



Neutral Citation Number: [2022] EWHC 2835 (Admin)

CO/2422/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 November 2022

Before:

LORD JUSTICE LEWIS
MR JUSTICE LINDEN

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
- and -
MAX CHARLESWORTH

Appellant

Respondent

DUNCAN ATKINSON KC (instructed by **Crown Prosecution Service**) for the **Appellant**
The respondent did not appear and was not represented

Hearing date: 9 November 2022

Approved Judgment

Lord Justice Lewis:

INTRODUCTION

1. This is an appeal by way of case stated by Gareth Branston, District Judge (Magistrates' Court) in respect of his dismissal of an application for a sexual harm prevention order ("SHPO") pursuant to section 345 of the Sentencing Act 2020 ("the Sentencing Code").

THE FACTS

2. The material facts are set out in the case stated. On 9 February 2022, the respondent, Max Charlesworth, pleaded guilty at Thames Magistrates' Court to three offences of making indecent photographs of children. Prior to that hearing, the appellant had served a draft SHPO indicating an intention to seek the imposition of an SHPO in the event that Mr Charlesworth was convicted.
3. At the hearing on 9 February 2022, sentence was adjourned to 2 March 2022 to enable the preparation of a pre-sentence report. On 2 March 2022, the respondent appeared for sentence before Thames Magistrates' Court. The prosecution indicated it wished to apply for a SHPO but the respondent indicated that he contested that application. The justices adjourned the application for an SHPO to 6 May 2022. They proceeded to sentence the defendant to 26 weeks' imprisonment for the first offence, 20 weeks' imprisonment for the second and 10 weeks' imprisonment for the third, the latter two sentences to run concurrently with the sentence for the first offence. The sentence of imprisonment was suspended for 24 months and was subject to various requirements.
4. On 5 May 2022, solicitors for the respondent informed the magistrates' court that the respondent no longer intended to contest the SHPO. On 6 May 2022, the matter came before District Judge Branston. He dismissed the application as he considered the magistrates' court was *functus officio*, that is, that it no longer had any power to make the SHPO as the role of the magistrates' court was concluded after the magistrates had imposed the suspended sentence of imprisonment. The district judge stated a case for appeal.
5. The district judge explained the reasons for his decision in the case stated. At paragraphs 63 to 65, he says this:

“63. I determined that the magistrates' court had no power to adjourn consideration of the application for a SHPO to a date after sentence. I determined that the justices had fallen into error in sentencing the defendant and then adjourning the application in the way that they did. I determined that, by 6th May 2022, the court was *functus officio*. I determined that, by 6th May 2022, the court had completed its sentencing of the defendant. I therefore dismissed the application for an SHPO.

“64. In my judgment the plain wording of section 345(1) of the Sentencing Code envisaged that the court would make a SHPO at the same time as it sentenced the offender. The power to make a SHPO on conviction was given to “*the court dealing*

with the offender...”. “Dealing” is a present participle, suggesting that the power to make a SHPO would be exercised contemporaneously with sentence. It was also the experience of the court that SHPOs on conviction were invariably made at the same time as sentence was imposed”

“65. The same point arises in relation to section 401 of the Sentencing Code, which provides that a court sentence for an offence includes any order made by the court “*when dealing with the offender*”.

6. The district judge stated that he relied on the fact that there was no express power in section 345 of the Sentencing Code or elsewhere to adjourn consideration of the SHPO until a date after sentence. He further concluded that section 10(3) of the Magistrates’ Court Act 1980 (“the 1980 Act”) conferred power to adjourn for inquiries following conviction but not after sentence. He also noted that section 10(3) limits the length of any adjournment to a period of four weeks if the offender is on bail or three weeks if he is remanded in custody. Here, the justices had adjourned for a period of nine weeks.
7. The district judge asked the following two questions of law or jurisdiction for the opinion of the High Court, namely:

“Q1. Was I correct to find that there is no legal power for a magistrates’ court to sentence an offender and then adjourn, to a later date, consideration of an application for a sexual harm prevention order, pursuant to section 345 of the Sentencing Code?”

“Q.2 In the circumstances, was I correct to dismiss the prosecution’s application for a sexual harm prevention order?”

THE LEGAL FRAMEWORK

8. Section 345(1) of the Sentencing Code provides as follows:

“345 Sexual harm prevention order: availability on conviction

(1) Where a person is convicted of an offence listed in Schedule 3 or 5 to the Sexual Offences Act 2003 (sexual offences, and other offences, for the purposes of Part 2 of that Act), the court dealing with the offender in respect of the offence may make a sexual harm prevention order.”

9. Section 346 of the Sentencing Code provides that:

“346 Exercise of power to make sexual harm prevention order

Where a sexual harm prevention order is available to a court, the court may make such an order only if satisfied that 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 offender, or
 - (b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.
10. There are definitions of the meaning of “sexual harm” and provisions governing what matters must or may be specified in a SHPO (see sections 344 and 346 to 348A) of the Sentencing Code. There is provision in section 350 governing variations, renewal and discharge of an SHPO. Part 31 of the Criminal Procedure Rules (Crim PR) contain provisions governing the making of applications for SHPOs and other behavioural orders.
 11. Section 401 of the Sentencing Code defines “sentence” in the Code as including “any order made by a court when dealing with an offender in respect of the offence”
 12. Section 10(1) of the 1980 Act provides that a magistrates’ court may at any time adjourn the trial. Section 10(3) provides as follows in relation to the exercise of that general power that:
 - “(3) A magistrates' court may, for the purpose of enabling inquiries to be made or of determining the most suitable method of dealing with the case, exercise its power to adjourn after convicting the accused and before sentencing him or otherwise dealing with him; but, if it does so, the adjournment shall not be for more than 4 weeks at a time unless the court remands the accused in custody and, where it so remands him, the adjournment shall not be for more than 3 weeks at a time.”

THE APPEAL AND THE SUBMISSIONS

13. Mr Atkinson K.C. on behalf of the appellant submitted that the magistrates’ court was still dealing with the offender both at the time that it adjourned the application for a SHPO on 2 March 2022 and when that matter came before the court on 6 May 2022. Nothing in the wording of section 345, or any other provision, of the Sentencing Code, deprived the court of power to adjudicate on that application. Section 10(3) of the 1980 Act conferred a power to adjourn consideration of the application. In those circumstances, he submitted that this court should answer the first question stated by the district judge in the negative and state that the district judge was not correct to find that there was no legal power for a magistrates’ court to sentence and adjourn, to a later date, consideration of the application for a SHPO. Mr Atkinson further submitted that the district judge was not correct to dismiss the application but should have dealt with it on its merits.
14. Mr Charlesworth did not appear or make submissions at the hearing of the appeal. In September 2022, his former solicitors advised that they were no longer instructed in the appeal. A police officer, having first confirmed with Mr Charlesworth his address and e-mail address, sent the appeal papers and a covering letter to Mr Charlesworth. The respondent subsequently sent a text message confirming receipt of those papers. Further documents were sent on two occasions by recorded delivery to Mr

Charlesworth's home. Those included a copy of the letter from the Court Office confirming the date and time of the hearing. I have no doubt that Mr Charlesworth would have been aware of this hearing and could have taken part had he chosen to do so.

DISCUSSION

15. The starting point, in my judgment, is the scope of the statutory provisions governing the power to make a SHPO. The condition that must be satisfied if the court is to have jurisdiction to make a SHPO is contained in section 345 of the Sentencing Code. The condition is that the offender "is convicted of an offence listed in Schedule 3 or 5 to the Sexual Offences Act 2003" (see section 345(1) of the Sentencing Code). Provided that that is the case, the court dealing with the offender has the power to make a SHPO. The reference to "dealing with an offender" in section 345(1) does not impose a further, temporal precondition which must be satisfied before the power to make a SHPO exists. In other words, the subsection, properly interpreted, does not require that the court make the SHPO at the same time that it imposes any substantive sentence, such as a sentence of imprisonment, on the offender. Rather, it is simply providing that the court which is dealing with the offender in respect of the offence is the court which has power to make a SHPO. Further, the court may only make such an order if it is necessary for one of the purposes in section 346 of the Sentencing Code.
16. In the present case, the magistrates' court decided at the hearing on 2 March 2022 to impose a suspended sentence of imprisonment and also to adjourn consideration of the application to make the SHPO. There is nothing in section 345 of the Sentencing Code which expressly or impliedly restricts the ability of the magistrates' court to proceed in that way. Indeed, on my analysis of the provision, there is nothing in section 345 of the Sentencing Code which would prevent consideration of an application for a SHPO even if that had first been made after the sentence of imprisonment had been imposed. Whether or not it would have been appropriate to make an order in such circumstances may, of course, be a different matter.
17. Furthermore, section 10(3) of the 1980 Act does provide a power to adjourn consideration of the making of an SHPO. That subsection provides, in effect, that the magistrates' court's power under section 10(1) to adjourn at any time includes power to adjourn "after convicting the accused" and "before sentencing him or otherwise dealing with him". The purpose for which the power may be exercised is for "enabling enquiries to be made or of determining the most suitable method of dealing with the case". The power to adjourn may be exercised after conviction but before otherwise dealing with the offender, e.g. before making a SHPO, if that is not part of the sentence for these purposes, or alternatively as part of the sentence if it is to be treated as such by reason of section 401 of the Sentencing Code. Making inquiries about whether a SHPO was necessary and appropriate would be exercising the power to adjourn for the purpose of enabling inquiries to be made or, alternatively, for determining the most suitable method of dealing with the case (which, in context, must include the most suitable way of dealing with the offender post-conviction).
18. It is correct that section 10(3) of the 1980 Act provides that the adjournment shall not be for more than four weeks (although there could be further adjournments as appears from the words of section 10(3) which provides that an adjournment should not be for

more than four weeks “at a time”) and the adjournment here was for 9 weeks. The question then is whether “the intention of the legislature was that any act done following that procedural failure should be invalid” (see paragraph 3 of the decision of the Court of Appeal (Criminal Division) in *R v Ashton* [2007] 1 WLR 181 and see also *R v Adams* [2022] 2 Cr. App.R. (S) 3 at paras. 35 to 40 and *R v Ashford* [2020] EWCA Crim 673). I am satisfied that the intention of the legislature in enacting section 10(3) was not to invalidate any act if, for some reason, a magistrates’ court adjourned a case for longer than four weeks. The real question is whether it would be unjust to continue to proceed with the case given the procedural failure that had occurred. That will involve considering the wider interests of justice and whether there is a risk of injustice to the defendant or the prosecution if the proceedings continue: see *R v Ashton* at paragraph 5.

19. Here, the wider interests of justice do involve permitting consideration of whether a SHPO should be made. Such orders can only be made if they are necessary to protect the public or particular members of the public, or children or vulnerable adults from sexual harm (see section 346 of the Sentencing Code). It is in the interests of justice to enable a magistrates’ court to consider that issue following a conviction of a person for making indecent images of children. There is no prejudice to the defendant here. The reason why the matter could not be dealt with on 2 March 2022 was because Mr Charlesworth opposed the making of the order. It was in his interests to adjourn to enable him to have further time to consider the matter and prepare the arguments that he wished to put forward as to why an order should not be made. No prejudice would occur at the ultimate hearing of the application before the magistrates’ court as Crim PR 31.2(1) provides that a court must not make a behaviour order such as a SHPO unless the person to whom it is directed has had the opportunity to consider and to make representations at a hearing (whether or not that person in fact attends). It would, however, prejudice the prosecution if the application for a SHPO could not have been considered at the hearing on 6 May 2022 or later. Any application that they made under section 103A(3) of the Sexual Offence Act 2003 could only be based on conduct occurring after conviction. In all the circumstances, therefore, the correct course of action would have been to continue consideration of the application to make the SHPO at the hearing on 6 May 2022.
20. In the circumstances, therefore, the magistrates’ court was entitled to adjourn consideration of the application for a SHPO. The fact that the adjournment was for longer than four weeks would not invalidate all subsequent proceedings. It was open to the magistrates’ court to consider making a SHPO on 6 May 2022.
21. The interpretation of section 345 of the Sentencing Code that I consider to be correct is consistent with the decision of the Court of Appeal (Criminal Division) in *R v Adams* [2022] 2 Cr App. R. (S) 3. There, the Court was dealing with an application for a serious crime prevention order (“SCPO”). Section 19 of the Serious Crime Act 2007 (“the 2007 Act”) provides that the Crown Court may make a SCPO where it is “dealing with a person” who has been convicted of a serious offence. Section 36 of the 2007 Act provides an express power to adjourn any proceedings relating to a SCPO even after sentencing the person concerned. In *Adams*, the person was sentenced on 21 July 2017 for an offence of conspiracy to conceal criminal property and related offences. Confiscation proceedings were completed on 27 February 2020. It was not until 5 March 2020 that the prosecution notified the court that it intended to

apply for a SCPO and the application was made on 1 September 2020. At that time, the Crown Court had sentenced the person concerned and was no longer dealing with confiscation proceedings as they had concluded.

22. The Court held that the underlying intention of section 19 of the 2007 Act was to enable an offender to be dealt with for all relevant matters arising out of his conviction for a serious offence by a court. Viewed in that light, as the Court held at paragraph 52:

“... neither section 19(1)(a) & (b) of the Act, nor the combinations of section 19(1) & (2), provide, (whether explicitly or implicitly) any temporal restriction on when an application for an SCPO may be made”.

And later at paragraph 57:

“...The fact that the Crown Court had completed dealing with the appellant in relation to sentence and confiscation by 1 September 2020 did not render it functus officio in relation to the application for an SCPO, which was governed by the freestanding procedural provisions to which we have referred. Nor did s.19 of the Act provide a jurisdictional time limit in relation to the making of such applications. Likewise, for the reasons set out above, we respectfully disagree with HHJ Robinson's conclusion that s.19 requires that the court must still be otherwise dealing with an offender when an application for an SCPO is made.”

23. Finally, for completeness, nothing in this judgment should be read as encouraging prosecutors to defer making an application for a SHPO or courts to adjourn such applications until after a substantive sentence is imposed. It is generally preferable that a court should pass any substantive sentence of imprisonment or a community sentence, and make any behavioural order such as a SHPO, on the same occasion. That is likely to avoid the risk, for example, of dealing with offenders in a way which, overall, is disproportionate. Further, that accords with case law governing the making of such orders and the intention underlying the provisions in Part 31 Crim P.R. governing the making of such orders, including 3.1(5) which requires prosecutors to serve a notice of intent to apply for such an order not less than two business days before the hearing at which the order may be made. Further, prosecutors should not assume that a court will be prepared to adjourn any application for a SHPO to, or to consider any such application at, a later date after the substantive sentence is imposed. Nonetheless, as a matter of law, the magistrates' court has the power in an appropriate case to consider making a SHPO after it has imposed a substantive sentence such as a sentence of imprisonment.

CONCLUSION

24. For those reasons, I would answer the two questions as follows:

Q1. The district judge was not correct to find that there was no legal power for a magistrates' court to sentence an offender and

then adjourn, to a later date, consideration of an application for a sexual harm prevention order, pursuant to section 345 of the Sentencing Code.

Q.2 The district judge was not correct in the circumstances of this case to dismiss the prosecution's application for a sexual harm prevention order and should have proceeded to consider that application on its merits.

25. I would quash the dismissal of the application for a SHPO and remit the matter to the magistrates' court to determine whether to make such an order and, if so, to fix the terms of that order.

LINDEN J.

26. I agree.