the offender said: "Uv gone to bed. It cant be that naughty as ur a very shy person." The victim replied: "I'm not shy, thanks." The offender said: "Oh ok. So what was it that uv done that was sooo naughty. Leah's step dad was propa just shouting down the street to come in. Was she with u. Was it sex. Dont worry I wont say anything." The victim replied: "None of your business." The offender said: "ok." The victim said: "why am I going to tell you, you're an adult?" The offender replied saying, "Well I will let u get off to sleep. Sorry I asked. Nite nite and? It doesn't bother me what you do. You should know that by now :) Either way, it's up to you if you want Ur a good really lool. I will leave you in peace. If you change ur mind, then let me know. Nite. U still gonna talk to me?" The victim did not reply. The conversation ended with one further message from the offender which said: "U now want an iPod. U want everything lol. Well, I'm nearly at work, so I will leave you alone now. Don't worry about the iPhone. Was a silly idea."

12 In her police interview, the victim said these messages had made her feel "cringey".

13 On 11 June 2013, the mother of the neighbour's daughter contacted the police and reported that the offender had been sending explicit messages to her daughter and also to the victim. Later the same day, the offender was arrested on suspicion of inciting a child to engage in sexual activity. He was cautioned and replied with words to the effect of, "It was only a joke".

14 The offender was interviewed on 11 and 12 June 2013. In interview, he described how he came to know the victim and her friend. He confirmed that he was aware of their ages and that they were both at school. He admitted sending the victim a text message asking her what she would do for an iPhone. He had made sexual references to her which had been stupid and they had been a "joke". He had asked her if she had been "naughty" before. She had told him to leave her alone and he said that he would. He had embarrassed himself. He said that he knew that he should never have made any sexual references to a minor and said that he had no intention of following through with what he had said. He had only been joking about buying an iPhone but accepted that he never made any reference in his messaging to this being a joke.

15 The offender accepted that he had been the one to instigate this communication having seen profiles on Facebook and then adding telephone numbers to the contacts in his phone. He accepted having put an "x" on the messages that he had sent the victim but said that this was him being affectionate towards her but not in a sexual way. He admitted that he had asked her about her sexual experiences and that he had asked her for oral sex. He said that his brain had just made him ask. He said repeatedly that the salient communication had been a joke. The offender was not charged with any offences in relation to his communication with the neighbour's daughter.

16 Having been charged, on 3 April 2014, the offender appeared at St Albans Magistrates' Court and indicated a guilty plea. The guilty plea was entered and the offender was committed to the Crown Court for sentence: this was later considered to be an error as the offence should have been deemed to be indictable only as the act of penetration had been particularised. In any event, on 1 May 2014, the case was listed at St Albans Crown Court for sentence where the procedural point was raised by the defence. The judge then sat as a district judge, the plea was vacated, and the case was sent to the Crown Court. A new indictment was lodged and the offender pleaded guilty to the single count. There was no basis of plea.

17 The facts were opened and counsel for the prosecution addressed the judge on the Guideline and on the starting point. He submitted that the offence was category 1A within the guidelines issued by the Sentencing Council. The hearing was adjourned to a new date as the making of a SOPO was the subject of argument, and the application had not been served until shortly before the case was called on.

18 On 6 May 2014, the hearing was again adjourned as the judge was concerned that the offender was on bail in relation to a separate allegation (subsequent to the index offence). The judge wanted to know whether he was to be charged with the offence in case this affected the SOPO or when sentence should take place.

19 On 10 June 2014, at Hendon Magistrates' Court, the offender admitted breach of bail relating to use of the internet; he was then remanded into custody. The case was listed for mention hearings on 15 and 17 July 2014 at which the judge sought information on whether there was any imminent charge which would be likely to affect either the time for sentencing, or the SOPO. On 2 September 2014, it now became clear that there was no imminent charge, the judge stated that the offender should now be sentenced given the time that had elapsed and the case was fixed for sentence on 16 September 2014. We are far from clear why the case required so many hearings.

20 On 16 September 2014, the case was listed for sentence in the afternoon. Counsel originally briefed by the prosecution was unable to attend as he was delayed in another court. Substitute counsel was instructed. When the case was called on, late in the afternoon, the judge made it clear that he would not countenance any application to adjourn the hearing. He was entirely right to do so.

21 As to his antecedents, the offender was of previous good character, with no previous convictions, reprimands, warnings or cautions recorded against him. Further information came in the form of a pre-sentence report, dated 30 April 2014. The offender took full responsibility for his actions and expressed considerable shame, embarrassment and remorse for his behaviour. He agreed that offences of this type were serious and that victims would experience long term psychological harm. He was not able to acknowledge any sexual motivation even though he had sent numerous text messages to the victim (and to her friend) including one of a sexual nature. This behaviour might reasonably be interpreted as grooming children for sexual abuse. The offender acknowledged this, and said that he too would have drawn such a conclusion if his own children had been the target of such behaviour from another adult. None the less, he refuted any suggestion that he had a sexual preoccupation with female children.

22 The writer of the report conclude that the offender had either suppressed, or struggled to accept, that he harboured thoughts, beliefs and attitudes, which had prompted him to incite one female child to perform oral sex, and to send a sexually suggestive message to another. On the one hand, while culpability was not denied, there remained elements of distancing and denial of agency in his attitude to the offence. On the other hand, the offender was willing to reflect on his behaviour and to engage in any work to elucidate the mental processes which informed it. He was assessed as posing a low risk of serious harm to the public and a medium risk to children. While the Sentencing Council guidelines indicated that the offender faced a substantial custodial sentence, as the probation officer read them, it was suggested that the court may find mitigating factors which would enable a shorter custodial term to be considered. The court was invited to pass a suspended sentence.

23 The judge took a robust view of the case. He was clearly concerned that the guideline was said to put it into category 1A with a starting point of five years. In the event, he did not explain whether he accepted that categorisation or how the guideline assisted in the disposal of the case, thereby failing to explain how he had complied with his duty as set out in section 125(1) of the Coroners and Justice Act 2009. He accepted that the offender had pleaded guilty and was full of remorse and had a lost a great deal including his partner, his children and "all the rest of it". It was in those circumstances he came to pass the sentence of 180 days.

24 On behalf of the Solicitor General, it was submitted that the following aggravating features appear to be present: (i) the young age and vulnerability of the victim; (ii) the premeditated nature of the offending; (iii) grooming behaviour against the victim (albeit over the course of a short period of time); (iv) the significant disparity in age between the offender and the victims; (v) the possible effect (and the possible future effect) upon the victim.

25 Mr Evans recognised that the following mitigating features appeared to be present, namely: (i) the plea of guilty at a very early stage of the proceedings; (ii) the previous good character of the offender; (iii) his expressions of shame and remorse; (iv) the full admissions made by the offender in interview; (v) the available personal mitigation.

26 It is submitted by Mr Evans that the sentence of 180 days' imprisonment was unduly lenient in that the offence should have been assessed as a category 1A offence and the sentence failed adequately to reflect its gravity, the aggravating features, the need to deter others and the need to protect the public.

27 In order to deal with these submissions it is necessary to analyse in detail the guideline which brings together the offences of sexual activity with a child contrary to section 9 of the Sexual Offences Act 2003 and causing or inciting a child to engage in sexual activity contrary to section 10 of the Act. In the main, but not entirely, these are contact offences although the guideline makes it clear that it applies equally to offences committed remotely or on line.

28 As we have identified before the judge and before this court, it is maintained that the offence committed by this offender falls into category 1, that is to say that it involves penile penetration of the mouth by the victim. It is, of course, beyond argument that the offender did, in fact, incite the victim to suck his penis; the texts speak for themselves and, by his plea, he admitted the offence. The question is whether incitement to behave in that way, which does not involve anything more, falls within the same category of harm as either penetration of the vagina or anus (using a body or object) or penile penetration of the mouth, deserving of similar sanction subject to culpability and such aggravating and mitigating circumstances as might otherwise exist.

29 On this basis, such incitement, which does not involve physical contact or exposure of any sort is more serious than a category 2 offence which involves touching or exposure of naked genitalia or naked breasts by or of the victim. To provide colour to this example, if the analysis is correct, it is more serious to incite a child as this offender did than had he actually persuaded her to undress before a web camera and expose to him her breasts or genitalia. It would equally be more serious than persuading a boy to masturbate in front of a web camera. In our judgment, that simply cannot be right.

30 Mr Evans suggests the difficulty can be addressed by reference to the mitigating fact in Step 2 of the Guideline described as "sexual activity was incited but no activity took place because the offender desisted or intervened to prevent it". Mr Evans goes on that it would then be possible in the interests of justice to reduce the sentence below the category range to avoid the anomaly to which we have referred. In other words it is to treat the activity which may not be uncommon as an exception to the operation of the guideline, the mitigating factor to which Mr Evans is referring covering slightly different circumstances.

31 The answer however is to recognise that this guideline covers very different offending and that the language used within it must be construed by particular reference to the offence then under consideration. Thus, if over a web camera, a female child is incited to insert an object into her vagina and she does so, a category 1 offence is committed; if a child is persuaded to touch or expose his or her naked genitalia and does so, that is a category 2 offence. Similarly, if a child is incited to persuade someone else (whether or not the offender) actually to behave in that manner, the offence is correctly characterised as category 1 or 2 respectively. The harm is the impact on the victim of behaving as he or she has done, whether in the presence of the offender or remotely or on line.

32 To that extent, the offence of causing sexual activity is potentially more serious than inciting such activity because the actual activity is a necessary part of the offence. Incitement can lead to actual activity which can be categorised accordingly. But where the incitement does not lead the child to behave in the manner incited, although the culpability is likely to be identical, the harm is necessarily less: the same is so in relation to attempts.

33 Thus, in this case, there has been no penile penetration of the mouth either by or of the victim; fortunately for the offender, she immediately rejected the suggestion which, we repeat, she described as "cringey". She told her friend whose mother reported the matter to the police. It is also consistent with the principle identified in *R v H (CM)* [2014] EWCA Crim 2094 dealing with causing or inciting a person with a mental disorder impeding choice to engage in sexual activity contrary to section 31 of the Act which prescribes different maxima and has different guidelines depending upon whether penetration was involved.

34 In our judgment, what happened here did not fall within category 1 at all. In the circumstances, because the offending did not proceed beyond incitement, it was "other sexual activity" within category 3. That accords not only with the judge's rejection of the suggestion that the offender's behaviour justified a starting point of five years but also provides appropriate headroom between the sexual suggestion and any actual activity without necessarily engaging upon the exceptional basis for departing from the Guideline.

35 The offence was undeniably one of high culpability but as category 3 had a starting point of 26 weeks in custody and a range up to three years' imprisonment the sentence passed by the learned judge fell fairly and squarely within it. In those circumstances, recognising the multiple features of culpability (grooming, disparity of age and the opportunity to reconsider and desist within the time frame that text messages are sent, read and then the subject of reply) all lead to the conclusion that this sentence was entirely appropriate.

36 In the circumstances, although we acknowledge that the Solicitor General has performed an important public function in bringing the ambiguity of this guideline to our attention and allowing the court to provide definitive explanation of the way in which it operates, consistent with that analysis, we decline leave to refer the sentence as unduly lenient.

Application dismissed.

BRENDAN WRIGHT, Barrister