

Neutral Citation No. [2019] EWCA Crim 2480

No: 201900682/A2

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 28 November 2019

B e f o r e:

LORD JUSTICE DAVIS

MR JUSTICE JEREMY BAKER

RECORDER OF PRESTON

(HIS HONOUR JUDGE BROWN QC)

(Sitting as a Judge of the CACD)

R E G I N A

v

AB

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Mr H Gray appeared on behalf of the **Applicant**

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

Mr Justice Jeremy Baker

1. On 25 March 2016, in the Crown Court at Manchester (Minshull Street), AB pleaded guilty to an offence of child abduction, contrary to section 2(1) (b) of the Child Abduction Act 1984.
2. Following a series of adjourned hearings in the Crown Court, on 29 January 2016 a sexual harm prevention order was imposed upon him until further order, pursuant to section 103A of the Sexual Offences Act 2003 in the following terms:

“1. Having contact either directly or indirectly, including online, with any child under 18 years old except for:

- a. Normal, incidental and not reasonably avoidable in the course of lawful day to day life or.
- b. With the express written approval of Social Services for the area where the defendant is residing.

2. Being present in a place of residence ('place of residence' to include any building that is a dwelling, a hotel a bedroom or hostel bedroom, vehicle, vessel, tent or movable structure) where there is also a child under 18 years present except:

- a. Where the presence of the child inside the place of residence has been expressly approved in writing by Social Services for the area where the place of residence is.

3. Entering an area within 50 metres of any school, nursery or designated play area designed for the use of enjoyment of persons under the age of 16 years unless:

- a. The defendant is traveling on a road, railway, subway or waterway.
- b. Is in transit in or on a mechanically propelled vehicle; and

c. Remains within the excluded area for no longer than is reasonably necessary to reach the destination.

4. Taking up employment paid/unpaid (includes self-employment/voluntary work) that will bring him into regular contact with children under 18 years.

5. Residing at any address without prior approval of his Police Offender Manager."

3. The effect of the imposition of the sexual harm prevention order for an indefinite period was that by virtue of section 103G(2) of the Sexual Offences Act 2003, AB was also required to comply with the notification provisions of Part 2 of the Act for an indefinite period.
4. On 1 March 2016 AB was made the subject of a 12-month community order with two conditions, namely a supervision requirement for 12 months and a residence requirement for 6 months.
5. Although the child abduction offence had been committed during the operational period of a suspended sentence order of 4 months' imprisonment suspended for a period of 12 months imposed by the Magistrates' Court on 8 May 2014 in respect of an offence of witness intimidation, no action was taken in respect of it.
6. AB's application for an extension of time (1089 days) in which to apply for permission to appeal against the sexual harm prevention order has been referred to the Full Court by the single judge.
7. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 apply to this case and no matter may be published which would lead members of the public to identify the child complainant involved in these proceedings.

Circumstances of the offence

8. On 22 September 2014 the complainant's mother had left her 17-month-old daughter downstairs in her home in Oldham whilst she went upstairs to pack a bag. When she returned downstairs she discovered that her daughter was not there and the front door was slightly ajar. She went outside, where a young girl informed her that she had seen a male enter her home and then exit from it with her daughter in his arms, whereupon he entered the next-door house.
9. The complainant's mother went to the next-door house (where the applicant's own mother lived) and saw the applicant inside with her daughter in his arms. The daughter was extremely distressed and the applicant had his hand over her mouth to stop her screaming. The complainant's mother banged on the window which caused the applicant to go to the rear of the house. The complainant's mother ran back inside her own home and through to the rear where she was able to access the backyard of the neighbouring house, where she found the applicant with her daughter still in his arms. A struggle ensued between them, in the course of which the applicant told the complainant's mother that her daughter had walked into his mother's house. However, when the complainant's mother informed the applicant that she was going to call the police, he let go of her daughter and ran away.
10. As a result of the incident the 17-month-old child suffered a small scratch to the side of her face and small bruises to her cheeks. The applicant was arrested by the police later that day and made "no comment" in interview.

The grounds of appeal

11. No appeal against sentence was instigated by the applicant's original legal team. Indeed,

it was only when, on 18 December 2018, other counsel was representing the applicant at the same Crown Court in respect of an offence relating to an admitted failure to comply with the terms of the sexual harm prevention order, arising from his relationship with an adult female who had two young children whom he visited between April and June 2018, that concerns were raised as to the lawfulness of the original sexual harm prevention order and it was decided to seek permission to appeal.

12. It is correct to note that prior to this recent conviction which, following the applicant's remand in custody for a period of 8 weeks, was dealt with by the imposition of a 3-year community order, with a requirement to complete the Sex Offender Treatment Programme, the applicant had been convicted by the Greater Manchester Magistrates' Court of an admitted failure to comply with the notification requirements, contrary to section 91(1)(a) of the Sexual Offences Act 2003, as a result of which he was fined on 2 October 2018.
13. The grounds of appeal seek to question both the lawfulness of the imposition of the sexual harm prevention order and, in the alternative, the extent of its conditions.
14. In relation to the question of its legality, although it is acknowledged that the offence of child abduction is an offence listed under schedule 5 of the Sexual Offences Act 2003, and therefore one in relation to which section 103(2)(a)(i) of the 2003 Act applies, it is submitted that the court either did not determine or ought not to have determined that it was satisfied that it was necessary to make a sexual harm prevention order for the purpose of protecting the public or any particular members of the public from sexual harm from the applicant as was necessary under section 103(2)(a)(ii) of the 2003 Act so as to enable the court to lawfully impose such an order.
15. In the alternative it is submitted that, bearing in mind the guidance provided by this court

in *R v Smith* [2011] EWCA Crim 1772 and *R v Parsons* [2017] EWCA Crim 2163, certain terms of the order were neither necessary nor proportionate, namely its duration and the age of the individuals who were sought to be protected.

History of the court appearances and reports

16. In order to consider these grounds it is necessary to have regard to some of the hearings which took place at the Crown Court and also to the reports which were considered by His Honour Judge Lever who presided over each of these hearings and imposed both the sexual harm prevention order and the community order upon the applicant.
17. The first of these hearings took place on 1 June 2015 when the matter was first listed for sentence. It is anticipated that the judge had before him a report from a consultant and general forensic psychiatrist, Dr Lachlan Campbell, dated 17 March 2015 and a pre-sentence report dated 17 April 2015. The former of these contained a diagnosis that the applicant was suffering from Athetoid-type Cerebral Palsy attributable to congenital sub-cortical brain injury together with borderline impairments of intelligence. Dr Campbell noted that the applicant's account of the offence was significantly different from that provided by the prosecution, namely that the applicant had found the young child crying outside his own mother's home and had taken her inside for her own protection. Dr Campbell stated that on the basis of these competing accounts of the incident, he was unable to form any useful view of the applicant's ongoing risks to others, particularly to children. The author of the pre-sentence report who faced the same situation considered that as a minimum the applicant presented a medium risk of serious harm and recommended imposition of a suspended sentence order with a supervision requirement.

18. Following the prosecution's opening of the circumstances giving rise to the conviction the judge observed that:

"... I can tell everybody I treat this case very seriously ... the situation is that it is the horror of every mother of a young child in this country that somebody is going to go into their house, through an open door and carry off their child."

He went on to enquire of defence counsel:

"What on earth was he...? I had better read the reports but what on earth was his motive?"

To which defence counsel replied:

"That is a very difficult question that the defendant cannot answer through me ... the defendant cannot give your Honour an explanation."

Following this exchange, the judge left the Bench in order to read the reports and upon coming back into court stated:

"... the position as well while I have got the prosecution is that this is a case which I also found especially troubling to consult my brethren. They unhelpfully for you Miss Patrick sort of feel that although this is not a sexual case and therefore none of the sexual preventative measures like a register, signature or that sort of thing is appropriate, they feel instinctively that there are preventative measures which they think that the prosecution should be able to draw to my attention to."

19. The following exchange then took place between the judge and the prosecution counsel:

"MR EDWARDS: Yes and it is I know a scheduled offence for the purposes of the Sexual Offences Act and so Sexual Prevention Orders could be imposed is my understanding.

[THE JUDGE]: Even though I have not yet found that it was for the purpose of sex?

MR EDWARDS: Well yes, it is a schedule offence. If your Honour found that it was not for the purpose of sex, then of course the application may not be merited.

[THE JUDGE]: Yes.

MR EDWARDS: But is certainly is capable of attracting those sorts of measures.

[THE JUDGE]: But is there any other way I can protect the public from this sort of behaviour by this defendant?

MR EDWARDS: There would be a restraining order. That would be an alternative but of course that would only be against this particular complainant.

[THE JUDGE]: No but I cannot make an order that he is not alone with young children and that sort of thing unless I go down the sexual route is it?

MR EDWARDS: I believe that is right. It would have to be a Sexual Offences Prevention Order. I cannot think of another way to do that.

[THE JUDGE]: Right so we will ask Miss Patrick now, what was the motive on the full facts?"

20. There was then an exchange between the judge and defence counsel:

MISS PATRICK: Not for any sexual gratification, the defendant would say.

[THE JUDGE]: So what was the motive?

MISS PATRICK: He would say he did not think the situation through, but he thought he was trying to do the little girl a favour by removing her from the house and taking her into his care, in effect.

[THE JUDGE]: So why when the mother knocks on the front door is he disappearing out of the back door with the child?

MISS PATRICK: Your Honour, yes, and in hindsight I think the defendant would be the first to accept that his actions were completely and utterly inappropriate, but of course now he has had time to reflect and he has had professionals like probation and like the psychiatrist who has spoken to him-

[THE JUDGE]: He did not tell the correct version to the psychiatrist so we have no ability to risk- assess.

MISS PATRICK: Yes, that is his version that he gave to the psychiatrist and the probation report author.

[THE JUDGE] But he is not standing by it now.

MISS PATRICK: Your Honour, he is standing by his plea, which was entered without a basis."

21. Thereafter defence counsel submitted that the court was not in a position to be satisfied on the evidence before it that the applicant was sexually motivated when he committed the offence, following which the judge posed the following rhetorical question to prosecution counsel:

"... it is not sustainable, is it, that the court can draw an irresistible inference that this had to be sexual motivation?"

To which prosecution counsel replied:

"MR EDWARDS: There is simply no evidence about motive, and so, no, I have to accept that point. The only person who can possibly know why he did this is the defendant and there is no evidence-

The judge then indicated that he was going to adjourn the sentencing hearing in order to enable the consultant psychiatrist to provide a risk assessment on the basis of the

prosecution evidence relating to the incident, after which the judge indicated that:

"... I shall decide whether the public interest requires a lengthy term of imprisonment or whether the public interest actually, because I cannot make a preventative order, requires a lengthy term of close supervision."

22. By the time that the matter returned to court on 17 November 2015, two further pre-sentence reports had been prepared dated 14 August and 10 November 2015, together with two reports from another consultant in forensic psychiatry, Dr Vijay Pandrapragada, dated 30 August and 11 November 2015.

23. The first of these pre-sentence reports disclosed that in 2012 the applicant had been arrested for an offence of sexual assault when it was alleged that he had been in bed with a 7-year-old girl and had placed one of his hands inside her pants. However, no prosecution had ensued. It was also stated that the offence of witness intimidation (for which the applicant had received the suspended sentence order in 2014) involved the applicant acting with others threatening to rape the victim's child.

24. In the light of this new information the author of the pre-sentence report stated that:

"... It may be fair to assume that the motivation (for the child abduction offence) could be sexual ..."

such that it was considered that the applicant now posed a high risk of serious harm to children.

25. This view was reflected in the psychiatric report dated 30 August 2015 which stated that:

"Given previous concerns about sexual activity with an underage female it is likely that the attempts to abduct the victim may have an underlying motivation but [AB] denies this. It is likely that there is a higher risk of sexual violence towards underage females if he is in the community without supervision and monitoring."

In the second of these pre-sentence reports it was noted that the applicant was now

accepting that, as part of the incident giving rise to the child abduction, he had entered the complainant's home and removed the child, albeit that he maintained that his motivation for doing so was because he heard the child crying and was concerned for her safety. In the light of this new information, Dr Pandrapragada stated in his second report that:

"In my view it is difficult to say that he does not pose a continuing risk to children or reoffend in future without understanding his motivation to commit the index offence."

26. When the matter returned to court on 17 November 2015 the judge indicated that, in view of the fact that the alleged sexual assault had not resulted in a prosecution, it would be "completely improper" to assume any criminal offence had taken place. Moreover, in regard to the issue of sexual motivation relating to the offence of child abduction the judge considered that this was a case in which he would need to provide the applicant with an opportunity of giving evidence in the course of a *Newton*-type hearing. The sentence hearing was again adjourned, on this occasion in order to enable the Probation Service to consider whether they could offer

"close supervision for three years by somebody who specialises in this type of case".

27. The case next returned to court on 29 January 2016, at which point the judge indicated that in his view, if he imposed a determinative prison sentence for the offence of child abduction, a period of 4 years would be justified prior to any reduction to reflect the timing of his guilty plea, which would result in a term of about 32 months being imposed upon him. It was noted that the applicant had already spent 16 months on remand in

custody and therefore the judge decided to release the applicant on bail to probation approved premises pending his assessment by the Probation Service as to the suitability of the applicant living with his brother.

28. By this time a draft of the proposed sexual harm preventative order was before the court.

On enquiry by the judge, not only did defence counsel indicate that the applicant consented to making of the order, but following the exchange took place with prosecution counsel:

"[THE JUDGE]: I make this order today, until further notice and the legislation allows me to do that, does it?"

MR RHIND: It does, your Honour. It has been looked into; this is an offence listed in schedule 5 of the Sexual Offences Act 2003 and the court therefore has power-

[THE JUDGE]: Even though there is no proved sexual element-

MR RHIND: Yes.

[THE JUDGE] --because of the actions of the mother, promptly?

MR RHIND: Yes."

In these circumstances the judge made the sexual harm prevention order, adjourned sentence and released the applicant on conditional bail.

29. When the case finally returned to court on 1 March 2016, the judge in passing sentence stated that:

"[AB], this has been a very long running case. My first priority is the protection of the public and young children. My second priority, which

is also important, is the fair treatment of you and you have spent a lot of time in custody and that enables me to give an order which is focusing on helping you to stay out of trouble ..."

Legal principles

30. The legislation providing the court with the power to impose a sexual harm prevention order is contained within section 103A of the Sexual Offences Act 2003:

"103A Sexual harm prevention orders: applications and grounds

(1) A court may make an order under this section (a 'sexual harm prevention order') in respect of a person ('the defendant') where subsection (2) or (3) applies to the defendant.

(2) This subsection applies to the defendant where—

(a) the court deals with the defendant in respect of—

(i) an offence listed in Schedule 3 or 5, or

(ii) a finding that the defendant is not guilty of an offence listed in Schedule 3 or 5 by reason of insanity, or

(iii) a finding that the defendant is under a disability and has done the act charged against the defendant in respect of an offence listed in Schedule 3 or 5

and

(b) 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 members of the public 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."

Moreover, "sexual harm" is defined by section 103B(1) as follows:

"... 'sexual harm' from a person means physical or psychological harm caused

- (a) by the person committing one or more offences listed in Schedule 3, or
- (b) (in the context of harm outside the United Kingdom) by the person doing, outside the United Kingdom, anything which would constitute an offence listed in Schedule 3 if done in any part of the United Kingdom ..."

31. In *Smith Hughes LJ* (as he then was) provided extremely useful guidance in relation to the making of sexual offences prevention orders under the predecessor legislation, and in particular endorsed the use of the following questions at [8]:

- "i Is the making of an order necessary to protect from serious sexual harm through the commission and sexual offences?
- ii If some order is necessary, are the terms proposed nevertheless oppressive?
- iii Overall are the terms proportionate?"

32. It is to be noted that the legislation which provided for the making of sexual offences prevention orders sought to provide protection from "serious sexual harm" in contradistinction to the current legislation which seeks to provide protection from "sexual harm" by the making of sexual harm prevention orders.

33. In so far as the age of children who are likely to be in need of protection is concerned, the court in *Smith* observed at [21] that unless there is a particular need to protect those between 16 and 18, generally the restriction on contact should be limited to those under the age of 16.

34. More recently in *R v McLellan* [2017] EWCA Crim 1464, Gross LJ, provided further guidance in relation to the duration of sexual harm prevention orders at paragraph 25:

"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."

Discussion

35. We have little doubt that many of the difficulties which arose in this case would not have done so, if the offence of which the applicant had been convicted was one listed under schedule 3 of the 2003 Act, namely one that was sexual per se. In such circumstances, the question of whether the court could be satisfied that it was necessary to make a sexual harm prevention order for the purposes of protection of the public or particular members

of the public from sexual harm from the applicant would have been a more straightforward task.

36. However, the offence was not of this nature but one which was listed under schedule 5, which ought to have had the effect of putting into sharper focus the question of whether the question posed under section 103A(2)(b)(i) could be answered in the affirmative. Unfortunately, what appears to have been taken place is that there was a lack of clarity as to what was required to be considered and consequently a lack of focus upon the question of the protection of the public from sexual harm by the applicant, as opposed to the risk of harm in general.
37. In this regard, we have some sympathy with the judge, who does not appear to have had all the assistance he might have expected either, with respect from counsel, the consultant psychiatrists or the Probation Service. Nevertheless, it seems to us that this was a case in which it was beholden upon the court to have grasped the nettle at a relatively early stage and make the necessary determination as to whether it could be satisfied that it was necessary to make a sexual harm prevention order for the purposes of protecting the public or any particular members of the public from sexual harm from the applicant. In this regard, if it was considered necessary to conduct a *Newton*-type hearing then this should have taken place.
38. In the event, the lack of focus at an early stage has not only resulted in the applicant receiving a community order for the offence of child abduction, when otherwise we consider that a custodial sentence would have been appropriate, but it has made our own task the more difficult. As we have already observed, there appears to have been some confusion as to what it was the court had to be satisfied about and therefore no clear finding was made on the central issue which was required for the purposes of enabling

the court to impose a sexual harm prevention order. Indeed, to the extent that the court did focus upon a matter which was relevant to the central issue, namely the applicant's motivation, the court appears not to have been satisfied that there was sufficient evidence of a sexual motive for the offence of child abduction.

39. In these circumstances, and given the history of the proceedings which we have set out, we have with some reluctance reached the conclusion that we do not consider that we are in a position to be satisfied for ourselves that the necessary criteria for the making of a sexual harm prevention order has been made out in this case, namely, that it is necessary to make such an order for the purpose of protecting the public or any members of the public from sexual harm from the applicant. Reminding ourselves that the definition of "sexual harm" provided by section 103B(1)(a) of the Sexual Offences Act 2003, is physical or psychological harm caused by the person committing one or more offence listed in schedule 3.

40. The effect of this is that we are not satisfied that the judge was entitled to have imposed a sexual harm prevention order upon the applicant in the present case. We would add that even if we had considered otherwise, we are also of the view that this was not a case in which, without further detailed consideration, the order should have been imposed either indefinitely or indeed provided protection for those aged under 18, as opposed to those under 16. We would also add, for the sake of completeness, that neither do we consider it likely that this was a case in which it was appropriate not to have activated the suspended sentence order. Indeed, even if it had been, then the court was otherwise obliged to deal with the applicant in one of the other ways set out in schedule 12 to the Criminal Justice Act 2003.

Conclusion

41. In these circumstances, we propose to extend time, grant permission to appeal and allow the appeal to the extent of quashing the sexual harm prevention order.

LORD JUSTICE DAVIS: Are there any points arising? You have a representation order, do you?

MR GRAY: I do, my Lord.

LORD JUSTICE DAVIS: We will have to see what happens hereafter.

MR GRAY: My Lord, I may be returning in relation to an appeal submitted now in relation to the most recent proceedings taken but that is for another date.

LORD JUSTICE DAVIS: We say nothing about that. Perhaps we just might point out, and your client can hear this: self-help can come into play here. In his own interests he might want to consider whether he can help himself.

MR GRAY: He assures me that he has undertaken specific steps with that in mind and is co-operating with the police and offender manager.

LORD JUSTICE DAVIS: I know that you indicate that steps might be taken by reference to the current community order but maybe - we know not - he is benefiting from them. I do not think we can say more than that. I am sure you will handle this very responsibly.

Thank you both very much indeed.

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

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