Neutral Citation Number: [2022] EWCA Crim 1253

Case No: **202200678 A4**

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM Lewes Crown Court
Her Honour Judge Laing QC
T20220017/ S20220036

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/09/2022

Before :

LORD JUSTICE MALES
MR JUSTICE SWEENEY
and
HHJ ANDREW LEES

- -

Between :

REGINA	**Respondent**
- and -	
LEE (ALSO KNOWN AS MANDY) DAVIDOFF	**Appellant**

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- -

Mr W Sneddon (instructed by **Crown Prosecution Service**) for the **Respondent**
Mr G Glbert (instructed by **Tang Bentley & Jackson**) for the **Appellant**

Hearing dates : 24 June 2022

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Approved Judgment

MR JUSTICE SWEENEY:

Introduction

1. On 15 November 2021, in the Crown Court at Portsmouth, the appellant (who is now aged 53 and identifies as being female) pleaded guilty to Counts 1 and 3 on Indictment T20220017 - in which he was charged with breaches (respectively on 8 & 13 October 2021), "contrary to section 103(1)(a) of the Sexual Offences Act 2003" ("the SOA 2003"), of a Sexual Harm Prevention Order ("SHPO") that had been imposed on 1 September2021 by Her Honour Judge Laing QC, the Honorary Recorder of Brighton and Hove ("the judge"), in the Crown Court at Lewes. Sentence was adjourned for reports. A month later, before Magistrates, the appellant pleaded guilty to a charge that, on 11 September 2021, he had sent an offensive message by means of a public electronic communications network, contrary to section 127(1)(b) & (3) of the Communications Act 2003 ("the CA 2003") - which was put in the alternative to an original charge of sending an indecent electronic communication, contrary to section 1(1)(b) & (4) of the Malicious Communications Act 1988 ("the MCA 1988"), which was withdrawn. In the result, the appellant was committed to the Crown Court at Portsmouth for sentence on the offensive message charge.

2. On 18 January 2022 both cases were transferred to the Crown Court at Lewes where, on 17 February 2022, the appellant was sentenced by the judge to 2 months' imprisonment on Count 1, to 16 months' imprisonment concurrent on Count 3, and to 2 months' imprisonment consecutive on the charge committed for sentence. Further, a suspended sentence of 18 months imprisonment, which the judge had also imposed on 1 September 2021, for 3 offences of breach of a SHPO and one offence of outraging public decency, was activated in full and ordered to run consecutively. The total sentence imposed was thus one of 3 years' imprisonment.

3. In addition, the judge imposed a fresh SHPO on the appellant, until further order. The Schedule of Prohibitions in the SHPO provided, amongst other things, that:

   "*The Defendant is prohibited from:*

   1. *Being unclothed from the waist down or exposing his genitals in any area to which the public has access, save for in any public toilet facility for the purposes of urinating or defecating.*

   ……

   4. *Possessing owning or using any computer capable of accessing the internet or internet enabled device (including, but not limited to, a mobile phone, tablet computer, dongle, or personal computer) unless:*
      a. *It has been installed with monitoring software that is approved and monitored by the Police Force in the area in which the defendant resides; and*
      b. *It has the capacity to retain and display the history of internet use and he does not delete such history or conceal the history (not to use such things* (as) *incognito browsing, in private, private browsing, virtual computer or VPN); and*

c. He makes the device immediately available on request for inspection by a Police officer/staff or employee; or

d. The computer or internet enabled device is not able to have monitoring software installed but has been approved by your VISOR/MAPPA officer who has provided their confirmation in writing.

Confirmation is not to be unreasonably withheld save for a computer at the defendant's place of work, Job Centre Plus, public library, educational establishment or other place, which must be notified and approved by your Police Visor Office in the area that you reside.

5. *Sending by any means, including but not limited to, electronic messaging, internet based messaging service, postal service or by hand delivery, any image whether digital or otherwise, of any genitalia including his own*."

4. The appellant now appeals, by leave of the Single Judge, against the prohibitions in the SHPO imposed on 17 February 2022 to which we have just referred.

5. The Grounds of Appeal are that:
    1. Given the way that Prohibitions 1 and 5 mimic the existing criminal law:
        (1) The Judge erred in finding that Prohibitions 1 and 5 were "necessary" within the statutory meaning.
        (2) The Judge failed to have sufficient regard to previous authority in imposing Prohibitions 1 and 5.
    2. The Judge erred in concluding that the Court had the statutory power to impose Prohibitions 4 and 5 to seek to prevent the commission by the appellant of the offences under the Communications Act 2003.

Background

6. The appellant had 8 previous convictions for 26 offences, including indecent exposure, sending an offensive communication, and breaches of SHPOs.

7. On 24 January 2019, in the Crown Court at Norwich, for 3 offences of exposure (one of which was committed whilst on bail) and an offence of sending an indecent message via a communication network, contrary to section 127 of the CA 2003, the appellant was sentenced , in total, to 8 months' imprisonment suspended for 24 months. A SHPO was also imposed for a period of 5 years

8. On 13 February 2020, after conviction for 4 offences of indecent exposure and 4 offences of breach of the SHPO imposed on 24 January 2019, and breach of the suspended sentence also imposed on 24 January 2019, the appellant was sentenced, in total, to 86 weeks' immediate imprisonment, and a new SHPO was imposed for a period of 10 years, with one prohibition, namely that:
"*The defendant is prohibited from being unclothed from the waist down or exposing his genitals in any area to which the public has access, except a male only toilet facility*".

9. The appellant was released on licence on 24 September 2020. On 10 November 2020 he indecently exposed himself to a woman taking her children (who were aged 9 & 10) to school; to another woman also taking her children to school; and, a little later, to passing traffic. He was arrested and made no comment in interview. He was charged with three offences of breach of the SHPO imposed on 13 February 2020, and one of outraging public decency. A Victim Impact Statement from one of the victims expressed disgust at what the appellant had done, and explained its adverse effect.

10. In the result, on 1 September 2021 the appellant appeared before the judge in the Crown Court at Lewes, and (as touched on above) was sentenced for those offences to a total of 18 months' imprisonment suspended for 24 months – with a programme requirement and a rehabilitation activity requirement.

11. A new SHPO was imposed for a period of 10 years. The application for the SHPO had asserted that:
    (1) It would allow VISOR officers to effectively manage the appellant in the community.
    (2) The prohibitions were intended to stop the appellant from exposing himself or conducting himself in a lewd or sexual way in public that would cause offence, distress, or alarm.
    (3) Since being released from prison in August/September 2020, the appellant had begun to leave his telephone number on pieces of paper which he had put on random car windows asking for relationships and a place to live.
    (4) The current offending was close to a junior school at a time when children were being dropped off, so that a condition preventing the applicant from going near schools would help safeguard any further offending.

12. In the result, the SHPO which the judge made contained three prohibitions including;
    (1) Not to be unclothed from the waist down or exposing his genitals in any area to which the public has access except a male only toilet facility.
    ……
    (3) *Not to leave contact details on pieces of paper, asking for relationships, on any area the public can see.*

The instant offences

13. The suspended sentence and SHPO having been imposed by the judge on 1 September 2021, the facts of the instant offences were as follows:

14. The first in time was the offence of sending an offensive message, for which the appellant was ultimately committed for sentence. On 14 September 2021, the appellant sent two photographs of his erect penis, via WhatsApp, to the phone of a female Probation Officer who had previously supervised the appellant. When arrested, the appellant denied the offence. However, he was identified via a small tattoo that can be seen in both photographs.

15. The first breach (Count 1) of the SHPO occurred on 8 October 2021. The appellant left a note on a bus which stated, along the lines of: "*I'm looking for a relationship*", and included the appellant's telephone number. The second breach (Count 3) occurred on 13 October 2021 when, in broad daylight in a street, the appellant exposed his non-erect penis to a 70 year old woman who was on her mobility scooter in the street. On subsequent arrest, he denied the offence.

16. As indicated above, the breach offences were both charged as being "contrary to section 103(1)(a) of the Sexual Offences Act 2003". That, we observe, was in error. Section 103 of the SOA 2003 was and remains concerned with the application of sections 97-100 in Scotland, it has never had anything to do with the breach of a SHPO. As originally enacted section 104 of the SOA provided the power to make a Sexual Offence Prevention Order ("SOPO"), and section 113 created the offence of breach of a SOPO. From 8 March 2015, sections 104 and 113 were repealed by the Anti-Social Behaviour Crime and Policing Act 2014, and replaced by sections 103A and 103L – which provided the power to make a SHPO, and created the offence of breach of a SHPO. From 1 December 2020, sections 104 and 113 of the SOA were replaced by sections 345 and 354 of the SA 2020. Thus, the instant breach offences should have been charged as being contrary to section 354 of the SA 2020.

17. However, given that the power to make the instant SHPO came only from the commission of the offensive message offence, contrary to section 127 of the CA 2003, which is one of the offences listed in Schedule 5 to the SOA 2003, that is not relevant to the merits of the instant appeal – particularly as there is no dispute as to the underlying facts of the instant breaches.

The Sentencing Hearing

18. There were various reports before the judge, namely two Pre-Sentence Reports, two up-to-date Response to Supervision Reports, a psychiatric report, and a psychological report. There was also a Victim Impact Statement from the 70 year old victim.

19. The psychiatric and psychological reports indicated that the appellant was not suffering from any mental illness, but that he had lowered intellectual functioning - with an IQ in the bottom 1% of the population.

20. The Pre-Sentence Reports indicated that the appellant had a high level of sexual preoccupation, with a pattern of offending which involved a level of planning, and the appellant exposing his penis to female members of the public, which the appellant found to be thrilling, in the belief that on seeing his penis the women would want a sexual relationship with him. The appellant, it was concluded, had very little insight into the risks involved in such offending, and the impact of it on the victims.

21. The prosecution put forward a draft SHPO and, in their Sentencing Note, invited the court to impose it, albeit recognising that some of its proposed terms were objected to.

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22. The objections on behalf of the appellant were set out in a written Response to the application for a SHPO. It was underlined, amongst other things, that:
    (1) Under provisions of section 345 of the Sentencing Act 2020 ("the SA 2020") a court may only impose a SHPO when a person is convicted of an offence listed in Schedule 3 (sexual offences) or Schedule 5 (other offences) to the SOA 2003.
    (2) Breach of a SHPO was not listed in either Schedule 3 or Schedule 5, whereas the offensive message offence was listed in Schedule 5.
    (3) Section 343(2)(a) of the SA 2020 provides that:
        "*the only prohibitions that may be included in a Sexual Harm Prevention Order are those that are necessary for the purposes of protecting the public, or any particular members of the public, from sexual harm from the offender*".
    (4) Sexual Harm is defined in section 344 of the SA 2020 as being:
        "*physical or psychological harm caused by the person committing one or more offences listed in Schedule 3 of the Sexual Offences Act 2003*".
    (5) By section 349 of the SA 2020, where a SHPO is made in respect of a person who is already subject to such an order, the first order ceases to have effect.

23. Attention was also drawn to a number of authorities, including:
    (1) *Boness and others* [2005] EWCA Crim 2395; [2006] 1 Cr App R (S) 120 – in which the court held, amongst other things, that prohibitions in preventative orders should not mimic the existing law or be imposed simply to increase the sentence for particular conduct - but rather should be designed to bite prior to any offence being committed.
    (2) *Mortimer* [2010] EWCA Crim 1303 – in which it was concluded that, prior to making a SHPO, the court should consider three questions, namely:
        a. Is the making of an order necessary to protect from serious sexual harm through the commission of scheduled offences?
        b. If some order is necessary, are the terms nevertheless oppressive?
        c. Overall, are the terms appropriate?
    (3) *Smith* [2011] EWCA Crim 172; [2012] 1 WLR 1316 - in which the court concluded that it was not appropriate to impose multiple prohibitions on an offender just in case he committed a different kind of offence, and that no order was required if it merely duplicated another scheme to which the offender was already subject.
    (4) *Lewis* [2016] EWCA Crim 1020; [2017] 1 Cr App R (S) 2 – in which it was concluded that it is <u>not</u> enough for the Crown to assert that a prohibition is necessary on a 'safety first' basis, because the offender might graduate to other offences.
    (5) *Parsons and Morgan* [2017] EWCA Crim 2163; [2018] 1 WLR 2409 - in which the court concluded that the guidance in *Smith* (above) remained generally sound, subject to technological developments, and that;
        a. No order should be made unless it is necessary to protect the public from sexual harm from an offender.
        b. Any prohibition imposed must be clear and realistic.
        c. The terms must not be oppressive and must be proportionate.
        d. Any order must be tailored to the facts.

24. Against that background, it was submitted that, contrary to the decisions in *Boness* and *Smith* (both above), the first proposed prohibition did no more than mimic existing provisions - in that the conduct sought to be prohibited was an offence of exposure contrary to section 66 of the 2003 Act and/or an offence, at common law, of outraging public decency. Therefore, the prohibition was both unnecessary and contrary to the authorities.

25. It was further submitted that the fourth prohibition was not necessary given that, to date, none of the appellant's offences had involved the internet, there was no identifiable risk, and the terms sought appeared to indicate a 'safety first' or' just in case' approach.

26. As to the fifth prohibition, it was submitted that, as with the first prohibition, it did no more than mimic the offence of sending an offensive message contrary to section 127(1) of the CA 2003 to which the appellant had pleaded guilty. Therefore, the prohibition was not necessary.

27. In any event, it was submitted, the prohibition, if made, would not prevent the appellant from committing any of the offences listed in Schedule 3 to the SOA 2003 Act and, thus, did not fall within the definition of sexual harm in section 344 of the SA 2020 and, therefore, given the terms of section 343(2)(a) of the SA 2020, was not a prohibition that could be included in the proposed SHPO.

28. It is clear from the transcript of the judge's remarks during mitigation that she ultimately concluded that, against the background that the appellant's offending was increasing quite substantially in both gravity and frequency, with the instant offences being committed within a very short time of the imposition of the suspended sentence on 1 September 2021, it was necessary to impose the prohibitions that she ultimately approved (which were less in number than those originally proposed) because it was necessary to do so to protect the public – stating: "It's looking at future risk here, and I'm afraid I think the increase in the offending means there is a future risk".

The submissions on appeal

29. As to Ground 1, Mr Gilbert, on the appellant's behalf, in the combination of his written and oral submissions, argued that, against the background of the decisions in *Boness* and *Smith* (both above), the behaviour prohibited in Prohibition 1 was all capable of being an offence of indecent exposure, contrary to section 66 of the SOA 2003 Act, or an offence of outraging public decency. Similarly, that the behaviour in Prohibition 5 would amount to an offence under either section 1 of the MCA 1988, or section 127 of the CA 2003. Therefore, Mr Gilbert submitted, neither prohibition was necessary, and both were contrary to the decisions in *Boness* and *Smith*.

30. As to Ground 2, and against the background of the terms of sections 343(2)(a) and 344 of the SA 2020 (above), and given that the offence of breaching a SHPO is not listed in either Schedule 3 or Schedule 5 to the SOA 2003 Act, whereas offences contrary to section 127

of the CA 2003 are listed in Schedule 5 to the SOA 2003 but not in Schedule 3 to that Act, Mr Gilbert submitted that:

(1) The judge was invited to order Prohibitions 4 and 5 for the purpose of preventing the appellant from committing offences under the CA 2003.
(2) That offence was listed in Schedule 5 but not in Schedule 3 to the SOA 2003.
(3) Therefore, applying sections 343 and 344 of the SA 2020, it was outside the court's powers to impose such terms.
(4) Some support for that interpretation could be found in *R v AB* [2020] 1 Cr. App. R (S) 67, in which this court found that the sentencing judge had erred in imposing a SHPO in respect of an offence of child abduction which was listed in Schedule 5 to the Act but not in Schedule 3. It was thus not a sexual offence per se and therefore the judge should have had a clearer focus on whether a SHPO was necessary to protect the public from sexual harm by the offender.

31. Mr Gilbert continued that where, on an application for a SHPO, there was doubt as to whether an offence was sexually motivated, the court had to determine whether it could be satisfied that it was necessary to make a SHPO for the purpose of protecting the public, or any particular members of the public, from sexual harm by the offender.

32. Mr Sneddon, on behalf of the Respondent, in the combination of his written and oral submissions, accepted that a prohibition should not be included in a SHPO simply to increase the penalty for an offence, or to mimic an existing offence. However, as to Ground 1, he submitted that prohibitions 1 & 5 restricted the appellant from conduct that might otherwise not be caught by any of the offences relied upon in argument by the appellant. For example, Mr Sneddon submitted, in *Hills v Chief Constable of Essex* [2006] EWHC 2633 it was concluded that a term in an ASBO prohibiting "carrying any knife or blade in any public place" was necessary in order to prevent Hills' practice of carrying a blade of less than 3", the carrying of which was therefore not an offence contrary to section 139 of the Criminal Justice Act 1988.

33. Prohibition 1, Mr Sneddon argued, caught conduct which did not amount to the offences of indecent exposure (which requires proof of intentional exposure and an intention to cause alarm and distress) or outraging public decency. Indeed, Mr Sneddon submitted, there were a myriad of ways in which Prohibition 1 could be breached whilst not committing either offence – e.g. by a claim that the appellant was urinating or defecating, or did not know what anyone could see, and the prohibition was specifically tailored to the appellant's past behaviour, including past claims that only the appellant's bottom had been exposed. It was also of interest to note, Mr Sneddon submitted, that the same prohibition had been included in past SHPOs without complaint.

34. As to Prohibition 5, Mr Sneddon submitted that it also went beyond the offences in either section 1 of the MCA 1988 and section 127 of the CA 2000 - e.g. in the former case an intention to cause anxiety or distress in the recipient is required, and in the latter case only

electronic communications are caught. Again Mr Sneddon submitted, the prohibition was specifically tailored to the appellant's sexual behaviour, including what the appellant has said to the author of the Pre-Sentence Report who concluded that the appellant remained extremely sexually pre-occupied, and did not recognise the underlying issues in relation to sending such images.

35. As to Ground 2, Mr Sneddon asserted that the court did have the power to impose Prohibitions 4 and 5 – albeit that neither section 127 of the Communications Act 2003 nor section 1 of the Malicious Communications Act 1988 were listed in Schedule 3 because the prohibitions were designed to target conduct beyond those offences – in particular the urge to expose the appellant's penis and the appellant's admitted intentions to pursue further contact with recipients. Further, Prohibitions 4 and 5 were necessary to prevent the appellant from exploring the internet, telecommunications networks, or other methods of finding people and protecting them from harm from the appellant's sexual desires and predilections.

36. It was also of interest to note, Mr Sneddon submitted, that Schedule 3 to the 2003 Act does include the indecent communication offences under section 7(1) and (2) of the Sexual Offences (Scotland) Act, which would be caught by the appellant's likely activities which, given the wide reaching ambit of the internet, could include the commission of such conduct in Scotland.

Discussion

37. As indicated above, the issue which we have identified in relation to the provision under which the instant breaches were charged does not, as such, impact upon the Grounds of Appeal.

Ground 1

38. It is not disputed that it is not permissible to include in a SHPO prohibitions which simply mimic an existing offence, or are simply intended to increase the maximum penalty for such an offence on breach. However, it is clear, for the reasons advanced on behalf of the Respondent, that, in this case, Prohibitions 1 and 5 do not fall foul of that approach. Rather, they cover a number of situations which do not amount to other offences in circumstances where they are necessary to prevent sexual harm resulting. Therefore, Ground 1, which is limited to alleged mimicry and increase in the maximum sentence, fails

Ground 2

39. Section 345 of the SA 2020 provides that a court may impose a SHPO where there has been a conviction for an offence listed in either Schedule 3 (sexual offences) or Schedule 5 (other offences) to the SOA 2003. Section 343 of the SA 2020 Act limits the prohibitions in a SHPO to those necessary for protecting the public or members of the public from sexual harm. Section 344 of the 2020 Act defines sexual harm as meaning physical or psychological harm **caused by the person committing one or more of the offences listed**

in Schedule 3 to the 2003 Act (our emphasis). It follows, the conviction only for an offence or offences listed in Schedule 5 is not a bar to the making of an order as such, as illustrated by *AB* (above), but that there must be focus on whether the terms of section 344 are met. Rightly, no issue is raised under this Ground in relation to Prohibition 1, as there was clear evidence of the necessity of protecting members of the public from sexual harm arising from the offence of exposure, which is an offence that is listed in Schedule 3, and activity preliminary to such offences).

40. However, in relation to Prohibitions 4 & 5, Mr Sneddon's ingenious argument in relation to potential offences in Scotland is too remote from the reality of the case and, when pressed in argument to identify a relevant offence in England & Wales listed in Schedule 3 he relied upon outraging public decency , which is listed in Schedule 5. In the result, we have concluded that, on the facts of this case, the criteria in the combination of sections 344 and 345 of the SA 2020 were not met, and that therefore there was no power to impose Prohibitions 4 & 5.

Conclusion

41. In the result, Ground 2 succeeds, and we quash Prohibitions 4 & 5.

42. To that extent only, this appeal is allowed.