

Neutral Citation No. [2020] EWCA Crim 788

No: 201900558/B1-201804307/B1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 9 June 2020

(VIRTUAL COURT)

B e f o r e:

LADY JUSTICE MACUR DBE

MR JUSTICE SWEENEY

MR JUSTICE JEREMY BAKER

R E G I N A

v

DAVID MICHAEL GARRITY

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr J Elliott appeared on behalf of the **Appellant**

Ms K Wilkinson appeared on behalf of the **Crown**

A P P R O V E D J U D G M E N T

MR JUSTICE JEREMY BAKER:

1. On 10 December 2010 a Sexual Offences Prevention Order was imposed on the applicant, David Michael Garrity, when he was sentenced in the Crown Court at Manchester to two years' imprisonment for thirty-three offences of making indecent photographs of children contrary to section 1 of the Protection of Children Act 1978 and four offences of possessing them contrary to section 160 of the Criminal Justice Act 1988.
2. The order which was of indefinite duration prohibited the applicant from the following:
 - "i. Seeking to contact or communicate in any way with a child under the age of 16 yrs except a family member in the presence of a parent or guardian.
 - ii. Accessing, viewing or downloading pornography and/or Indecent images of any person under the age of 16 yrs.
 - iii. Making any indecent photographic images (including moving images) of any person under the age of 16 yrs.
 - iv. Seeking to obtain or keeping in his possession any magazines, publications or another article containing Indecent photographs and/or the subject matter relating to any person under the age of 16 yrs."
3. On 23 January 2017, at the Crown Court in Manchester, the applicant pleaded guilty to ten offences of making indecent photographs of children and two offences of breach of a Sexual Offences Prevention Order, contrary to section 103I(1)(a) of the Sexual Offences Act 2003.
4. On 16 March 2017 he was sentenced to concurrent terms of twelve months' imprisonment in respect of the offences of making indecent photographs of children and twelve months' imprisonment concurrent inter se but consecutive to the other sentences for the two offences of breach of a Sexual Offences Prevention Order, making a total sentence of two

years' imprisonment.

5. In addition the judge replaced the existing Sexual Offences Prevention Order and imposed a Sexual Harm Prevention Order. This order was also of indefinite duration and prohibited the applicant from:

- "i. Using any device capable of accessing the internet unless:
- a. It has the capacity to retain and display the history of internet use, and
 - b. Such history is preserved for a period of 12 months, unless earlier deletion is authorised by a police officer, and
 - c. He makes the device available on request for inspection by a police officer.

ii. Possessing any device capable of storing digital images unless he makes it available on request for inspection by a police officer."

6. Unfortunately, when the Sexual Harm Prevention Order was processed and sent out by the Crown Court it was based upon an earlier more extensive draft and purported to prohibit the applicant from:

"i. Seeking to contact or communicate in any way with any child under the age of 16 years, except:

- a. Contact authorised by a police offender manager for the area where the Defendant resides; or
- b. Normal, incidental and not reasonably avoidable contact of day to day life or
- c. A Court Order pursuant to the Children Act 1989 has been granted authorising contact; or
- d. With the express, written, approval of Social Services for the area where the Defendant is staying.

- e. A family member in the presence of a parent or guardian
- ii. Contacting directly or indirectly, or attempting to contact directly or indirectly, via the Internet or telephone networks any child under the age of 16 years. This includes, but is not limited to:
 - a. Social Networking websites such as Facebook, MSN, Bebo and Twitter
 - b. Video communication software, such as Skype and Face time
 - c. Messaging programs, such as Blackberry Messenger, MSN and Email.
- iii. Using or possessing any device capable of accessing the internet unless:
 - a. it has the capacity to retain and display the history of internet use and such history is preserved for a period of 12 months (save for where a Police Offender Manager has authorised internet history to be deleted) and
 - b. the device remains free from software designed to delete, amend or conceal the history internet use (other than operating system software) and
 - c. the defendant makes the device available on request for inspection (including forensic examination) by a Police Offender Manager and
 - d. the details of the device have been notified to a Police Offender Manager for the area where the defendant resides.

Or

- a. the device is used solely for the purposes of work or employment (other than self-employment) and
- b. the device is not removed by or on behalf of the defendant from the employers' premises and
- c. the internet use of the device is monitored by the employer and
- d. the device is owned by the employer.

Or

- a. the device is owned and used within a public library or other civic building and

- b. the device is not removed by or on behalf of the defendant from the premises
- iv. Possessing or using any device which is capable of storing digital images, unless:
 - a. the details of the device have been notified to a Police Offender Manager for the area where the defendant resides and.
 - b. the defendant makes the device available on request for inspection (including forensic examination) by a Police Offender Manager and
 - c. the details of the device have been notified to a Police Offender Manager for the area where the defendant resides.

Or

- a. the device is used solely for the purposes of work or employment (other than self-employment) and
- b. the device is not removed by or on behalf of the defendant from the employer's premises and
- c. the device is owned by the employer.

Or

- a. the device is owned and used within a public library or other civic building and
- b. the device is not removed by or on behalf of the defendant from the premises.

- v. Accessing, viewing or downloading pornography and/ or Indecent images of any person under the age of 16yrs.
- vi. Making any indecent photographic images (including moving images) of any person under the age of 16yrs.
- vii. Seeking to obtain or keeping in his possession any magazines, publications or another article containing Indecent photographs or the subject matter relating to any person under the age of 16yrs
- viii. Not to associate with any other known registered sex offender, either directly or indirectly."

7. On 3rd August 2018, following a trial in the Crown Court at Manchester, the applicant was convicted of two offences of breaching a Sexual Harm Prevention Order, contrary to section 103I(1)(a) of the Sexual Offences Act 2003, in respect of which he was sentenced to six months' imprisonment on each concurrent.
8. The applicant now seeks permission out of time to appeal against his most recent convictions for breaching a Sexual Harm Prevention Order and had applied for permission out of time to appeal against sentence which was limited to the duration of the Sexual Harm Prevention Order imposed on 16 March 2017.
9. However, for reasons which will become apparent, although Mr Elliott, who appears upon behalf of the applicant, pursues the applications out of time for permission to appeal against conviction, he does not seek to pursue the applications in relation to sentence
10. The various applications having been referred to us by the Registrar, we will grant permission to appeal out of time in relation to the appeal against conviction.

Appeal against conviction

11. The convictions arose subsequent to the appellant's release on licence from the sentence of two years' imprisonment imposed on 16 March 2017. He was released in January 2018 and was provided with hostel accommodation. Shortly thereafter, on 13 January 2018, a hostel employee found an MP3 player in his room. The police were notified and on the following day they attended and searched the appellant's room and also found a Samsung smart phone. These items were seized and the appellant was arrested. When questioned in interview the appellant stated that he did not appreciate that the two electronic items were covered by the terms of the Sexual Harm Prevention Order and in any event he was unaware of the identity of his police offender manager.
12. In the belief that the terms of the Sexual Harm Prevention Order made by the court on 16

March 2017 were those which the court had processed and sent out, the appellant was charged with two offences of being in breach of a Sexual Harm Prevention Order by reason of his possession of these two items without first having notified his police offender manager.

13. At his subsequent trial in the Crown Court the error as to the terms of the Sexual Harm Prevention Order was not discovered by anyone and therefore the only issue for the jury to consider was whether they were sure that the appellant did not have a reasonable excuse for being in possession of the electronic items without prior notification to his police offender manager. In the event, the jury rejected the appellant's defence which mirrored his account in interview and he was duly convicted of the two offences.
14. Subsequently it has come to the attention of all those involved in these proceedings that the Crown Court had made an error when processing and sending out the Sexual Harm Prevention Order which did not reflect the order which was made by the judge in court on 16 March 2017. This error has now been remedied by the Crown Court and an amended Sexual Harm Prevention Order has been processed and issued which does reflect the order made in court by the judge. Moreover, the respondents to this appeal accept that under the terms of this order the appellant was not prohibited from possessing these two electronic items without first having notified his police offender manager and therefore do not oppose the appeal against his convictions.
15. It is extremely unfortunate that this situation has arisen and underlines the importance for all those involved in such proceedings to ensure that the wording of any order issued by the court properly reflects the terms of any order made in court by the judge. In the present case it is apparent that this did not occur, hence the extensive terms of the Sexual Harm Prevention Order which was processed and issued by the court, which did not

properly reflect the more limited terms which had been made in court by the judge.

Moreover, it is clear that those more limited terms did not prohibit the appellant from possessing the electronic items without first having notified his police offender manager.

16. In these circumstances, as it is the order made in court by the judge which is the lawful order (see *R v Watkins* [2015] 1 Cr App R (S) 6) the appellant ought not to have been convicted of the two offences of breaching the Sexual Harm Prevention Order and we will quash those convictions.

Abandoned application for permission to appeal against sentence

17. The original application for permission to appeal against sentence, was limited to the duration of the Sexual Harm Prevention Order which was imposed on the applicant on 16 March 2017. In the grounds of appeal it was submitted that the judge had failed to adequately consider and, more to the point, give reasons for why it was that he imposed an indefinite order, rather than one which coincided with the duration of the notification provisions, which in this case was 10 years, and the cases of *R v McLellan* [2017] EWCA Crim 1464 and *R v Perren* [2018] EWCA Crim 314 were relied upon.

18. However, it has recently come to Mr Elliott's attention that at the hearing on 16 March 2017, counsel then appearing on behalf of the applicant had conceded that it was appropriate for an indefinite Sexual Harm Prevention Order to be made and it was noted that it replaced a previous Sexual Offences Prevention Order of indefinite duration.

19. In any event we would observe that, had we been considering this as an extant application for permission out of time to appeal against sentence, not only does the applicant have two sets of offences relating to the downloading of indecent images of children but the latter set of convictions, for which sentences were imposed on 16 March 2017, included breaches of the earlier Sexual Offences Prevention Order.

20. We also note that, during a Newton type hearing in relation to the latter set of offences to which he had pleaded guilty, the applicant maintained that he had only downloaded the indecent images in order to undertake research relevant to making an appeal against his previous convictions and that he had no sexual interest in children; an assertion which was reflected in his explanation to the Probation Officer and understandably rejected by the judge.
21. In these circumstances, we would have been of the opinion that, regardless of the fact that the judge on 16 March 2017 had not given detailed reasons for imposing a Sexual Harm Prevention Order of indefinite duration, nevertheless such an order was justified and we would have refused the applications relating to his appeal against sentence.

Conclusion

22. Accordingly, we will formally give permission to the applicant to abandon the applications in respect of sentence which will be dismissed. However, the appeal against the appellant's convictions will be allowed. The convictions will be quashed and for the avoidance of doubt we confirm that the terms of the Sexual Harm Prevention Order of indefinite duration imposed on 16 March 2017 are those announced by the judge in court as set out at [5] herein.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk