



Neutral Citation Number: [2020] EWCA Crim 1748

Case No: 2020 01644 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT ST ALBANS
His Honour Judge Bright, Q.C.

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2020

Before :

LORD JUSTICE STUART-SMITH
MR JUSTICE EDIS

and

HIS HONOUR JUDGE BURBIDGE, Q.C. sitting as a judge of the Court of Appeal
Criminal Division

Between :

The Queen
- and -
Scott Edward Rowlett

Respondent

Appellant

Mr. J. McGuinness, Q.C and Mr. J. Gwatkin (assigned by the Registrar) for the **Appellant**
Mr. J. Price, Q.C. (instructed by **CPS Appeal Unit**) for the **Crown**

Hearing dates : 1st December 2020

Approved Judgment

Mr. Justice Edis:

1. This case has come to this court because of the way in which the legislature chose to develop the valuable regime whereby the court can make orders to protect the public from sexual offenders. The scheme became so complex that an experienced and able judge, assisted by two experienced counsel, made an order which, on the face of it, he had no power to make. No-one noticed until it was breached, and new counsel examined what had been done. The Sexual Offences Prevention Order (always known by the acronym SOPO) was the first step in the creation of this labyrinth, implemented by the Sexual Offences Act 2003. It was later felt that it would be better to call these orders Sexual Harm Prevention Orders (always known by the acronym SHPO). Other changes were made to the scheme apart from the change of name, some of which we discuss below. This was achieved by amending the relevant provisions of the Sexual Offences Act 2003 by the insertion of ss.103A-103K and making other consequential amendments by the Anti-Social Behaviour, Crime and Policing Act 2014 with effect from 8th March 2015. Transitional arrangements were made for dealing with SOPOs which had been made prior to that date. The result was a power under s108 of the 2003 Act to amend such a SOPO. It was not a power to vary such a SOPO so that it became a SHPO. Between March 2015 and March 2020 such orders continued to be SOPOs. By complex provisions of s114 of the Anti-Social Behaviour Crime and Policing Act 2014 all such “existing” SOPOs became SHPOs on 8 March 2020.
2. The issue in this appeal concerns what should be done where a defective application to amend a SOPO has led a judge to issue a “varied” order that was in form and, apparently, in substance a SHPO. The appellant submits that this order was and is a nullity, made without jurisdiction. The Crown submits that this court can and should regularise the position as from the date of the Judge’s order.
3. We are grateful for the skilled assistance of all counsel in this highly technical area both in their written and oral submissions. We understand that it was junior counsel for the appellant, Mr. Gwatkin, who first appreciated the defect in what had been done and we are particularly grateful to him for that.

The making of the SOPO

4. On 4 October 2012 the appellant was convicted of the rape of a 13 year old girl. On 12 December 2012 he was sentenced to 10 years imprisonment and made subject to a SOPO until further order. At the time of conviction the appellant was 21 years old. He is now 29.
5. The SOPO prohibited the appellant from:

“Being alone or in the company of any female child under the age of 16 without the supervision of an adult with parental responsibility for the said child”
6. The SOPO was made under s.104 of the Sexual Offences Act 2003, which provided

104 Sexual offences prevention orders: applications and grounds

(1) A court may make an order under this section in respect of a person (“the defendant”) where any of subsections (2) to (4) applies to the defendant and—

(a)

(b) in any other case, it is satisfied that it is necessary to make such an order, for the purpose of protecting the public or any particular members of the public from *serious* sexual harm from the defendant.

7. We have emphasised the word “serious” for reasons which will become apparent.
8. It is not suggested in this appeal that the original order was wrongly made. The appeal is brought with leave of the Single Judge against a decision of HHJ. Bright, Q.C. made on 5 December 2017 in the Crown Court at St Albans on an application by the Chief Constable of Hertfordshire Police to vary the SOPO so that it became a SHPO. As we have said, s108 of the 2003 Act as amended did not permit this.
9. The appellant had been released from custody on 12 May 2017. His supervising officer from the Hertfordshire Constabulary Public Protection Unit had concerns over his behaviour after release, as we describe below. This caused the Chief Constable to apply for a variation of the SOPO. After hearing the application and without objection on behalf of the Appellant, who was represented by counsel, the SOPO was varied to a SHPO until further order in the terms set out below:

“1. Not to have any unsupervised contact with any child under the age of 16 without the permission of the child’s parent/guardian and children’s services.

2. Not to communicate via the internet or by mobile phone with any child you do not reasonably believe to be aged 16 or over.

3. Not to use or possess any device with the capability of connecting to the internet unless:

i. You obtain written permission from PPU to use/possess device

ii. Risk management software is installed by PPU where available

iii. You make any device capable of accessing the internet in your possession (within your property) available upon request save and except for within the workplace, with written permission from PPU.

4. Not to delete/block/change any internet history (this includes using ‘private browsing’) on any mobile phone, computer, tablet or games console you use.”

The Application Before the Judge

10. The application cited section 103E of the Sexual Offences Act 2003 which had come into force on 8th March 2015 and which was part of the series of provisions which was intended to replace the SOPO regime with the SHPO regime. It provided that a court can vary, renew, or discharge an SHPO upon application. It does not confer a power to vary a SOPO. By s.103E(5) the Act provided:-

An order may be renewed, or varied so as to impose additional prohibitions on the defendant, only if it is necessary to do so for the purpose of

(a) protecting the public or any particular members of the public from sexual harm from the defendant, or

(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom.

Any renewed or varied order may contain only such prohibitions as are necessary for this purpose.

11. It was alleged that “the Defendant had, since the date of release, acted in such a way as to give reasonable cause to believe that a variation to the existing Sexual Offences Prevention Order is necessary under Section 104(1) of the Sexual Offences Act 2003 as amended by Section 114 Anti-social Behaviour, Crime and Policing Act 2014 to protect the public or any particular members of the public from sexual harm”.

12. The application relied upon a witness statement from Vicky Carter. She was employed by Hertfordshire Constabulary as a MOSAVO (management of sexual and violent offenders) officer and worked in the Public Protection Unit. At this time, the Appellant was subject to the SOPO, but there were also, it would appear, terms of his licence which gave her powers to investigate his conduct. She said that on the 8th of June 2017 she checked the appellant’s phone during a joint probation meeting. She saw that he was communicating with people he did not know in a sexual manner, sending and receiving intimate photos. He said that people would contact him on Facebook and he would talk to them despite not knowing them. She gave him advice. On the 31st of August 2017 she received a phone call from a probation officer who said she had checked the appellant’s phone during their session and had found concerning messages to and from a 12 year old female. Ms. Carter collected the phone the same day and completed a download. On the 1st of September she attended the Appellant’s home address to speak with him about what the probation officer had seen. He admitted that he had entered into a conversation with a child but blamed a friend, saying they were trying to get him. She asked why he continued to speak to communicate with people he did not know. He said he had been stupid but he wanted to meet new people. He admitted that he had breached his licence conditions by being in contact with a fellow prisoner.

13. When Ms. Carter reviewed the download she found that the appellant had conducted the following searches in Apple Safari, all on dates after her meeting on 8th June when she had first inspected the Appellant's phone:

Rape scenes school girls on 26/06/2017 at 06:04:47

Virgin school girls on 26/06/2017 at 06:11:47

Russian schoolgirls in the bath on 18/07/2017 at 00:42:02

Schoolgirls in the bath on 18/07/2017 00:53:04

Japan tiny on 18/07/2017 14:49:30

British virgin schoolgirls nude on 18/07/2017 at 14:59:45

[Name redacted] nude 18/07/2017 at 15:01:52

14. The redacted name in the last search is a teenage female relative of the Appellant. He admitted to most of these searches, and said that he did them because he wanted to go back to prison. He denied searching "[redacted name] nude" and stated that someone must have cloned his phone. There was no internet history on the days the Appellant searched for the above; A stated that he was using "private browsing". Whether this was true or not, it meant that he had taken steps to avoid his use of the internet being detected.
15. On the 21st of August 2017 the Appellant had entered in a Facebook Messenger conversation with a 12 year old female.
16. Between the 25th of July 2017 and the 8th of August 2017 the Appellant entered into a conversation with a 14 year old via imessage.
17. The ages of these girls were both stated in the conversations, and both conversations were sexual in their nature.
18. We comment at this point that this behaviour by a person who was only recently released from prison and subject to intensive supervision under the terms of a licence is extremely concerning. The licence will expire in two years' time, leaving only the SHPO in place for the protection of the public.

The Judge's Comments in granting the variation 5/12/17

19. The judge said that the information provided to the Court suggested that the pre-existing SOPO did not cover or prohibit some of the activities in which it was believed the appellant had engaged or might engage in the future, with regards to underage girls. It was entirely appropriate for the SOPO to be replaced with a completely new order, a SHPO, to prevent the appellant from doing various things that were not previously covered. It was pleasing that the variation was not opposed but if it had been it was unlikely a new order would not have been made. The Court was satisfied that the new order was necessary for the protection of underage girls as there was a significant risk unless the order was made. Given that he made an order restricting contact with "any child" the order he made was not supported by this

reasoning because he made no finding that the Appellant posed any threat to male children. We shall return to this.

Grounds of Appeal

20. The Ground of Appeal alleges that the Judge erred in unlawfully and without jurisdiction making a Sexual Harm Prevention Order when there was no power under the relevant legislation to do so.
21. In writing and orally before us today, counsel who now appear for the Appellant have advanced a series of submissions. It is agreed that the technical analysis which they have helpfully and clearly set out is correct.
22. First they submit, correctly, that the change from SOPOS to SHPOs was achieved by s.113 of the Anti-Social Behaviour, Crime and Policing Act 2014 which came into effect in 2015. The threshold for the making or variation of an order was changed. The SOPO threshold, that the order sought be necessary to protect the public from “serious sexual harm”, was replaced with the SHPO requirement that the order be necessary to protect the public from “sexual harm” (s.103A(2)(b) of the Sexual Offences Act 2003 and contrast the repealed s.104(1) of the same Act).
23. s.114 of the Anti-Social Behaviour, Crime and Policing Act 2014 contained transitional provisions in relation to “existing orders” (defined as, amongst other orders, a SOPO of the kind made in this case prior to the commencement date of the 2014 Act). This section retained the power to vary such orders with reference to the higher threshold test set out at s.108 of the Sexual Offences Act 2003 which gave the power to vary a SOPO on application. This is not a power to replace a SOPO with a SHPO, but only a power to amend a SOPO and is only exercisable if the higher threshold is met.
24. Accordingly, the variation of the SOPO in this case could only be made under those transitional provisions and required the court to be satisfied that the variation was necessary to protect the public from serious sexual harm. This point was not brought to the attention of the judge and it is not clear which threshold he considered. This is “the threshold issue”.
25. It is agreed that the application was made under the wrong provisions, and that the only power available to the judge was the power under s108 SOA 2003 to vary the SOPO. The judge did not do this, but purported to make a new order, which he called a SHPO. This is the “jurisdiction issue”.
26. The consequences of these agreed defects in the process before the judge are not agreed. The appellant submits by parity of reasoning with *R v Hamer* [2017] EWCA Crim 192 that the order must be quashed because it was made without jurisdiction, and that the Court of Appeal under s11(3) of the Criminal Appeal Act 1968 is limited to exercising the powers which were available to the judge. Since he had no jurisdiction, neither does this court.

The Crown Response

27. In response, the Crown submits that there was a valid application before the judge to vary the SOPO albeit one which cited the wrong statutory scheme, and that the technical error in framing the order is one which is not fatal to its validity. The court should not quash it, but make an order varying the SOPO in the same terms under s108 of the SOA 2003 being satisfied that it was necessary for the protection of the public from serious sexual harm.
28. By the phased transitional provisions contained in s114 of the Anti-Social Behaviour Crime and Policing Act 2014 all “existing” SOPOs became SHPOs on 8 March 2020. This means that If we accept the prosecution submissions, we would make an amended SOPO which would have been in force as such between 5 December 2017 and 7 March 2020 and has been in force as a SHPO with the same terms since that date.

Discussion and Decision

29. First, the difference in thresholds, we are confident, makes no difference to the result in this case, in that the order was clearly required to protect female children from serious sexual harm. This is a non-technical finding on the merits. This Appellant had a conviction for the rape of a 13 year old girl, and, while subject to licence and a SOPO, had behaved in a very worrying and compulsive fashion very soon after his release. Any judge would rapidly conclude that an order of the kind which was made was necessary for the protection of the public from serious sexual harm. Any other conclusion would be perverse, particularly because there was and is no material to contradict this outcome. Accordingly, the fact that the application was made on a false basis may have diverted the judge’s attention from the proper test which had to be applied, but it was amply satisfied, and he would inevitably have so found. We do, however, consider that if he had been invited to consider the correct legal test he would not have found that his order was necessary to protect male children from serious sexual harm. There was no material before him capable of justifying this conclusion. He should also have been presented with a draft which reflected the need to exempt inadvertent contact with children from attracting criminal liability. The “threshold issue” is therefore resolved against the Appellant with this modification to the judge’s order.
30. Therefore, the issue is a technical one, but not one without importance. It is agreed that an application to vary the SOPO could have been made to the Crown Court and, as we have said, it would have inevitably succeeded, subject to the two adjustments to the breadth of the new order which we have identified.
31. The reason the issue is not without importance is that there are proposed proceedings for breach of the order, which include breaches of the provisions added by Judge Bright in December 2017.
32. S108 of the Sexual Offences Act 2003 provided the power to grant variations of SOPOs. As in force at December 2017 this provided:-

108 SOPOs: variations, renewals and discharges

(1) A person within subsection (2) may apply to the appropriate court for an order varying, renewing or discharging a sexual offences prevention order.

(2) The persons are—

(a) the defendant;

(b) the chief officer of police for the area in which the defendant resides;

(c) a chief officer of police who believes that the defendant is in, or is intending to come to, his police area;

(d) where the order was made on an application under section 104(5), the chief officer of police who made the application.

(3) An application under subsection (1) may be made—

(a) where the appropriate court is the Crown Court, in accordance with rules of court;

(b) in any other case, by complaint.

33. In *Hamer*, as here, it was agreed that the order made by the Crown Court was defective and had to be quashed, and the second issue was whether the Court of Appeal Criminal Division could make an order in a correct form which corrected the judge's error. It was held that it could not. *Hamer* had come before the Crown Court because he had been convicted of breaching the original SOPO, but no application had been made by anyone listed in s108(2) of the SOA 2003. The court explained that the amended order had to be quashed explaining at [15]:-

“This is because the offences which entitle the court to impose a SHPO do not include the offence of breaching a SOPO: s.103A(2) and Schs3 and 5 of the 2003 Act as amended.”

34. The Court held that in the absence of an application by a person listed in s108(2) of the 2003 Act there was no power to vary the SOPO. The statutory conditions must be complied with before the power conferred by the statute arises. The Crown Court, and therefore the Court of Appeal Criminal Division, had no jurisdiction.

35. In the present case the statutory conditions were complied with in that there was an application which had been made by the Chief Officer of Police, as required by the 2003 Act. S108(3)(a) gives procedural primacy to the CrimPR. This application had been made in compliance with CrimPR 31.5 so far as procedural matters such as service of notice and evidence are concerned. CrimPR 31.11 provides:-

Court's power to vary requirements under this Part

3.11 Unless other legislation otherwise provides, the court may—

- (a) shorten a time limit or extend it (even after it has expired);
- (b) allow a notice or application to be given in a different form, or presented orally.

36. The court would have been acting lawfully if it had treated the defective application for an SHPO as an application under s108 for a variation of the existing SOPO and had granted a variation of it if satisfied (as we have said it would have been) that it was necessary to do so to protect the public from serious sexual harm. It did not do so, because neither counsel was alive to the defect in the application, and they did not invite the judge to express the order in accordance with the correct statutory scheme.
37. Had that happened, the judge would have been acting within his jurisdiction to make a proper order on a defective application. It follows therefore that we have power to do likewise.
38. This approach is in accordance with the decision of this court in *Ashford* [2020] EWCA Crim 673, following a full review of the statutory scheme. That court applied *R v Ashton* [2006] EWCA Crim 794, and said:-

17.The court [in *Ashton*] accepted a submission that the approach to such issues is to avoid determining cases on technicalities when they do not result in real prejudice and injustice and to ensure that they are decided fairly on their merits.

18.It does not appear that *R v Ashton* was cited to the court in *R v Hamer*. It is however clear that the court in *R v Hamer* regarded a contravention of the statutory provision as to who might make the application as going to the jurisdiction of the court. We respectfully agree. In our view, it is to be inferred from the terms of section 103E that Parliament intended that a court should only have jurisdiction to vary an existing order if the application was made by one of the persons whom the section permits to make it, and made to the court prescribed by the section. If Parliament had intended otherwise, it could easily have legislated in more permissive terms, to the effect (for example) that a court may vary an SHPO on application by the prosecutor. We think it significant in this respect that when SHPOs replaced SOPOs in 2015, Parliament chose to enact section 103E in materially the same terms as the predecessor legislation.

19.We take a different view, however, of Parliament's intention in respect of the requirements of section 103E(3) as to the form of the application and as to strict compliance with all applicable rules of procedure. A failure to comply with one of those requirements can in our view be regarded as a procedural defect, not intended to invalidate the proceedings, and to be addressed in accordance with the principles stated in *R v Ashton* at [4].

39. For these reasons we intend to allow the appeal, to quash the order but to make an order in similar terms to those used by Judge Bright, which will be drawn up as a variation of the SOPO, exercising the power in s108 SOA 2003 which was in force at the date of his order. By the phased transitional provisions referred to above, that is now a SHPO. The substantive differences between his order and ours are
- i) that the word “female” will appear in our order before the word “child” wherever it appears; and
 - ii) paragraph 1 of the order will be amended so that it reads
“1. Not to have any unsupervised contact with any child under the age of 16, other than
 - a) Such as is inadvertent and not reasonably avoidable in the course of lawful daily life, and
 - b) without the permission of the child’s parent or guardian (who has knowledge of his conviction and this order) and with the express approval of Social Services for the area.”
40. The second amendment brings the order in line with the practice derived from *R v. Smith* [2011] EWCA Crim 1772, and explained at Archbold at 20-275, and in the Compendium on Sentencing at S7-13.
41. We now need to turn to the issue of what it was between 5 December 2017 and today. Is our correction of the form of the SOPO of effect from the date it was made in December 2017, or can the order only lawfully be in force from today? This is important because of the allegation of breach.
42. It is common ground in this case that there is an appeal route to this court against the order which was made by Judge Bright. It is, however, necessary to examine the statutory basis for it in order to decide whether the adjusted order we have now made should only take effect from today, or whether there has been a valid and binding order in those terms since 5 December 2017. This is the final issue we have to resolve. A statutory gap in the appeal route has emerged, further complicating an area of the law which could, and should, be simple but which is not.
43. S.110(3) of the Sexual Offences Act 2003 as originally enacted provided an appeal against the granting or refusal of an application to vary a SOPO under s108 of the Act. This provision was repealed with effect from 8 March 2015. S103H of the Act came into force on 8 March 2015 and provided for a similar appeal route and allows for an appeal against the making or refusal of an application under s103E. That section only gives power to vary a SHPO. As at 5 December 2017 the order in this case was a SOPO and not a SHPO.
44. Assuming that Parliament did not intend to remove a right of appeal in respect of applications to amend SOPOs which continued to exist as such pending their conversion into SHPOs by operation of law in 2020, it is necessary to seek that right in the Criminal Appeal Act 1968. s11(3) of the Criminal Appeal Act 1968 governs the extent of the court’s powers on appeal against sentence. Of course, Judge

Bright's order was not made when sentencing the Appellant. However, s50(1) of the 1968 Act defines "sentence" as including

"any order made by a court when dealing with an offender."

45. Therefore, although there is no express right of appeal against an order under s108 any longer to be found in the 2003 Act, such a right would appear to exist at least in the case of "an offender" under the 1968 Act. Mr. Rowlett was "an offender" having been convicted of an offence of rape, and the court was, in December 2017 "dealing with" him. This perhaps explains why we have been addressed by reference to s11(3) of the 1968 Act. This provides

(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently for an offence for which he was dealt with by the court below may—

(a)quash any sentence or order which is the subject of the appeal; and

(b)in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;

but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court below.

46. Mr. McGuinness argues that it should not be "backdated" because there is no statutory warrant for such an order. He relies on s29(4) of the Criminal Appeal Act 1968 which deals with the effect of an appeal against sentence

(4)The term of any sentence passed by the Court of Appeal under section 3, 4, 5, 11 or 13(4) of this Act shall, unless the Court otherwise direct, begin to run from the time when it would have begun to run if passed in the proceedings from which the appeal lies.

47. Mr. McGuinness submits that this provision only relates to the "term" of any sentence and not to the terms of any order which do not specify a "term". We agree. However, we consider that the terms of s11(3) provide the answer. The order we make is made "in place of" the Crown Court order and must be an order which the Crown Court had power to make. The "place" of the Crown Court order includes the time during which it is valid, and our order substitutes itself for the Crown Court order in respect of the time of its validity. Moreover, we doubt if the Crown Court had a power to make a SOPO on 5 December 2017 which would be suspended in its effect until the date of this judgment.

48. This order is therefore a SOPO which came into force on 5 December 2017. This reflects the principle by which an appellate court operates. It makes an order which

must have been within the power of the first instance judge, on the basis of the law as it then stood and, in the absence of fresh evidence, on the material which was before that judge. There is no “prejudice” to the Appellant because he knew, at all material times, what the order prevented him from doing and has been deprived only of a technical defence to an allegation of breach of which he was entirely unaware until advised of it by his present legal team. That post-dated the conduct which is alleged to have constituted a breach of Judge Bright’s order.

49. This appeal is therefore allowed to the very limited extent that the order will be drawn up in an amended form which reflects this judgment, but will for all purposes have been in force that amended form since 5 December 2017.