



Neutral Citation Number: [2019] EWCA Crim 234

Case No: 201800915

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Isleworth Crown Court
HHJ Moore
T20150002

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/02/2019

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE MCGOWAN DBE
and
HER HONOUR JUDGE DHIR
(Sitting as a Judge of the Court of Appeal Criminal Division)

Between:

CHRISTIAN CONNOR
- and -
REGINA

Appellant

Respondent

Mr Simon Heptonstall (instructed by CPS Appeals and Review Unit) for the Crown
Ms P Blake (instructed by MI Banks Solicitors) for the Appellant

Hearing date: 5th December 2018

Approved Judgment

©

LADY JUSTICE THIRLWALL :

1. This is an application for an extension of time to appeal the terms of a Sexual Offences Prevention Order (SOPO) imposed by HHJ Moore at Isleworth Crown Court on 27th February 2015 and for permission to appeal the terms of the order. The applications were referred to the full court by the Registrar.
2. The appellant Christian Connor (now known as Tymon) is 32 (DOB 21.12.1986). The SOPO was imposed alongside a sentence of 16 months' imprisonment for 12 offences committed over a period of four years between 2010 and June 2014: voyeurism, contrary to section 67(3) and (5) of the Sexual Offences Act 2003 (7 counts, 8 months' imprisonment concurrent on each), encouraging the commission of an offence contrary to section 46 of the Serious Crime Act 2007 (3 months' imprisonment concurrent), possession of an extreme pornographic image contrary to section 61(1) of the Criminal Justice and Immigration Act 2008 (3 months' imprisonment concurrent), possession of an indecent photograph of a child contrary to section 160 of the Criminal Justice Act 1988 (3 counts, 8 months' imprisonment concurrent on each count, consecutive to the other sentences). In addition to the SOPO the appellant was required to comply with the provisions of Part 2 of the Act (notification to the police) for 10 years. He may be included in the relevant list by the Disclosure and Barring Service.
3. The appellant was an intelligent man from a stable family. He had good academic qualifications and had held down responsible employment, including as a mental health nurse. His offending came to light after he deceived a boy online into sending him an image of his foot. He then asked for a photograph of his genitalia. The boy told his father and the police were informed. The appellant was traced and after initial denials admitted all the offences. The voyeurism consisted in the main of videos he had made of a) teenage boys in the changing room at the swimming baths b) a man and (separately) a boy urinating in the public toilets c) people in the changing rooms and bathrooms in the mental hospital where he was working for a time and d) the people he lived with as they used the shower and bathroom.
4. The prosecution sought a SOPO. The draft put before the judge pursuant to sections 104 and 106 of the Sexual Offences Act 2003 was of indeterminate duration and was to be made in the following terms (we have adopted the numbering used in the Order): -
 1. Not to be in possession or use any device capable of accessing the internet, other than a desktop computer specifically authorised & provided by his employer for the purpose of employment (not including self-employment), but subject to the following conditions:
 - (A) It has been installed with internet monitoring software approved by his managing Police Officer from the Police Force area in which he resides, and that that software is operational
 - (B) It has the capacity to retain and display the history of internet use
 - (C) He makes the device available on request for inspection by a Police Officer

(D) He does not delete any history of internet use and/or specified internet monitoring software

(E) he must not use/enable any encryption or privacy tools – to include wiping tools.

2. Not to access social websites and engage in any form of communication with person who is/are or appear to be under 18 years of age

(A) Not procure any individual for the purpose of inciting them to perform any sexual activity on line

(B) Not to record or download any imagery that could be considered to be pornographic or obscene in nature

(C) Not to possess/be in possession of any device including capable of storing digital images unless it is made available on request for inspection by a Police Officer.

3. Not to be in possession of any device including mobile telephones and computer tablets that is/are capable of recording still or video images

(A) In the case of a Mobile telephone – not to be enabled to access the internet.

5. It is plain from the transcript of the sentencing hearing and other correspondence that the appellant's solicitor received a draft of the proposed order in advance of the hearing, in accordance with good practice. It does not appear that it was shown to the appellant until the hearing. By that stage he was on suicide watch and extremely agitated. Ms Blake discussed the order with the appellant at court but said that in hindsight this should have been done earlier and more time taken over it. The judge was dealing with a busy list. There was, as is often the case, pressure to get the cases heard and so there was some pressure of time on counsel to go through the order with the appellant on the spot. In the event the appellant accepted the terms of the SOPO and, according to the transcript, had signed it.
6. The judge imposed the order in terms sought but reduced the duration to 10 years.
7. It is plain from the transcript that there was no detailed scrutiny of the order at the hearing. Had there been some focus it would have been appreciated by all that it did not comply with the decision of this court in **R v Smith [2012] 1 WLR 1316**. That decision should have been drawn to the attention of the sentencing judge by counsel.
8. Before turning to the substance of the appeal we set out the course of events post sentence.
9. The offences were committed in Manchester but because the case was dealt with in Isleworth, the Greater Manchester Police (GMP) had no involvement in the drafting of the order. It was they who were to supervise it because the appellant lived in their area on his release from prison.
10. Shortly after his release from prison in October 2015 it became obvious that the order was unworkable. The appellant sought advice on how to vary the order. He contacted the court and was advised to put his application to vary in writing. The GMP were supportive of a variation and their solicitor drafted a proposed amended

order but it was their position, correctly, that the application was really seeking to appeal the order since the amendments were more far reaching than those appropriate on a variation.

11. The case was listed before HHJ Moore on 10th May 2016. It was adjourned and heard on 20th June 2016 when the appellant appeared in person and the police were represented. The Crown suggest that the application was declined for want of jurisdiction. Elsewhere it is said that the judge refused the application because there had been no change of circumstances. Ms Blake was approached to act pro bono (as was Mr Sethi, the appellant's solicitor). Both agreed to act without payment. When Ms Blake contacted the court in the latter part of 2016 she was told the record was unclear as to what had happened previously. She was advised to list the case for mention. This was wasteful of resources. The records of court proceedings should be sufficiently clear to inform any member of the public of what has occurred. The case was listed for mention in November 2016 and adjourned generally. There are no transcripts of the hearing because of difficulties in locating the digital recording. This is unsatisfactory.
12. At a later hearing on 20th November 2017 it was established that the judge had refused to vary the order (in June 2016) because there had been no change of circumstances since the order had been made. The proper course was (as it had been from the beginning) to appeal to this court.
13. In the light of the outcome of the hearing on 20th November 2017 notice of appeal was lodged and the matter came before us. Prosecuting counsel pointed out that the application did not make explicit whether it was an appeal against the refusal to vary or an appeal against the original order as the former may not have required an extension of time and was a relevant factor in considering any extension to appeal the original order. We are satisfied that it is an appeal against the original order pursuant to section 110(1) of the Sexual Offences Act 2003 and have treated it accordingly. Given that the order did not conform to the guidance given in **Smith**, with the result that the order was unworkable and disproportionate, as we shall explain, an appeal to this court was inevitable. That it took so long to reach this court was not the fault of the appellant. It would be unjust to shut him out. We extend the time for appeal and grant leave.
14. In a further development in May 2018 the appellant was arrested and pleaded guilty to a count of doing an act intended to pervert the court of justice and two counts of breaches of the order. He had in his possession a smartphone which he flushed down the lavatory when the police attended his home to assess his compliance with the SOPO. He was sentenced in June 2018 to a total of 16 months' imprisonment.
15. It follows that there have been a number of changed circumstances which would have paved the way for a further application by either the appellant or GMP for a variation in the order pursuant to section 108 of the Sexual Offences Act, as amended.
16. In the course of argument about whether appeal or application to vary was the correct route for the appellant to have taken once the difficulties with the order had become clear we were referred to section 114(4) of the Anti Social Behaviour Crime and Policing Act 2014 which provides that there may be "no variation [of an existing SOPO] that extends the period of the order or any of its provisions." We were told that there is some uncertainty as to what that means; there is a suggestion that it may prevent the extension of any provision of the order. Whilst this question is not

relevant to the decision in this case given that this is properly an appeal, we are satisfied that the passage is concerned only with duration. It follows that it means that an order to vary may not extend the duration of an existing SOPO or the duration of any of its provisions.

The merits of the appeal

17. In **Smith**, Hughes LJ as he then was, made it clear that orders must be tailored to the circumstances of each case but there are some principles of broad application including that a blanket prohibition on computer use or internet access is not permissible. As was pointed out by this court in **R v Parsons [2017] EWCA Crim 2163** the internet is a far greater feature of everyday life now than it was in 2012 and we have no doubt that this was true when the appellant's case was before the Crown Court. The failure to take into account the principles in **Smith** was an error which we must correct, as Mr Heptonstall who did not appear below, readily accepted. We are grateful to him for the helpful written submissions he provided at very short notice which were then developed orally.
18. The assertion by counsel for both sides at the time it was made that it was proportionate and workable was made without proper thought. Whilst the judge accepted their submissions we note that he said "one can always make an application for variation". No doubt it was upon that statement that the appellant later relied in his application to vary. The GMP and the sex offender manager both agreed that the order was not workable.

Paragraph 1

19. As drafted, paragraph one of the order would probably have the effect of preventing the appellant from using the internet at all for any purposes since it permits use only of a desktop computer provided by his employer. Even were he to obtain employment it does not follow that he would be provided with a desktop computer. The prohibition is obviously oppressive and disproportionate. The parties submit and we are satisfied that the public would properly be protected by prohibitions to the following effect:
 1. Using any computer or device capable of accessing the internet unless:
 - (i) He has notified the police VISOR team within 3 days of the acquisition of any such device;
 - (ii) It has the capacity to retain and display the history of internet use, and any automatic deletion is set to not less than 12 months, and he does not delete such history;
 - (iii) He makes the device immediately available on request for inspection by a police officer, or police staff employee, and he allows such person to install risk management monitoring software if they so choose;
 - (iv) This prohibition shall not apply to a computer at his place of work, Job Centre Plus, Public Library, educational establishment or other such place, provided that in relation to his place of work, within 3 days of him commencing use of such a computer, he notifies the police VISOR team of this use.

2. Interfering with or bypassing the normal running of any such computer monitoring software.
3. Using or activating any function of any software which prevents a computer or device from retaining and/or displaying the history of internet use, for example, using 'incognito' mode or private browsing.
4. Using any 'cloud' or similar remote storage media capable of storing digital images (other than that which is intrinsic to the operation of the device) unless, within 3 days of the creation of an account for such storage, he notifies the police of that activity, and provides access to such storage on request for inspection by a police officer or police staff employee.
5. Possessing any device capable of storing digital images (moving or still) unless he provides access to such storage on request for inspection by a police officer or police staff employee.
6. Installing any encryption or wiping software on any device other than that which is intrinsic to the operation of the device.

This permits use of the internet for the ordinary tasks of everyday life and allows proper monitoring of the appellant's internet use.

Paragraph 2

20. This is unhappily worded. It reads "not to access social websites and engage in any form of communication with person who is/are or appear to be under 18 years old". The aim was, according to the police in the application, "to prevent further offending by denying further access/downloading and retention of illicit images of children or vulnerable person". On the face of it the appellant is prevented from accessing all social media (taking a broad interpretation of social websites for this purpose). Further the use of "and" rather than "in order to" has led the appellant to assume that he must not engage in any form of communication with any person under 18 years old. This includes with relatives and others who know of his convictions.
21. Such potentially oppressive prohibitions were not necessary on the evidence that was before the court. The term "social website" is imprecise and unhelpful. We consider that a necessary and proportionate restriction is included in the new term 7 that is set out at paragraph 25 below.
22. The original paragraph, 2A, adds nothing to paragraph 2 as now drafted and should be deleted.
23. We are invited to delete 2B by the police offender manager on the grounds that preventing the use of lawful pornography could deprive the appellant of an outlet for his sexual desires and so potentially place the public at risk. We have not heard any evidence about this and disregard it. However, there was no evidence about whether the appellant used lawful pornography or not and we note that there was no separate justification for this requirement in the application or at the hearing. This suggests it was included without any consideration. The Respondent submits correctly that viewing and downloading unlawful images is unlawful; there is no need for an order prohibiting such conduct. It should be deleted.

Paragraph 3

24. Even at the time the order was made there were few mobile phones that did not have a camera or could not have internet access. It is unlikely that such phones will still be in circulation by the time the order comes to an end. The behaviour to which these paragraphs are directed is dealt with earlier in the amended order (see paragraph 1). This paragraph should be deleted.

Additional provisions

25. The police suggested and the appellant agreed that two more prohibitions were necessary:
7. Living in the same household as any child under the age of 18 or entering or remaining in any household where a child under 18 is present unless with the express approval of Social Services for the area in which he resides.
 8. Having any unsupervised contact or communication of any kind with any child under the age of 18 other than:
 - (i) Such as is inadvertent and not reasonably avoidable in the course of daily life, or
 - (ii) With the consent of the child's parent or guardian (who has knowledge of his convictions) and with the express approval of Social Services for the area.

This was based on the GMP's assessment of the offending and the fact that during the course of the investigation into his offending the appellant had said that he is sexually attracted to children.

26. We received no explanation for the omission of the proposed paragraphs from the original application. As has been said on a number of occasions, first in **Smith** by Hughes LJ, care must be taken when considering conditions of non-contact with children. In this case there had been no contact offences, notwithstanding long standing and prolific offending of other types. There was no reference to the risk of such offending in the psychiatric report but the probation report records the appellant saying that had he not been caught who knew what he might be capable of. In the event there have been no contact offences since the order was made and it appears that the appellant understood that he was prevented from having any contact of any type with anyone under 18. Ms Blake told us that there had been no change in the appellant's position since the proposed draft order was prepared. He remains content with the two additional prohibitions. This is evidence that they are necessary and we accept the submissions of both parties that they are proportionate to the risk posed.
27. By operation of section 103 an appeal against a SOPO is treated as an appeal against sentence. Section 11(3) of the Court of Appeal Act 1968 prevents this court from passing a sentence on appeal which is more severe than the original. The question arises whether those two prohibitions, which are of a different type from the original prohibitions, render the sentence more severe than the sentence originally passed.
28. As Sir Brian Leveson, P, made clear in **R v Thompson [2018] EWCA Crim 639**, to assess whether a sentence offends section 11 (3) requires a detailed consideration of severity in the context of the overall sentence.
29. Unlike the prohibition on online contact, living in the same household as a child is subject to the express approval of social services; it is not an absolute prohibition.

The same applies to unsupervised contact. The prohibition is not absolute; the consent of the parents or guardians is required. This would allow the appellant to have contact with family members where parents are aware of his convictions. We have already set out in detail the other amendments made to the SOPO which result in very significantly reduced restrictions on the appellant. Taking those amendments with the additional prohibitions we are satisfied that the resulting order is less restrictive than the original order. It does not breach section 11(3).

30. Accordingly, to the extent we have already indicated the appeal will be allowed, the original order quashed and a fresh order in the terms indicated will be substituted.

Listing

31. We cannot leave this case without commenting on the quality of the order which was produced by the court and which forms part of the official court record. It does not accurately reflect the content of the order made by the judge. It has been prepared from a proforma, with no thought given to whether the resulting document makes sense. As a result a number of double negatives appear which, if read literally, would have the opposite effect to that intended. It also contains spelling and typographical errors. In the event no one was misled and the appellant has not sought to make anything of the mistakes made. This should not happen. All orders sent out from the Crown Court must be in proper form and reflect the order made by the judge. They should be produced by suitably trained staff who understand the importance of the order and the consequences of a failure to comply with it. If there is any doubt the order must be brought back to the judge.
32. It is plain that most of the problems with this order would have been avoided had proper time been allocated to it in the courtroom and afterwards. The funds wasted on applications (4 in this case) and this appeal with the consequent pressures on the lists far outweigh the costs saved by dealing with the matter in haste. Listing is a judicial function. Resident judges and listing officers should ensure that in every case which may require an ancillary order the list reflects the time needed to deal effectively with all the issues.