[2021] EWCA Crim 737

IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100085/A1

Royal Courts of Justice

Strand

London

WC2A 2LL

Tuesday 27 April 2021

Before:

LORD JUSTICE BEAN

MRS JUSTICE FARBEY DBE

RECORDER OF NEWCASTLE

(HIS HONOUR JUDGE SLOAN QC)

(Sitting as a Judge of the CACD)

REGINA

V

PHEAN MAYNE

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MR C HARPER appeared on behalf of the Appellant.

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J U D G M E N T

LORD JUSTICE BEAN: Phean Mayne appeals with leave of the single judge from a sentence of 2 years 10 months' imprisonment, imposed in the Crown Court at Northampton by HHJ Mayo (Recorder of Northampton) for breach of a sexual risk order.

Mr Mayne accessed child sexual exploitation pornography online in 2017. He was arrested but not prosecuted. What did happen is that the police applied to the Northampton Magistrates' Court for a Sexual Risk Order pursuant to section 122A of the Sexual Offences Act 2003 (a provision inserted by the Anti-social Behaviour, Crime and Policing Act 2014 with effect from 2015). Subsection (6) permits the court to make a sexual risk order on an application by the police if the court is:

> "... satisfied that the defendant has... done an act of a sexual nature as a result of which it is necessary to make such an order for the purpose of—
> (a) protecting the public or any particular members of the public from harm from the defendant..."

We need not refer to subsection (6)(b) which deals with harm from a defendant outside the United Kingdom.

Subsection (9)(a) states:

> "The only prohibitions that may be imposed are those necessary for the purpose of—
>
> (a) protecting the public or any particular members of the public from harm from the defendant..."

The Sexual Risk Order in this case was made for a period of 5 years. The first prohibition was on:

> "1. Having any contact or communication of any kind with any child under the age of 16 other than:

> i. such as [is] inadvertent and not reasonably avoidable in the course of his daily life or
> ii. with the consent of the child's parent or guardian, who has knowledge of the Order and with the express approval of social services in that area."

Mr Mayne did not attend the court hearing and it appears that he was not compelled to do so. He was served with the Order after the event by a police officer who explained its meaning to him.

We wish to express some concerns about both the wording of prohibition 1 and the procedure that was used. The form of words approved by the decision of this Court in R v Smith [2012] 1 Cr App R(S) 82, for what was then called a Sexual Offences Prevention Order ("SOPO") (replaced in 2015 by the Sexual Harm Prevention Order ("SHPO")) was:

> "(5) having any *unsupervised* contact of any kind with any female under the age of 16, other than
> (i) such as is inadvertent and not reasonably avoidable in the context of lawful daily life, or (ii) with the consent of the child's parent or guardian, who has knowledge of his convictions." [emphasis added]

Removing the word "unsupervised" makes the order very stringent. It might on a literal construction be said to prohibit a defendant even from going to shops or pubs where he knows families including children are likely to be present. But even if that is not correct the order as made in this case without the word "supervised" before the word "contact" clearly prohibits the defendant from entering any home of anyone who has children likely to be present, unless he has both obtained the prior permission of the local Social Services and informed the children's parent or guardian of the contents of the Sexual Risk Order.

If such drastic orders are to be made it seems to us that this should be at a hearing at which the defendant is present and legally represented, so that the court can consider submissions about the wording and the proportionality of the order proposed.

Having said that, we go on to describe how the defendant came to be in breach of the order in the present case. He formed a relationship with a young woman who we shall call "Laura". She was a young adult with two young children. He did not tell her at first about that Sexual Risk Order and did not obtain the permission of Social Services to visit her home. The relationship began in August 2019. It was not until November 2019 that he told her that he had been involved in a police investigation concerning accessing indecent images of children. He explained this as being due to his searching for images of his own experiences of abuse as a child. Laura told her mother about what the appellant had revealed to her. The mother in turn informed the police; this led to the present prosecution.

It is right to say, as Mr Harper has emphasised in oral argument before us, that there is no evidence that the defendant took indecent photographs of Laura's children, or that he sought to spend time alone with them and he was not, for example, involved in bathing them.

Mr Mayne did not admit the charge. His defence in the Crown Court was that when the police officer had explained the Order to him and handed over a copy, he paid no attention and tore it up shortly afterwards. He believed that he had only been prohibited from having unsupervised contact with children since that had been the terms of a court order previously made against him in respect of contact with his 6-year-old son. The judge very wisely did not attempt to treat the offence as one of strict liability but directed the jury that they had to be satisfied that the defendant knew that he was breaching the order. Unsurprisingly the jury convicted.

In passing sentence the judge turned to the Sentencing Council Guideline for breach of a sexual harm prevention order (SHPO), there being no guideline for breach of a sexual risk order. The SHPO breach guideline has three levels of culpability: A is a serious or persistent

breach; C is a minor breach, or a breach just short of having a reasonable excuse, and B is a deliberate breach falling between A and C. As to level of harm, category 1 is a case which causes or risks very serious harm or distress. The word "very" is emphasised in the guideline itself.

The judge had of course presided over the trial at which the defendant gave evidence. In his sentencing remarks he said this:

> "You were interviewed about it and you did not accept... you do not even accept now that that order [Sexual Risk Order] affected you but it did. I have to now work out the appropriate sentence for your offending. You are of good character and you have a diagnosis of an emotionally unstable personality disorder. At the end of the trial I indicated that I wanted an All Options Report on you because I had concluded that you were, firstly, intelligent but you were narcissistic and manipulative. Now, they may well be traits of your personality disorder but you have not been diagnosed as having a narcissistic disorder.
>
> In my judgment, Mr Mayne, there is no doubt that the harm you caused [Laura] and her family places this into harm Category 1 were I to be using the guideline for the breach of a Sexual Harm Prevention Order. I have heard cogent argument from counsel today about the applicability of that guideline and in my judgment it is the most useful guideline that there is. I also have to assess your culpability. I repeat, I am not sentencing you as a sex offender but I am sentencing you as somebody who made a deliberate choice to ignore an order and not to communicate for a considerable period of time.
>
> In my judgment your offending fell just within culpability A, Category harm 1. The range, therefore, is between two years and four and a half years' custody. The starting point is one of three years. In my assessment your offending falls at about that level.
>
> Mitigation: the only mitigation is what is included in the psychiatric report which I have read about you which is your distressing childhood experiences. I do not play those down in any way shape or form and the fact that you have been treated for a series of mental health difficulties over [a] period of time. What I have to do in your case, as I do in any case involving a mental disorder, is to assess for myself the impact [of] your mental disorder on your offending and in my judgment that is low.
>
> Your emotionally unstable personality disorder did not contribute to your

> offending and in my judgment adds very little mitigation. You have over the years been medicated by a series of anxiolytic drugs but of course they will not have affected by one jot your personality disorder because such is not amenable, as you now know, to medical treatment. What I have to do, therefore, is using the guidelines as much as I can I have to apply three principles. The first is to decide whether the custody threshold has been passed. Yes, it has. Secondly, I have to decide using the guidelines and my own judgment and knowledge of your case what is the least sentence of imprisonment I can impose. That in my judgment is one of two years' and ten months' imprisonment.
>
> The third question which is [whether] that be suspended does not arise because the sentence I have arrived at is too long for any suspension. The sentence, therefore, for this breach is one of two years' and ten months' imprisonment."

The judge also made a restraining order under the Prevention from Harassment Act preventing the appellant from contacting Laura directly or indirectly. The order was made until further order, that is for an indefinite period. No issue as to that arises in this Court.

We begin with the judge's use of the guideline for sexual harm prevention order breaches. We consider that it is proper to make some measured use of that guideline but it does not directly apply to breaches of sexual risk orders and it must be borne in mind that a person in breach of a sexual risk order may not have been (and the defendant has not been) convicted of any sexual offence. The fact that the two breach offences have the same 5-year maximum penalty is not a reason for applying the sexual harm prevention order breach guideline without modification.

We also think there is force in the point made by Mr Harper that the judge, having said originally that the culpability was on the cusp of level A and level B or "right at the bottom of A" in discussion with counsel, proceeded to take a starting point of 3 years or "about that level" and to arrive at a final sentence of only 2 months under that starting point.

The purpose of the sexual risk order made against the appellant was to protect children from the risk of harm. In starting a relationship with Laura the appellant was creating a risk of

harm to her children but we doubt whether, even if the SHPO guidelines were directly applicable, this could properly be categorised as a case of category 1 harm. We accept that Laura's discovery that the appellant was not what he had seemed to be, leading to her breaking off the relationship and terminating her pregnancy, was a deeply traumatic experience for her, and the distress caused to her is conceded to be relevant as an aggravating factor in sentence. But it must be noted that if Laura had been childless the appellant would not have been committing any breach of the sexual risk order at all in doing what he did.

The judge was right to impose a sentence of immediate custody and a suspended sentence would not have been adequate for the seriousness of this offence. But in our view, the sentence of 34 months' imprisonment was too long. Taking all the factors we have outlined into account, we allow the appeal and substitute a sentence of 18 months' imprisonment.

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