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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation No. [2021] EWCA Crim 445

CASE NO 202002679/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 17 March 2021

Before:

LORD JUSTICE MALES

MR JUSTICE JEREMY BAKER

RECORDER OF DERBY

(HER HONOUR JUDGE SHANT QC)

(Sitting as a Judge of the CACD)

REGINA

V

ROBERT NORMAN LAWRENCE HOWARTH

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MR T ACWORTH appeared on behalf of the Appellant.

APPROVED JUDGMENT

MR JUSTICE JEREMY BAKER:

1. On 24 September 2020 in the Crown Court at Salisbury, Robert Howarth pleaded guilty to three offences of making indecent images of children, contrary to section 1(1)(a) of the Protection of Children Act 1978, as a result of which he was fined the sum of £1,000 and made the subject of a community order for 2 years with a rehabilitation activity requirement for 40 days. In addition he was ordered to pay £500 towards the costs of his prosecution and a surcharge in the sum of £90. An order was made for the forfeiture and destruction of a number of his electronic items and he was made the subject of a sexual harm prevention order pursuant to section 103A of the Sexual Offences Act 2003 without duration of time.
2. Robert Howarth appeals against sentence with the permission of the single judge, limited to one aspect of his sentence, namely the unlimited duration of the sexual harm prevention order.

Offences

3. On 17 July 2019, Wiltshire police visited the appellant's home, where he was arrested and a number of his computer devices were seized. In subsequent interviews the appellant admitted using a website known as 'Chatstep' and stated that he may have used such items such as "perv", "extreme" and "pop" although the appellant did not accept that those items demonstrated that he had a sexual interest in children. The appellant stated that he had never knowingly accessed indecent images of children, although when he had been looking at adult pornography such images would "pop up" on the screen.
4. The devices taken by the police were subsequently analysed and it was ascertained that the appellant had used "TOR" to access the dark web. As well as indecent images of children there was evidence of discussions regarding the sexual abuse of children and the

appellant indicating "teen schoolies" as a preference when asking what pornography he wanted to access. In total the police investigation found that the appellant had accessed child pornography over a period of about 4 years between 2015 and 2019 and uncovered 49 category A indecent images of children, 49 category B indecent images of children and 183 category C indecent images of children. The appellant was further interviewed by the police on 9 January 2020 and made "no comment" to questions asked by the police.

The appellant

5. The appellant had no previous convictions and a pre-sentence report revealed that he had been accessing sexual pornography over the Internet for a number of years. The appellant claimed that his real interest was confined to adult sexual material and that the images relating to children popped up accidentally on his screen when he used the dark web. He denied that he had any sexual interest in children and had in any event commenced a course of therapy in relation to his use of online pornography.
6. The appellant is a married man with one adult daughter and two young grandchildren. He had retired after a lifetime's career in scientific research and has since suffered from some physical ill-health. The author of the report considered the appellant to pose a medium risk of similar offending which would be assisted by a rehabilitation activity requirement and a sexual harm prevention order directed to his use of the Internet.

Sentencing remarks

7. In his sentencing remarks the Recorder stated that the appellant was 65 years of age and was of previous good character. The appellant had pleaded guilty to the offences for which he stood to be sentenced and disclosed that he would not be passing an immediate custodial sentence in relation to them. A repeat of the appellant's behaviour however

would almost certainly result in a custodial sentence.

8. The Recorder had considered the Sexual Offences Guidelines, the Imposition of Community and Custodial Sentences Guidelines, the Totality Guidelines, the Covid-19 Guidelines, and the Guilty Plea Guidelines. He stated that his starting point for the most serious offence would have been 1 year's imprisonment. There was a serious aggravating factor of the age of some of the children in the schedule of the images that the Recorder had seen and the fact that the offending had occurred over a sustained period of time, although the offending appeared to be spasmodic.
9. Bearing in mind the appellant's good character, his age, his guilty pleas and the submissions that had been made on his behalf along with the constructive proposal in the pre-sentence report, the Recorder took the view that immediate custody was avoidable in this case, notwithstanding the appellant's minimisation of his offending during the course of his interview with the probation officer. The sentence was therefore a 2-year community order on each count concurrent. There would be up to 40 days' rehabilitation activity requirement which the appellant would have to attend. The punitive element of the offending would be a fine of £1,000 and the appellant would be ordered to pay £500 towards the costs of the prosecution.
10. In so far as the sexual harm prevention order was concerned the Recorder made that for an indefinite period of time in the following terms:

"1. Using any device capable of accessing the internet unless:
a. he notifies the police or his offender manager that he possesses the item within three days of its acquisition;
b. it has the capacity to retain and display the history of internet use and is at all times set to do so;
c. he makes the device available on request for inspection by a police officer or offender manager; but this prohibition shall not apply to a computer at a Job Centre Plus, public library, educational establishment or other such place or a computer at his place of work or which is provided to him by his

employer for the remote working, provided that, in relation to a computer at his place [of] work or which is provided to him for remote working, he notifies the police or his offender manager within three days of commencing use of such a computer and provides them with all his usernames and passwords.

2. Deleting his history of internet use (beyond the item's manufacturer's default settings).

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

4. Disposing of any device capable of accessing the internet or storing digital images without the prior approval of the police or his offender manager."

Grounds of appeal and response

11. On behalf of the appellant, Mr Acworth makes no complaint about any aspect of the orders imposed upon the appellant, save for the unlimited duration of the sexual harm prevention order which he submits is unjustified in this case, given the nature and extent of the appellant's offending, coupled with his lack of previous convictions. He submits that the appropriate duration of order, in the present case, should be one of 5 years.

12. On behalf of the respondent, Mr Onslow, in his respondent's notice agrees, that the unlimited duration of the sexual harm prevention order was unjustified, but submits that , the appropriate duration of the order in this case should be one of 7 years.

Discussion

13. At the date of the sentencing exercise in this case the statutory test as to whether and to what extent a sexual harm prevention order should be imposed was that set out in section 103A(2)(b) of the Sexual Offences Act 2003 (now mirrored in section 346 of the Sentencing Act 2020), namely:

"...the court is satisfied that it is necessary to make a sexual harm prevention order for the purpose of (i) protecting the public or any particular public members of from sexual harm from the defendant or (ii) protecting children

or vulnerable adults generally or any particular children or vulnerable adults from sexual harm from the defendant outside the United Kingdom."

14. As was made clear by this Court in *R v Smith* [2011] EWCA Crim 1772, in relation to the predecessor legislation concerning the analogous sexual offences prevention orders, the statutory test of necessity required the court to focus on the twin issues of necessity and proportionality when deciding whether and, if so, in what terms such an order should be made in a particular case.

15. More recently, this guidance has been reiterated in relation to sexual harm prevention orders by this Court in *R v McLellan* [2017] EWCA Crim 1464, where Gross LJ at [25] made observations as to the correlation between the duration of sexual harm prevention orders and the notification requirements under section 80 of the Sexual Offences Act 2003:

"i) First, there is no requirement of principle that the duration of a SHPO should not exceed the duration of the applicable notification requirements. As explained in *Smith*, at [17], it all depends on the circumstances.

ii) Secondly (so far as here relevant), a SHPO may be made when the Court is satisfied that it is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant: s.103A (1) and (2)(b)(i) of the 2003 Act. As with any sentence, a SHPO should not be made for longer than is necessary.

iii) A SHPO should not be made for an indefinite period (rather than a fixed period) unless the Court is satisfied of the need to do so. An indefinite SHPO should not be made without careful consideration or as a default option. Ordinarily, as a matter of good practice, a Court should explain, however briefly, the justification for making an indefinite SHPO, though there are cases where that justification will be obvious.

iv) All concerned should be alert to the fact – as this case highlights – that the effect of a SHPO of longer duration than the statutory notification requirements has the effect of extending the operation of those notification requirements; an indefinite SHPO will result in indefinite notification requirements: s.103G(1) of the 2003 Act. Notification requirements have real, practical, consequences for those subject to them; inadvertent extension

is to be avoided."

16. It is regrettable, as Mr Acworth concedes, that this case has had to come before this Court, rather than being dealt with appropriately in the Crown Court. Firstly, although it would appear that there was good notice and discussion concerning the extent to which it was necessary and proportionate to make a sexual harm prevention order in this case, there appears to have been no such focus on its duration. Secondly, to the extent that the Recorder considered this issue, he did not provide any reasons which sought to justify the making of an indefinite order in this case. Thirdly, once it was appreciated that such an order had been made, this does not appear to have been the subject of submissions to the Recorder, either at the hearing or subsequently at a slip rule hearing pursuant to section 155(1) of the Powers of Criminal Courts (Sentencing) Act 2000.
17. In these circumstances, we have had to consider this issue for ourselves. Firstly, we should say that despite the appellant's lack of previous convictions, we are satisfied that given the nature and extent of the offending in this case, coupled with the contents of the pre-sentence report, such an order relating to the appellant's use of the Internet was necessary. Secondly, that the terms of the order were both necessary and proportionate.
18. However, in relation to the issue of the duration of the order, we do not consider that the imposition of an indefinite order is either necessary or proportionate. In this regard, had it not been for the imposition of the indefinite nature of the sexual harm prevention order, the duration of the notification period under section 82(1) of the Sexual Offences Act 2003 would have been one of 5 years, which, by reason of section 103C(2)(a) would also have been the minimum duration of his sexual harm prevention order.
19. In the present case, we have considered whether this is anything which necessitates the duration of a sexual harm prevention order in this case being required to be of a longer period than the minimum duration provided for under section 103C(2)(a). In this regard,

we note that the appellant's use of the Internet to view child pornography extended over a significant period of time, namely 4 years, and involved the use of TOR to access the dark web. Moreover, although it is to his credit that he had commenced a course of therapy, he continued to minimise his association with child pornography to the author of the pre-sentence report.

20. In these circumstances, we consider that it is both necessary and proportionate for the duration of the sexual harm prevention order in this case to be one of 7 years which will also be the duration of the period which he will be subject to the notification requirements by virtue of section 103G(2)(a) of the Sexual Offences Act 2003 (now mirrored by section 352(2)(a) of the Sentencing Act 2020).
21. There is one further matter which has been brought to our attention by the Registrar, namely the amount of the surcharge in this case. The surcharge of £90 was based on the imposition of the community order whereas if the surcharge had been based on the financial penalty of £1,000 it would have been a surcharge in the sum of £100.
22. This Court has determined in *R v Abbott* [2020] EWCA Crim 516, that where more than one type of disposal is imposed at the Crown Court, the amount of the surcharge payable is the higher of the amounts due on the making of each such disposal.
23. In these circumstances, we have also considered the effect of section 11(3) of the Criminal Appeal Act 1968 which precludes this Court increasing any aspect of the sentencing exercise unless, taking the case as a whole, the appellant would not be dealt with more severely than he was in the court below. We are satisfied that having very substantially reduced the duration of the sexual harm prevention order, increasing the surcharge by the sum of £10 to £100, would not fall foul of that prohibition.
24. Therefore this appeal is allowed to the extent that the sexual harm prevention order will

be reduced in its duration to one of 7 years but that the surcharge will be increased to £100. To that extent this appeal is allowed.

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

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