



Neutral Citation Number: [2018] EWCA Crim 2825

Case No: 2018/00035

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CROWN COURT AT CARDIFF
HHJ LLOYD CLARKE
S20170518

Sitting in the Crown Court at Swansea

Date: 18/12/2018

Before:

THE RIGHT HONOURABLE THE LORD BURNETT OF MALDON
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES

THE HONOURABLE MR JUSTICE LEWIS

and

SIR RODERICK EVANS

Between:

SHAUN RAWLINSON

Appellant

- and -

THE CROWN

Respondent

Mr James Evans (instructed by **Lloyd and Rowe Solicitors**) for the **Appellant**
Mr Paul Jarvis (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 5 December 2018

Approved Judgment

Lord Burnett of Maldon CJ:

1. This appeal raises the following issues:
 - 1) The applicant was sentenced to a conditional discharge for three years on 9 January 2015 for an offence of exposure contrary to section 66 of the Sexual Offences Act 2003 (“the 2003 Act”). Did he become subject to the notification requirements under Part 2 of the 2003 Act at that time?
 - 2) In July 2017 he was sentenced to three years imprisonment for a drugs offence. He was resentenced for the exposure offence and sentenced to two months’ imprisonment (to be served concurrently) having breached the conditional discharge. Did the applicant become subject to the notification requirements and, if so, from what date did those notification requirements apply?
 - 3) In December 2017 the Crown Court issued a certificate pursuant to section 92 of the 2003 Act confirming his conviction. Does the Court of Appeal (Criminal Divisional) have jurisdiction to hear an appeal against either the notification requirements or the certificate?
 - 4) Should the appeal against the sentence of two months’ imprisonment be allowed?
 - 5) If so what, if any, are the consequences for the notification requirements and the certificate?
2. The application for permission to appeal was referred by the Registrar to the full court. We heard the application on 5 December 2018. At the end of the argument we announced our decision. We granted leave to appeal. We allowed the appeal and quashed the concurrent sentence of two months’ imprisonment and imposed no further sentence. There was no jurisdiction to hear an appeal against either the notification requirements which, as we will explain, arose by operation of law when the appellant was resentenced, or the certificate.
3. These are our reasons.

The facts in more detail

4. On 9 January 2015, in the Cardiff and Vale of Glamorgan Magistrates’ Court the appellant, Shaun Rawlinson, who was then 18, pleaded guilty to one offence of exposure contrary to section 66 of the 2003 Act.
5. At about 23.30 on 15 November 2014, he walked past his 50 year old victim, and her friend. There was an argument between the victim and the appellant. The victim shouted at the appellant and said he was acting like a girl. The appellant said he was not a girl, pulled his trousers and underwear down, exposed his penis and moved his hips back and forth. He then exposed his naked bottom to the victim. The victim was distressed and disgusted at what had happened to her. The offence did not entail what might be described as the usual sexual element. It was a childish reaction to what the appellant saw as an insult. He had previous convictions for disorderly behaviour and for using threatening or abusive words both. He also had a conviction for wounding for

- which he had received a suspended sentence. It was varied to a short sentence in a young offender institution, although we know nothing of the circumstances.
6. The magistrates made a conditional discharge order for three years, no doubt taking the view that this was a stupid piece of behaviour, rather than anything overtly sexual. They might have taken a more serious course. But provided the appellant did not commit any further offence within three years, the effect of the order would be that he would not be punished for that offence.
 7. On 24 July 2017, having pleaded guilty to an offence of possession of a class A drug with intent to supply, the appellant was sentenced by the Crown Court at Cardiff to three years' imprisonment. There is no appeal against that sentence. Having committed an offence during the term of the conditional discharge, the appellant was re-sentenced to two months' imprisonment for the offence of exposure, to be served concurrently with the sentence for the drugs offence.
 8. In November 2017, an employee of the South Wales Police wrote to the Crown Court expressing her opinion that the statutory notification requirements for those convicted of sexual offences applied to the appellant. On 6 December 2017, at a further hearing, the Crown Court judge informed the appellant that he should have been told at the hearing in July 2017 that, as a consequence of the conviction for a sexual offence, the notification requirements of Part 2 of the 2003 Act applied. They required him to notify the police of his address and other prescribed details for a period of seven years.
 9. On 6 December 2017, a certificate was issued under section 92 of the 2003 Act in respect of an offence described as "Exposure (Sexual Offences Act 2003 S66)". It certified that the date of conviction was 9 January 2015, and the words "Re-sentenced 24.07.17 at Cardiff Crown Court" were entered against the box marked "date of sentence if different". The total sentence imposed was said to be "Conditional discharge for 3 years – Resentenced to 2 months imprisonment". That certificate was issued by an officer of the Crown Court who certified as follows:

"I hereby certify that the above-named defendant was on the above date convicted in respect of the above sexual offence(s) to which the notification requirements provided for by Part 2 of the Sexual Offences Act 2003 apply and that the court so stated in open court on that date".
 10. The certificate had on its reverse a notice (not forming part of the certificate itself) headed "Notice of requirement to register with the police". It contained a summary of the statutory notification requirements and a warning that failure, without reasonable excuse, to comply with the requirements is an offence. It said that "these requirements apply to you from the date of conviction for a period of 7 years". That echoes the words of the statute but, as we shall see, for the purposes of the notification requirements which arise under the 2003 Act the date of conviction, for these purposes, can be the date upon which the sentence which gives rise to the requirements was imposed.

These proceedings

11. The appellant applied for leave to appeal against the notification requirements contending that they did not apply in cases where a person was re-sentenced to imprisonment on breach of a conditional discharge. He sought to challenge the certificate. The appellant also challenged the sentence of two months' imprisonment as manifestly excessive.

The Statutory Provisions

12. The provisions governing notification requirements are contained in Part 2 of the 2003 Act. Section 80 provides:

“80 Persons becoming subject to notification requirements

(1) A person is subject to the notification requirements of this Part for the period set out in section 82 (“the notification period”) if–

- (a) he is convicted of an offence listed in Schedule 3;
- (b) he is found not guilty of such an offence by reason of insanity;
- (c) he is found to be under a disability and to have done the act charged against him in respect of such an offence; or
- (d) in England and Wales or Northern Ireland, he is cautioned in respect of such an offence.”

13. Schedule 3 lists over 90 offences from which notifications requirements arise by operation of the statutory scheme. Paragraph 33 governs offences of exposure under section 66:

“An offence under section 66 of this Act (exposure) if–

- (a) where the offender was under 18, he is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months;
- (b) in any other case–
 - (i) the victim was under 18, or
 - (ii) the offender, in respect of the offence or finding, is or has been–
 - (a) sentenced to a term of imprisonment,
 - (b) detained in a hospital, or
 - (c) made the subject of a community sentence of at least 12 months.”

14. The notification period is specified in the table set out in section 82 of the 2003 Act. The notification period is linked to the sentence imposed. In the case of a person over

18 who is sentenced to imprisonment for a term of six months or less, the notification period is a period of seven years:

“82 The notification period

- (1) The notification period for a person within section 80(1) or 81(1) is the period in the second column of the following Table opposite the description that applies to him.

Description of relevant offender	Notification period
A person who, in respect of the offence is or has been sentenced to imprisonment for life or for a term of 30 months or more	An indefinite period beginning with the relevant date
A person who, in respect of the offence, has been made the subject of an order under section 210F(1) of the Criminal Procedure (Scotland) Act 1995 (order for lifelong restriction)	An indefinite period beginning with that date
A person who, in respect of the offence or finding, is or has been admitted to a hospital subject to a restriction order	An indefinite period beginning with that date
A person who, in respect of the offence, is or has been sentenced to imprisonment for a term of more than 6 months but less than 30 months	10 years beginning with that date
A person who, in respect of the offence, is or has been sentenced to imprisonment for a term of 6 months or less	7 years beginning with that date
A person who, in respect of the offence or finding, is or has been subject to a restriction order	7 years beginning with that date
A person which section 80(1)(d)	2 years beginning with that date
A person in whose case an order for conditional discharge or, in Scotland, a probation order, is made in respect of the offence	The period of conditional discharge or, in Scotland, the probation period
A person of any other description	5 years beginning with the relevant date

...

(6) In this Part, “relevant date” means—

(a) in the case of a person within section 80(1)(a) or 81(1)(a), the date of the conviction;

(b) in the case of a person within section 80(1)(b) or (c) or 81(1)(b) or (c), the date of the finding;

(c) in the case of a person within section 80(1)(d) or 81(1)(d), the date of the caution;

(d) in the case of a person within section 81(7), the date which, for the purposes of Part 1 of the Sex Offenders Act 1997 (c. 51), was the relevant date in relation to that person.”

15. The notification requirements are contained in sections 83 to 89 of the 2003 Act. The offender must within three days notify the police of various matters such as his name, home address, and the address of other premises at which he regularly resides or stays, date of birth, national insurance number etc. The obligations include notifying the police of any change in the specified information. Section 91 of the 2003 Act provides that it is a criminal offence to fail, without reasonable excuse, to notify in accordance with the requirements of the relevant sub-sections of sections 83 to 85, 87 and 89 of the 2003 Act.

16. Section 92 of the 2003 Act provides for certificates as evidence of a conviction. The section provides so far as material:

“92 Certificates for purposes of Part 2

(1) Subsection (2) applies where on any date a person is—

(a) convicted of an offence listed in Schedule 3;

(b) found not guilty of such an offence by reason of insanity;
or

(c) found to be under a disability and to have done the act charged against him in respect of such an offence.

(2) If the court by or before which the person is so convicted or found—

(a) states in open court—

(i) that on that date he has been convicted, found not guilty by reason of insanity or found to be under a disability and to have done the act charged against him, and

(ii) that the offence in question is an offence listed in Schedule 3, and

(b) certifies those facts, whether at the time or subsequently, the certificate is, for the purposes of this Part, evidence (or, in Scotland, sufficient evidence) of those facts.

(3) Subsection (4) applies where on any date a person is, in England and Wales or Northern Ireland, cautioned in respect of an offence listed in Schedule 3.

(4) If the constable—

(a) informs the person that he has been cautioned on that date and that the offence in question is an offence listed in Schedule 3, and

(b) certifies those facts, whether at the time or subsequently, in such form as the Secretary of State may by order prescribe, the certificate is, for the purposes of this Part, evidence (or, in Scotland, sufficient evidence) of those facts.”

17. The general scheme of the 2003 Act is to link the period of the notification requirements that attach to a specific offence to the type and length of sentence. The consequence is that if notification requirements arise they can apply for the period of a conditional discharge, two, five, seven or ten years or indefinitely (the last subject to review). But there are some offences in respect of which notification requirements arise only if the sentence imposed crosses a threshold. Exposure in an example. Section 132 of the 2003 Act deals with offences which are listed in schedule 3 to the 2003 Act but for which the notification requirements only arise if a sentence of a particular type is imposed:

“132 Offences with thresholds

(1) This section applies to an offence which in Schedule 3 is listed subject to a condition relating to the way in which the defendant is dealt with in respect of the offence or (where a relevant finding has been made in respect of him) in respect of the finding (a “sentencing condition”).

(2) Where an offence is listed if either a sentencing condition or a condition of another description is met, this section applies only to the offence as listed subject to the sentencing condition.

(3) For the purposes of this Part (including in particular section 82(6))—

(a) a person is to be regarded as convicted of an offence to which this section applies, or

(b) (as the case may be) a relevant finding in relation to such an offence is to be regarded as made, at the time when the sentencing condition is met.”

Issue One: Did the notification requirements arise when the appellant was sentenced to a conditional discharge?

18. It is common ground that the appellant was not subject to the notification requirements on his conviction and sentence for exposure in January 2015. The notification requirements apply on conviction for an offence listed in schedule 3 to the 2003 Act. The relevant paragraph is paragraph 33. That provides that the notification requirements apply in the case of an offender aged 18 or over (as was the appellant) if he is convicted of exposure contrary to section 66 of the Act 2003 and either (a) the victim was under 18 (not the case here); or (b) if the offender was dealt with in a particular way, i.e. sentenced to a term of imprisonment, detained in a hospital or made the subject of a community sentence of at least 12 months. The appellant was not dealt with in any of those ways on conviction in January 2015. He was subject to a conditional discharge. At that date, therefore the notification requirements did not apply as he had not been convicted of an offence listed in schedule 3 to the 2003 Act.

Issue Two. Did the reporting requirements arise when the appellant was re-sentenced to two months’ imprisonment?

19. The appellant was subject to an order for conditional discharge and then convicted in the Crown Court of another offence (the drugs offence) committed during the period of conditional discharge. The Crown Court was entitled to deal with the appellant for the exposure offence in any way in which the Magistrates’ Court could have dealt with him: section 13(7) of the Powers of the Criminal Courts (Sentencing) Act 2000.
20. In our judgment, the effect of sentencing the appellant to a term of imprisonment for exposure was that the notification provisions of Part 2 of the 2003 Act then applied to him, and from that date. These conclusions follow from the terms of section 132 of the 2003 Act, read with sections 80 and 82. Section 132(1) provides that it applies to an offence listed in Schedule 3 to the 2003 Act which is subject to a condition relating to the way in which the defendant is dealt with (described as the “sentencing condition”). The offence of exposure is such an offence as it is listed in Schedule 3 subject to a sentencing condition.
21. Section 132(3) of the 2003 Act then provides that, for the purposes of Part 2 of the 2003 Act (which deals with the notification requirements), a person is to be regarded as convicted of an offence to which section 132 applies “at the time when the sentencing condition is met”. Section 80(1)(a) makes a person subject to the notification requirements “if he is convicted of an offence listed in Schedule 3”. He was not convicted for these purposes until the sentence of imprisonment was imposed in the Crown Court.
22. The notification period provisions in section 82 provide that the period begins with “that date” or “the relevant date”. The reference to “that date” in the second column of the table is to the date of the event referred to in the first column. A person

sentenced to less than six months' imprisonment is subject to the notification requirements for seven years from "that date", i.e. the date on which he was sentenced. Had he been re-sentenced to a community sentence of at least 12 months (an alternative sentencing condition in paragraph 33 of Schedule 3) then he would have been a "person of any other description" and subject to notification requirements for five years from the "relevant date". By virtue of section 82(6) read with section 132 that too would have been the date of re-sentence.

23. For completeness, we note that the reference in section 82 to "has been sentenced" is necessary to cover those formerly subject to the notification requirements of Part 1 of the Sex Offenders Act 1997: see section 81.
24. We note that the certificate (quoted above) issued under section 92 of the 2003 Act is unclear about the date from which the notification requirements run. It refers to date of the conviction as being 9 January 2015 and the date of sentence as being 24 July 2017. It says that "on the above date" the defendant was convicted of the relevant sexual offence and is subject to the notification requirements. That is correct. However, that description begs the question of when the period began. The certificate (and notice on the reverse) appears to be a pro forma in general use. As currently drafted it does explicitly not cater for cases where the sentencing condition is met after the original date of conviction or even make clear that the period may start, as it does in many cases, when the sentence is imposed. It would benefit from some clarification.

Issue Three. The jurisdiction of the Court of Appeal (Criminal Division)

25. The notification requirements apply by operation of the provisions of section 80 of the 2003 Act. They do not require any order or ruling by the court. If a person is convicted in circumstances falling within section 80, then the notification requirements apply for the notification period set out in section 82: see *R v Longworth* [2006] 1 W.L.R. 313 at [14] dealing with the analogous provisions of the previous regime.
26. An appeal does not lie against the statutory application of the notification requirements.
27. There are limited circumstances in which an appeal is possible, namely where a judge purports to give a ruling determining whether the notification requirements apply to a particular case. If, however, the sentencing court does no more than inform the offender of any notification requirements (as required by rule 28.3 of the Criminal Procedure Rules) that does not in itself amount to a ruling capable of being appealed: see *R v Longworth* [2006] 1 W.L.R. 320 at [20] and [32].
28. In the present case, the sentencing judge made no ruling in relation to the application of the notification requirements when sentencing the applicant in July 2017. They followed by operation of law. But in any event, her understanding of them was correct. When the matter came back before her in December 2017 following the communication from the police, the sentencing judge heard argument about whether and when the notification regime applied. She then authorised the issuing of the certificate because she was satisfied that it did.

29. There was no ruling of the sort canvassed in *Longworth* which could found an appeal. Rather, the judge was simply informing the appellant of the consequences of him being sentenced to a custodial term.
30. The certificate is not part of the sentence. It records the fact of conviction and may be used as evidence in any subsequent proceedings for an alleged breach of the requirements. A similar certificate may be issued by the police following a caution. The Court of Appeal does not have jurisdiction to hear an appeal from the certification of the facts identified in section 92. Such a certificate could be challenged in judicial review proceedings if it was wrongly issued. For an example of that see *R v George* [2018] 2 Cr. App. R. (S) 10. The Crown Court issued a certificate stating that the offender had been convicted of an offence to which notification requirements attached, namely distributing an indecent photograph of a child contrary to Section 1(1)(b) of the Protection of Children Act 1978. The offence is committed if an indecent photograph of a child *under 18* is distributed, but notification requirements arise only if the child is *under 16*. That condition was not satisfied and so no notification requirements arose under the 2003 Act. The certificate should not have been issued. There was no appeal against the certificate, but the court reconstituted itself as a Divisional Court, and quashed it.

Issue four. The appeal against sentence

31. Mr Evans submitted that the sentence of imprisonment was manifestly excessive. The offending in 2015 did not pass the custody threshold. Despite the sentence being concurrent, for the reasons we have given, the practical effect of its being quashed would be to relieve the appellant of the reporting requirements. They are not, of course, an additional form of punishment and are left out of account when deciding on sentence: *AG's ref (No. 50 of 1997)* [1998] 2 Cr. App. R. (S) 155.
32. We have summarised the facts of the exposure offence. Having regard to the Sentencing Council's Definitive Guideline on Sexual Offences, this offence of exposure was a category 3 offence within the relevant guideline as there was no raised harm and no raised culpability. The starting point would be a medium level community order with a range from a fine to a high-level community order. There were aggravating factors, namely the previous convictions, the fact the offence was committed at night and that two people were present. Those factors can justify an upward adjustment and, in appropriate circumstances, justify moving the offence into category 2 where the starting point is a high-level community order and the range is from a medium level community order to 26 weeks' custody.
33. In the present case, we do not consider that this offence crossed the custody threshold. It was a childish, stupid act which caused distress to others. There does not appear to have been any sexual motivation or sexual gratification involved. The offence would not itself have been so serious as to have merited a custodial sentence, notwithstanding the aggravating features that were present. In the circumstances, the sentence of two months' imprisonment is manifestly excessive. If this matter had stood alone, the likelihood is that a fine or a community sentence would have been appropriate. But the case is not now suitable for either additional sentence given that the applicant is in custody. For that reason, we impose no additional penalty.

Issue five. The consequences for the notification requirements and the certificate

34. As a result of the custodial sentence being quashed, the notification provisions in Part 2 of the 2003 Act do not apply. The appellant is not convicted of an offence listed in paragraph 33 of Schedule 3 to the 2003 Act as the condition that he be subjected to a custodial sentence (or a community sentence of 12 months) has not been satisfied.
35. So far as the certificate is concerned, both Mr Evans and Mr Jarvis, for the respondent, invited us to reconstitute ourselves as a Divisional Court to hear an application for judicial review with a view to quashing the certificate issued under section 92. We do not consider that to be appropriate.
36. The position is that the certificate is evidence that the appellant was convicted of exposure, an offence listed in Schedule 3: see section 92(2) of the 2003 Act. When the certificate was issued it accurately recorded the fact that the appellant had been convicted of exposure and that the offence was listed in Schedule 3 because the sentencing condition was satisfied. In public law terms (unlike *George*) there was no legal error made in issuing the certificate. There will be innumerable cases which come before the Court of Appeal, either as sentence appeals or convictions appeals, where certificates have been issued and where appeals succeed. Equally, there will be cases in which a certificate is issued by a Magistrates' Court and an appeal succeeds in the Crown Court. Absent a public law failing, in neither circumstance is there any basis upon which it becomes necessary to quash the certificate, in the former case by the Court of Appeal reconstituting itself as a Divisional Court, or in the latter embarking upon separate judicial review proceedings. That is because allowing an appeal does not result in the conclusion that the certificate was unlawfully issued.
37. The purpose of the certificate is to provide evidence in breach proceedings that at the time of alleged breach the person concerned was subject to reporting requirements. It is not conclusive evidence. Mr Evans and Mr Jarvis were concerned that the existence of the certificate might cause confusion in subsequent years. They hypothesised that a police officer who became aware of a certificate in a case where there had been a subsequent successful appeal, of which he was unaware, might arrest the person concerned and seek to initiate a prosecution. We should say that there was no suggestion that anything of the sort had in fact happened in the 14 odd years since the 2003 Act came into force. That is hardly surprising. The result of a successful sentence appeal would be recorded on the Police National Computer; and if a conviction appeal were allowed the conviction would not appear. The person concerned would know the position and would have an order of this court (or the Crown Court) and perhaps a written judgment. In a case such as this, where the certificate was sought at the instigation of the police, no doubt the appellant's advisers could take the precaution of letting the force have a copy of this court's order. But there is no warrant to embark on judicial review proceedings.

Conclusions

38. The appellant became subject to the reporting requirements of the 2003 Act when he was re-sentenced to a term of imprisonment for the offence of exposure. The seven year period for reporting arose at that time, and did not run from the date, over two years before, when he was originally convicted. No reporting requirements arose when he was originally sentenced to a conditional discharge. As a result of allowing

the sentence appeal and quashing the term of imprisonment for the exposure offence, the reporting requirements fall away. There is no appeal against the certificate issued under section 92 of the 2003 Act. Had there been a public law error in issuing the certificate it would have been vulnerable to being quashed in judicial review proceedings. But, there was no such error.