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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/02596/A4,
[2023] EWCA Crim 204



Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 14th February 2023

B e f o r e :

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

SIR NIGEL DAVIS

R E X

- v -

ETHAN ALLON

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Miss J Heggie appeared on behalf of the Applicant

Mr G Hendron appeared on behalf of the Crown

J U D G M E N T
(Approved)

Tuesday 14th February 2023

LORD JUSTICE HOLROYDE:

1. When he was 17 years old, the applicant committed an offence of distributing an indecent photograph of a child, contrary to section 1(1)(b) of the Protection of Children Act 1978. Aged 20, and with no other convictions, he was sentenced for that offence to a community order for 18 months, with a requirement of 100 hours of unpaid work and a rehabilitation activity requirement. There is no appeal against that aspect of the sentencing.

2. However, an issue arose as to whether the applicant would be subject to the notification requirements under Part 2 of the Sexual Offences Act 2003. The judge decided that he would. The applicant seeks to challenge that decision. His applications for leave to appeal against sentence and for a necessary short extension of time have been referred to the full court by the Registrar.

3. The applications raise issues important to judges and practitioners as to the interpretation of the relevant statutory provisions, the jurisdiction of the Crown Court, and the jurisdiction of this court.

4. The victim of the offence, to whom we shall refer as "C", is entitled to the protection of the provisions of the Sexual Offences (Amendment) Act 1992. Accordingly, during her lifetime no matter may be included in any publication if it is likely to lead members of the public to identify her as the victim of the offence.

The facts:

5. For present purposes we need say very little about the facts. Between about November 2018 and March 2019 the applicant and C were engaged in a sexual relationship. He was 17,

but she was only 15. At his suggestion, they made a video recording of themselves having sexual intercourse. In early March 2019, without C's knowledge or consent, the applicant uploaded the video to the Pornhub website, where it was viewed several hundred times before being taken down. As the judge was to say in his sentencing remarks, it was a betrayal of C by the applicant, which badly affected her and damaged her ability to trust others.

6. The applicant admitted the offence when interviewed by the police in September 2019. Very regrettably, two years then went by before he was eventually charged and required to appear before a magistrates' court on 22nd September 2021. He indicated his guilt and was committed for sentence to the Crown Court at Bradford.

The proceedings in the Crown Court:

7. At the sentencing hearing on 15th December 2021, His Honour Neil Davey KC (sitting as a Deputy Circuit Judge) explained in careful and perceptive sentencing remarks his reasons for imposing the sentence to which we have referred. He then raised the question of whether the notification requirements applied. Having heard submissions, he concluded:

"... my understanding at the moment is that [the applicant] will be subject to the notification requirements of the Sexual Offences Act 2003 for five years. ... And that is the order I make at the moment."

8. The appropriate officer of the Crown Court accordingly issued a certificate, pursuant to section 92 of the Sexual Offences Act 2003, stating that the applicant had been "convicted in respect of the above sexual offence, 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".

9. Further written submissions on this issue were thereafter made by both counsel, in which

reference was made to paragraphs 13 and 95 of Schedule 3 to the 2003 Act. On 20th January 2022, the matter came back before the judge under the slip rule. Miss Heggie, then as now representing the applicant, maintained and pursued her earlier submission that the applicant was not subject to the notification requirements because he was aged under 18 when he committed the offence. The judge remained unpersuaded and concluded:

"... my decision is that the notification requirements still apply ... because my interpretation of section 95 is that the reference to the person's age when the photograph was taken is a reference not to the offender, but to the person who appears in the photograph."

(The reference there to "section 95" was in fact a reference to paragraph 95 of Schedule 3.)

10. The attempt to appeal against that decision got off to a false start, because application was initially made for the Crown Court to state a case; hence the need for a short extension of time in relation to this application for leave to appeal against sentence.

The Statutory Framework:

11. Part 2 of the 2003 Act is entitled "Notifications and orders". Section 80(1) provides:

"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;

..."

12. Section 82 contains a table setting out the notification period, which varies according to the type and length of the sentence imposed. In accordance with that table, the relevant

period in this case, if the notification requirements apply, is five years. It may be noted that by section 82(2), that period would be halved in the case of an offender who was under 18 "on the relevant date", which phrase, by section 82(6)(a), means the date of conviction. Because of the long delay in charging, the applicant was aged 20 when convicted.

13. Schedule 3, paragraphs 1 to 35C, contain a list of the sexual offences contrary to the law of England and Wales which attract the notification requirements. By paragraph 13 this list includes the following:

"An offence under section 1 of the Protection of Children Act 1978 (indecent photographs of children), if the indecent photographs or pseudo-photographs showed persons under 16 and —

- (a) the conviction, finding or caution was before the commencement of this Part, or
- (b) the offender—
 - (i) was 18 or over, or
 - (ii) is sentenced in respect of the offence to imprisonment for a term of at least 12 months."

14. Paragraph 95 states:

"A reference in a preceding paragraph to a person's age is —

- (a) in the case of an indecent photograph, a reference to the person's age when the photograph was taken;
- (b) in any other case, a reference to his age at the time of the offence."

15. The judge held, in essence, that an offender such as the applicant, aged under 18 at the time of the offence but 18 or over by the time of conviction, is caught by the notification

requirements. He ruled that the person referred to in paragraph 95(a) of the Schedule is the subject of the photograph, not the offender, and that section 82(2) supported his view that it is the age of the offender at the date of conviction, rather than his age at the date of the offence, which matters for sentencing purposes.

The jurisdiction of this court:

16. The grounds of appeal challenge those rulings. We have received helpful written and oral submissions from counsel, to both of whom we are grateful. But before we consider those submissions, Mr Hendron, appearing today for the respondent as he did below, raises a preliminary point as to whether there is any right of appeal against the notification requirements, and whether this court has any jurisdiction to hear this application.

17. Mr Hendron is correct in his submission that the notification requirements take effect, if at all, by operation of statute and not by virtue of a decision or order of a sentencing judge. The position is neatly encapsulated as follows by the learned editors of the Sexual Offences Referencer at paragraph 14.04 of the 3rd edition:

"A notification requirement is not a 'penalty'. It is therefore unnecessary, except in the case of a notification order following conviction abroad, for the court to order notification. Instead, the requirement is automatic. The role of the court is only to state in open court that one of the eligibility criteria in section 80(1) has been satisfied, and to certify that fact."

18. As to whether there is a right of appeal, case law draws an important distinction, which was summarised as follows by Lord Burnett CJ in *R v Rawlinson* [2018] EWCA Crim 2825, [2019] 1 WLR 2565 at [25] to [27]:

"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 WLR 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* ... at [20] and [32]."

19. In the present case, the judge fell into error by purporting to order that the notification requirements should apply to the applicant. With respect to the judge, who was confronted with an issue which arose unexpectedly, he had no power to make such a ruling or order. He went beyond merely informing the applicant of the notification requirements, and, to borrow the words of Lord Mance in *R v Longworth* at [20]:

"... the objective effect of the course he took ... and of the language he used, was a ruling determining the position subject to appeal."

In those circumstances, we are satisfied that this court has jurisdiction to hear an appeal against the judge's purported ruling.

20. However, because the judge had no power to make an order determining whether the notification requirements do or do not apply in a particular case, the outcome before this court must be as Lord Mance said of the earlier proceedings in *R v Longworth*:

"... on the appeal, if the issue regarding the judge's power to rule had been identified, the judge's ruling should have been set aside without more, as having been beyond his power."

That is so whether the judge's view as to the application of the notification requirements in the circumstances of this case was right or wrong.

21. We, nonetheless, take the view that we should determine whether the judge was correct in his interpretation of the statutory provisions. We must address the fact that the Crown Court issued a certificate stating that the applicant is subject to the notification requirements, and we have had the benefit of submissions on both sides as to this issue, which is of practical importance in the Crown Court.

Analysis: the statutory provisions:

22. Schedule 3 to the 2003 Act, which identifies the types of offence which by section 80 will attract the statutory notification requirements, includes several paragraphs which limit the category of offence by reference to the age of the victim, the age of the offender, the age of both victim and offender, or the age of some other party. Paragraph 13 is one example. Other examples include paragraph 3 (by which an offence contrary to section 6 of the Sexual Offences Act 1956 is only included "if the offender was 20 or over"); paragraph 4 (by which an offence contrary to section 10 of the 1956 Act is only included "if the victim or, as the case may be, other party was under 18"); paragraph 5 (by which an offence contrary to section 12 of the 1956 Act is only included "if (a) the offender was 20 or over, and (b) the victim or, as the case may be, other party was under 18"); and paragraph 14 (by which an offence contrary to section 170 of the Customs and Excise Management Act 1979 is only included "if the prohibited goods included indecent photographs of persons under 16 and ... the offender was 18 or over").

23. That feature of the Schedule is, in our view, important when interpreting paragraphs 13 and 95. The offence contrary to section 1 of the 1978 Act is committed where an offender takes or distributes an indecent photograph of a child – that is, a person under 18. But Parliament, no doubt having in mind the position of adolescents who willingly engage in sexual activity which is prohibited by the criminal law, has limited the circumstances in which such an offence attracts the notification requirements. It has done so in two ways: first, by requiring that the subject of the photograph is a child under 16; and secondly, by requiring that the offender was 18 or over, unless his offence was of such seriousness that he is sentenced to custody for at least 12 months. The obvious rationale of that paragraph is to limit the adverse consequences of conviction for some young offenders. That being so, the tenses of the verbs used in paragraph 13 are carefully chosen. It is, in our view, clear that the words "an offence ... if ... the offender was 18 or over" refer to the age of the offender at the time when he committed the offence. Those words are to be contrasted with the time at which the offender "is sentenced" in paragraph 13(b)(ii). Were it otherwise, the rationale of paragraph 13 would be defeated and the imposition of an onerous statutory requirement of notification would depend not on the date of commission of the offence, but on the date when the prosecution was commenced, even though, as this case shows, that might be years after the relevant adolescent sexual activity.

24. The judge was, with respect, in error in being influenced by the general rule that a court's sentencing powers depend on the offender's age at the date of conviction, because the notification requirements, as we have said, are not part of the sentence of the court. The fact that sections 82(2) and 82(6)(a) apply that general rule is nothing to the point, because that section only has effect when an offender has been convicted of an offence listed in Schedule 3. It is not concerned to define the ambit of Schedule 3.

25. Paragraph 95 of the Schedule specifies the time at which the age of one of the persons

who have been mentioned in the many preceding paragraphs becomes relevant. Sub-paragraph (a) carves out specific provision for the case of an indecent photograph, which might arise under paragraph 13 or paragraph 14. In such a case, we agree with the judge that it is the age of the subject when he or she is photographed, not his or her age when the section 1 offence is committed, which matters. Many years may have elapsed between the photograph of the child under 16 being taken and its being distributed; but it is, and will remain for all time, a photograph of a child under 16.

26. Sub-paragraph (b) then provides compendiously for all others who have been mentioned in the earlier paragraphs, whatever their status in relation to the offence. It is for that reason that paragraph 95 uses the word "person" which troubled the judge. The sub-paragraph makes plain that it is each such person's age at the time of the offence which matters.

27. Accordingly where, as in paragraph 13, the application of the notification requirements is dependent upon the offender having attained a particular age, it is his age when he committed the offence which is relevant. Parliament has granted him the benefit of an exception from the normal consequences of his crime, based upon his comparative youth when he committed it; and he does not lose that benefit merely because he is not convicted until after he has attained the relevant age.

28. Drawing these threads together, C was aged under 16 when the offending film was recorded, but the applicant was not then aged 18 or over. In those circumstances, and on a proper interpretation of the statutory provisions, the notification requirements accordingly do not attach to the applicant.

The s92 certificate:

29. What then of the certificate issued by the Crown Court, which by section 92(2) of the

2003 Act is evidence that the applicant was convicted of an offence listed in Schedule 3? In the light of what we have said about paragraphs 13 and 95, the applicant was not in law convicted of an offence listed in Schedule 3, and there should not be in existence an official court document incorrectly certifying the contrary.

30. A similar situation arose on appeal in *R v George* [2018] EWCA Crim 417, [2018] 2 Cr App R(S) 10, where the prosecution were unable to prove that the subject of the photograph was aged under 16, and the notification requirements accordingly should not have attached to the offender. In that case, this court held that there was no right of appeal against the issuing of a section 92 certificate by the Crown Court, but that the incorrect certificate should not remain in place. With the consent of the prosecution, two members of the court in that case reconstituted themselves as a Divisional Court, granted permission to apply for judicial review, and quashed the certificate.

31. In *R v Longworth*, the court accepted that such a course by way of judicial review may be appropriate, albeit that it was not found to be appropriate in the particular circumstances of that case.

32. We have no doubt that it is appropriate in this case for us to adopt a course similar to that taken in *R v George*. Both counsel have helpfully indicated that they take no issue with our proceeding in that way.

Conclusions:

33. For the reasons which we have given, we grant the necessary extension of time and grant leave to appeal. We allow the appeal against sentence to this extent only. We set aside the order purporting to apply the notification requirements, which the judge had no power to make.

34. We reconstitute as a Divisional Court of three judges. We treat the application for leave to appeal as including an application for permission to apply for judicial review of the section 92 certificate issued by the Crown Court at Bradford. We treat the Crown Prosecution Service as an interested party in that application. We waive all time limits and all procedural requirements. We grant permission to apply, grant judicial review and quash the certificate.

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

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