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IN THE COURT OF APPEAL

CRIMINAL DIVISION



No. 201900903 A4

Neutral Citation Number: [2019] EWCA Crim 1945

Royal Courts of Justice

Tuesday, 22 October 2019

Before:

LORD JUSTICE SIMON
MR JUSTICE GOOSE
MRS JUSTICE COCKERILL DBE

REGINA
V
MATTHEW LOVE

**REPORTING RESTRICTIONS APPLY:
THE SEXUAL OFFENCES (AMENDMENT) ACT 1992**

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Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MS C. WILKS appeared on behalf of the Appellant.
THE CROWN did not attend and were not represented.

J U D G M E N T

MRS JUSTICE COCKERILL:

1 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 section 3 of the Act. We shall accordingly refer to the victim by initials only.

2 On 7 September 2018, having pleaded guilty before magistrates, the appellant was committed for sentence, pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000. On 25 January 2019 in the Crown Court at Merthyr Tydfil before her Honour Judge Lloyd-Clarke the appellant was sentenced to two years and eight months' imprisonment, plus a victim surcharge order of £170. The hearing was adjourned for the parties to further make submissions on the terms of a Sexual Harm Prevention Order. On 14 February 2019 before the same judge a Sexual Harm Prevention Order was imposed. It is this order which forms the basis for the appeal before us this morning, which is brought with the leave of the single judge.

3 The facts of the case are pertinent to the order and to the appeal. At about 11.30 am on Monday, 9 July 2018 the victim A, a 25-year-old woman, was walking along the Trevithick Trail in Merthyr listening to music on her headphones. She stopped to take a photograph. She saw the appellant who walked past her to some nearby steps. He stopped in front of her near the steps and took off a backpack he was carrying and began to look through it. She walked towards him and past him to get to the steps. As she got to the top of the steps, she felt a tug on the right-hand side of the bottom of her skirt. She turned to see what was happening and saw the appellant try to pull her skirt up. She cried out "Stop", but he continued to try with both hands to lift up her skirt. She tried to wriggle free. He let

go and walked away from her. She got to the corner of the steps, but once there, was too scared to move. The appellant immediately returned and continued with the assault, despite the victim pleading with him to stop. He pulled up her skirt, exposing her buttocks and forcibly turned her round, pulling her underwear down to her thigh. She was terrified of what he might do and began screaming and crying. He let go and walked off in front of her. She walked away and tried to call the police but was too upset and confused to dial the number. In the end a member of the public came to her aid and called the police on her behalf.

- 4 Once a description of the offender was provided to the police they undertook an investigation, including an extensive trawl of the CCTV from the immediate and surrounding areas. The appellant was identified and was arrested on 6 September 2018. On being arrested, he made some admissions, saying that his head had gone at the time. He also asked whether the girl was okay.

- 5 In an interview he said that as he walked along the road he had noticed a woman about 100 metres in front of him whom he thought had a nice body and that she was dressed in a skirt. He accepted that he walked after her, at one point even jogging to catch up with her because he intended to talk to her. He stopped by the steps, pretending to look in his bag, so that the victim would walk past him, allowing him to, as he put it, "*Check her out more*". He accepted that he had followed her to the steps, had taken hold of her skirt and lifted it up and grabbed her underwear and tried to pull it down. He said he acted as he did because he wanted to look at her vagina, but because she was shouting and upset he let her go. He accepted he had returned the second time and that a second time she had tried to stop him and she was shouting and upset. He said that when she walked off in the other direction he felt bad and walked after her again in order to apologise, but desisted when

he saw her in company with a male. He denied there was any sexual motivation. He said that he was "in the moment", but would not elaborate any further.

6 From the sentencing remarks, it appears that there were two Victim Personal Statements, the first made at the time of the incident or shortly after. The victim said she was very scared and did not know what was happening to her and was having flashbacks. She made a further statement, which although couched in impressively generous terms, expressing concern for the offender, made it clear that she was indeed traumatised. In particular, she speaks of how she was robbed of the ability to walk around her own town carefree.

7 As for the appellant's background, he was 27 years old and had a number of previous convictions, though none for sexual offences. His convictions included 18 months in a Young Offender Institution for a section 20 wounding against his father, an offence which involved many stitches being necessary. He was then sentenced to 18 weeks' imprisonment, suspended for 18 months with unpaid work, and a programme requirement and supervision for a section 47 assault against his partner. In 2015 there was an offence of causing unnecessary suffering to a protected animal, that is causing the death of young dog, for which he was sentenced to 16 weeks' imprisonment, at which point the term of imprisonment for the section 47 was activated with a reduced term of 10 weeks.

8 In relation to this current offence the appellant expressed remorse. He told officers he wished he had never put the girl through the experience and that he was sorry every day since for what he had done. He was, however, unable to explain his offending further.

9 The Pre-Sentence report revealed that the appellant was an only child and was brought up in foster care due his mother's mental illness and his father's violence. He described a traumatic childhood. He often saw his father beat his mother and felt resentment.

Impulsivity was identified as a significant problem for the appellant. The PSR said that given what appeared to be an escalating pattern of offending towards women, further exploration of his attitude towards women was required. All in all, he was assessed as being a high risk of re-conviction for a sexual offence. A psychological report stated that the appellant showed signs or traits of borderline melancholic and compulsive personality style. It opined that his risk of reoffending was most suitably managed in the custodial setting.

- 10 As noted earlier, there was an application on sentencing by the prosecution for a Sexual Harm Prevention Order which the court adjourned because the terms sought by the prosecution were complex and the court considered it was not appropriate to deal with the matter without an adjournment. Following that further discussion and debate, on 14 February 2019 the judge did impose a Sexual Harm Prevention Order in these terms which were considerably more limited than those originally sought by the prosecution:

"So for the next seven years you must not enter any public footpath, other than a footpath that forms part of a public highway, and for the next seven years you must, from the date of your release, comply with the installation of a body-worn GPS monitoring device. You must not tamper with it. You must not attempt to remove the device and you must permit the repair, maintenance and/or replacement of the device.

If you breach either of those terms within the next seven years, you commit a further criminal offence for which you can be sent to prison and the maximum penalty is five years."

- 11 It is submitted before us to today that this order is both contrary to principle and manifestly excessive. Ms Clare Wilks, for whose focused and clear submissions we are most grateful,

pointed us to section 103A(2)(b) of the Sexual Offences Act 2003, submitting that it imposed a necessity test. She submitted that while the appellant was assessed as high risk of reoffending for sexual offences, the order made failed to balance necessity against proportionality. She acknowledged that the terms of the order were effectively a consequence of the circumstances of this case.

12 She submitted that this court has made clear in *R v Smith* [2011] EWCA Crim 1772 that any Sexual Harm Prevention Order must be clear and realistic and capable of simple enforcement and tailored to the facts of the offending. She submits that this order failed that test. On the first limb Ms Wilks suggested that this was an opportunistic offence which just happened to take place on a footpath and with no pattern of offending, the order need not have been so directed. She submitted that it lacked clarity in the sense that the appellant might have to check what was a public footpath and what was not before setting off on any journey.

13 She also submitted that in relation to the second limb, the twelve months originally sought gave a clue as to the unsuitability of the GPS component and that this was an unusual order proposed by the Crown in an unprecedented way and advanced with a degree of unclarity. She submitted that the authority relied on demonstrated that it was not an order which was made in similar situations. In that case there had been multiple offending and breaches of notification. She submitted, indeed, that it was unclear as to why the order was needed and how it was planned to be used. Certainly, she said, taken together the order made was oppressive in the context of this single, albeit troubling offence, bearing in mind the other orders to which the appellant would be subject on release.

14 Attractively and clearly as these submissions were put, we find ourselves unable to agree in relation, at least, to the first part of the order. This was a serious sexual assault which left

the victim in fear that worse would happen and which has had a long-term effect on her.

Ms Wilks rightly accepted that this was a serious offence. We reject the submission that the motive was not sexual. Indeed, the appellant's own account in interview of why he performed the assault indicates that it was.

15 The appellant has been assessed as a high risk of further sexual offending and this is not surprising, given the fact that he has now committed this assault and that it is plain from his history and his previous convictions, as well as the Pre-Sentence Report, and Psychological Report that he has problems with impulse control more generally. This is reinforced by his own explanation for the offence of being "in the moment". Yet further basis for concern is found in the apparent escalation of issues with women, noted in the PSR, in relation to his recent offending. Given those long-standing problems of impulse control, the seriousness of the assault and the appellant's lack of any explanation as to what otherwise drove him to commit this offence, we are persuaded that on the facts of this case the hurdle of necessity was met for a Sexual Harm Prevention Order. Given the appellant's actions, based on his own account in following the victim from the road and waiting until the victim had reached a suitable quiet place before committing the offence, the focus in the order on paths away from the road, necessity likewise seems to be established in terms of affording protection to possible victims.

16 As for the questions of proportionality and oppression, the judge plainly considered the ambit of the order very carefully. We have noted that the judge was unwilling to make such an order without separate consideration. We have read the transcript of the prosecution's Opening of Facts at the hearing in relation to the Sexual Harm Prevention Order and have noted how carefully the judge pressed the prosecution as to the proposed order, ultimately declining to make it in the form sought but only in a narrower form, which as Ms Wicks advises us, the Judge herself considered and effectively drafted.

17 The order does not impede the appellant in getting from A to B. It may impede some leisure activities, but given the isolation of the places identified in submissions and the appellant's assessed risk which we have already noted, this cannot be seen as oppressive or disproportionate. It is also an order which we consider is perfectly clear and realistic and thus capable of simple compliance and enforcement. It is an order which is or should be clear to a person in the position of the appellant. It marks a distinction between paths which are away from the road and paths which are by the road, which should be perfectly capable of being followed. So far as any difficulties arising from a future change in residence is concerned, those could perfectly well be taken care of by a return to court if necessary, but there is no issue with the order as matters stand. So far as the first limb is concerned, on the facts of this case we are not persuaded that this order as made was contrary to principle or manifestly excessive.

18 As for the second element, the judge noted the imposition of the GPS tag was statutorily confined to a period of five years or further order. That order was imposed after the Crown had conceded that its original application for a twelve-month order was not within the Act. In those circumstances, we accept Ms Wicks' submission that where the Crown had not originally thought of the five-year term, there must from the outset be concerns about proportionality, as indeed the judge noted. Those concerns are not, in our judgment, allayed by any further consideration on the facts of this case. While we do not see the order as being contrary to principle necessarily, we are persuaded that given the facts of this case and given the other order which has already been made, it is an order which is manifestly excessive and, there being no ability to impose an order for a shorter period, we are persuaded that this order as drafted should not be imposed.

19 In the circumstances, the appeal is allowed solely to the extent of quashing the second part of the Sexual Harm Prevention Order. The first part of the Sexual Harm Prevention Order will stand, and the appeal to that extent is dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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5 New Street Square, London, EC4A 3BF

Tel: 020 7831 5627 Fax: 020 7831 7737

CACD.ACO@opus2.digital

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