IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00635/A5

[2023] EWCA Crim 929

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 14th July 2023

B e f o r e:

LORD JUSTICE DINGEMANS

HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

SIR ROBIN SPENCER

R E X

- v -

PETER DEANE

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Miss S Begum appeared on behalf of the Appellant

J U D G M E N T

Friday 14th July 2023

LORD JUSTICE DINGEMAN: I shall ask Sir Robin Spencer to give the judgment of the court.

SIR ROBIN SPENCER:

1. This is an appeal against sentence brought by leave of the single judge.

2. On 15th February 2023, in the Crown Court at Snaresbrook, the appellant (who is now 54 years of age) was sentenced by Mr Recorder Butt KC for one offence of possession of indecent images of a child, contrary to section 160(1) of the Criminal Justice Act 1988. The appellant had pleaded guilty to that offence at an earlier hearing, and sentence had been adjourned in part so that proper consideration could be given to the prosecution's application for a Sexual Harm Prevention Order.

3. The appellant had pleaded guilty on a factual basis which was agreed by the prosecution. He admitted being in possession of 9,587 indecent images of children found on two hard drives at his home address on 28th April 2020 in circumstances which we shall shortly explain. For the offence itself the Recorder imposed a conditional discharge for a period of 12 months, as to which there is no complaint. However, the Recorder also made a Sexual Harm Prevention Order for a period of five years, the provisions of which were designed to provide oversight of any access by the appellant to the internet. It is the making of that order that is challenged in the appeal.

4. We are grateful to Miss Begum for her written and oral submissions. In short, it is contended that there were insufficient grounds to make the order; and in the alternative (but rather more faintly) that the terms of the order were oppressive.

5. For the relevant factual background we have to go back to 2015 when the appellant was arrested for an offence of sexual assault of a female under 13. When the police searched his home, devices were seized which were found to contain indecent images of children and extreme pornographic images. He pleaded guilty to the offences and in January 2016 he was sentenced to 18 months' imprisonment for the sexual assault and to a consecutive term of 18 months for the indecent image offences – a total of three years' imprisonment. Plainly, therefore, these were serious offences. A Sexual Harm Prevention Order was made for a period of five years. The court also ordered forfeiture and destruction of all equipment upon which the images were found.

6. By reason of those convictions the appellant became a registered sex offender, subject to the sex offender notification requirements for life.

7. The appellant was eventually released from that sentence in August 2018. He had been released on licence in February 2017, but breached his licence in May that year and had been recalled to prison to serve the balance of the sentence. As part of the notification requirements he was required to register his address. Following his release, he failed to report a change of address. The police became suspicious because he appeared to be living at a relative's address in Islington, whereas his last registered address was in Camden.

8. On 28th April 2020 police officers attended the address in Islington and found the appellant there. He was arrested for breach of the notification requirements. Several items of property were seized, including an internet-enabled phone, the possession of which amounted to a breach of the requirements of the Sexual Harm Prevention Order.

9. The appellant was charged with these breaches and pleaded guilty at the Magistrates'

Court. On 27th May 2020, he was sentenced to a community order with a rehabilitation activity requirement. A deprivation order was made in respect of the phone. The five year Sexual Harm Prevention Order was still in force, but due to expire in January 2021 (in less than a year's time). There was no application at that stage to renew it.

10. However, when the police examined the devices seized from the address in Islington on 28th April 2020, it was discovered that there were hard drives containing a very large number of indecent images of children. The appellant was interviewed about that on 15th March 2021, but at that stage made no comment.

11. In September 2021, charges were laid by postal requisition based on the material found on those devices. The appellant was adamant that the offending material which had been found dated back to 2015, prior to his arrest for the offences which resulted in the three year sentence. A senior forensic examiner instructed on behalf of the appellant produced a report which confirmed this. It was established that the most recent file in relation to the offending images found on the devices seized in April 2020 had been created as long ago as 5th July 2015. The majority of the material had been deleted and was inaccessible. However, there was a small amount still accessible on the hard drives, namely the 9,500 odd images referred to and admitted in the basis of plea. The prosecution eventually accepted this basis of plea, but only on the day of trial, even though the basis had been offered well beforehand.

12. The basis of plea asserted that when the appellant was remanded in custody in 2015 he thought that all the offending material had been seized by the police. When he was released from custody and went home, on unpacking his belongings he was shocked to discover these hard drives. He had tried to delete all the material, which had extended to well over 200,000 images, but he must have missed these 9,500 images. The basis of plea concluded:

> "This was not intentional. I thought I had deleted everything, as supported by the fact that vast amounts were deleted. I have been trying to put all these matters behind me."

13. In advance of the sentencing hearing, the prosecution applied for a Sexual Harm Prevention Order on the basis that there had been a failure to notify the change of address and that there had been a breach of the original Sexual Harm Prevention Order by his unauthorised possession of a mobile phone. These were, of course, the matters for which he had been sentenced on 27th May 2020. There had been no further offending.

14. We have read the transcript of the sentencing hearing. We sympathise with the Recorder in his task of trying to get to the heart of the matter, with limited assistance, it has to be said, from prosecuting counsel who, through no fault of her own, had taken over the brief for the sentencing hearing only at the last minute.

15. In his sentencing remarks the Recorder distilled the appellant's culpability in these terms:

> "… you became aware that you had indecent images of children on devices in your possession but you did not destroy these devices or arrange for the police to collect them but instead you tried to delete the images yourself. That conduct was taking place alongside your failure to abide by the terms of your notification requirements and failure to abide by the terms of your Sexual Harm Prevention Order.
>
> I agree that your culpability is low but it is not negligible. There are good reasons why it is against the law for a person to be in possession of indecent images of children and there are good reasons why the offence is much wider than just downloading images for sexual gratification.
>
> In your case, I of course accept that you did not download these images, apart from when you did so in 2015. But the manner in which you were in possession of the images was part of the pattern of behaviour on your part in line with the other matters to which you have pleaded guilty."

It was because culpability was low that the Recorder imposed only a conditional discharge by way of punishment.

16. The Recorder then turned in his sentencing remarks to the application for a Sexual Harm Prevention Order. There had been extensive discussion of this during exchanges with counsel. The prosecution had produced an amended draft when the Recorder pointed out anomalies and errors. The Recorder correctly identified the relevant test. He had to be satisfied that an order was necessary to protect the public from sexual harm from the appellant by the commission of specified offences. The risk had to be real, as opposed to a trivial, fanciful or remote risk. Sexual harm can be caused both directly and indirectly by indecent images of children. The Recorder continued:

> "It is clear to me that … you do have a sexual interest in children and child pornography. The 2016 matters put that beyond doubt. I am quite satisfied, based on all that I have read and heard that a real risk remains of you accessing child abuse images online.
>
> Taking all the relevant matters together, the 2016 offending, the failure to comply with the Sexual Harm Prevention Order, the failure to comply with the notification requirements, and the facts of this offence in which culpability is low but not negligible, I am driven to the conclusion that you cannot be trusted in the community … with online equipment without limit and an order is necessary to protect the public from a real risk of
> sexual harm by you.
>
> The order of course has to be necessary, it has to be proportionate. That applies both to the making of an order, the terms of the order, and the duration of that order."

17. The terms of the order then made by the Recorder were set out in the document which was perfected by the Crown Court officer in accordance with the final draft which the Recorder had approved. It says:

"**Internet Enabled Devices**

1. Peter Deane is prohibited from owning, possessing or using any personal computer, laptop computer, tablet, mobile device, gaming device or any other equipment capable of accessing the internet, unless:

(a) He has notified the police within three days of acquiring such a device;

(b) That device has the capacity to retain and display the history of internet use;

(c) The internet history on the device is not deleted and private browsing/incognito modes have not been activated;

(d) That he allows monitoring software to be installed on any internet enabled device by police.

2. Any device within paragraph [1] in Peter Deane's possession must be made immediately available upon request for inspection by a police officer, or police staff.

3. Paragraph [1] does not apply to any device which is part of a public library or job centre, educational establishment, or used at a place of employment in the course of that employment.

Data Storage

4. Peter Deane is prohibited from possessing data storage devices such as hard drives unless he has notified the police within 3 days of acquiring such a device and it is then registered with the PPU unit That device must be made available upon request for inspection.

Cloud Based Storage

5. Peter Deane is prohibited from purchasing or using any cloud based storage facilities unless:

(a) He has first notified the PPU in the area where he resides of any cloud based internet storage facilities that he holds or obtains; and

(b) He provides police user names and passwords upon request to permit inspection.

The order will continue until 15th February 2028."

18. Miss Begum has set out in her written submissions a very full summary of the relevant law and procedure, and has quoted a lengthy extract from Blackstone's Criminal Practice.

19. The principal guideline authority remains *R v Smith* [2011] EWCA Crim 1772; [2012] 1 Cr App R(S) 82, although that case was decided under the slightly different statutory regime for Sexual Offences Prevention Orders (SOPOs) The leading authority now in relation to the imposition of internet prohibitions in Sexual Harm Prevention Orders (SHPOs) is *R v Parsons and Morgan* [2017] EWCA Crim 2163; [2018] 1 Cr App R(S) 43. Giving the judgment of the court, Gross LJ explained that, whereas under the previous legislation a Sexual Offences Prevention Order (SOPO) could only be imposed where necessary to guard against the risk of "serious" sexual harm, a Sexual Harm Prevention Order (SHPO) could be imposed where necessary to protect "… the public or any particular members of the public" from sexual harm *simpliciter*. The questions to be asked by the court, as modified to reflect that change, are:

> (1) is the making of the order necessary to protect the public from sexual harm through the commission of scheduled offences?
>
> (2) if some order is necessary, are the terms imposed nevertheless oppressive?
>
> (3) overall, are the terms proportionate?

The court in that case went on to say that the guidance given in *Smith* remained in general essentially sound and should continue to be followed, but in certain specific areas

developments in technology and changes in everyday life call for an adapted and targeted approach. That was so especially in relation to risk management monitoring software, cloud storage and encryption software. At [58] of the judgment the court set out the terms of the Sexual Harm Prevention Order which it substituted on appeal, to take account of these developments in technology, and which might be described as a model order. We note that the order made by the Recorder in the present case follows closely and in its essence the approved wording of that model order. Miss Begum, in answer to the court in the course of submissions, accepted that proposition.

20. Miss Begum submits principally that there were quite simply insufficient grounds for a further Sexual Harm Prevention Order. There had been no other substantive offending since the expiration of the original order in January 2021, or even since the last intervention by the police in April 2020. There were no grounds to establish a "real risk", and the order was oppressive. She submits that the failure to notify the change of address and the breach of the order in April 2020 in relation to the phone were due to confusion over the myriad of previous conditions and notification requirements imposed upon the appellant. The unauthorised phone had not been used to facilitate further offending. The facts of the current offence, she submits, were very unusual and tended to suggest that the appellant had been successfully rehabilitated in that he had sought to delete all the material on the hard drives which he had discovered, to his surprise, were still in his possession. He was clearly trying to put his previous offending behind him. The lifelong notification requirements and the conditional discharge would, she said, be protective factors to mitigate any future risk.

21. In the alternative, Miss Begum submits in writing (but, as we have said, only faintly) that if it was necessary to make an order at all, it should have been in the simple terms identified in *Smith*, to preserve the history on any device and allow the police access: see [20(v)] of the judgment in that case.

22. We have considered all these submissions carefully, but we are not persuaded that the Recorder's assessment of risk and his conclusion as to the necessity for an order can be faulted. In the passage from his sentencing remarks that we have already quoted, he set out his reasoning carefully. It was fully in accordance with the relevant principles we have identified. The appellant was perhaps fortunate that the order had not been renewed or extended when he was sentenced by the magistrates in 2020. At that stage, however, the extra 9,500 images, which were still on his hard drives, had not been discovered. As the Recorder pointed out, the appellant's culpability lay in failing simply to hand over the hard drives to the police for them to take the requisite action; that failure had, of course, to be viewed against the whole history of his offending, some of which was very serious, as the Recorder rightly said.

23. As to the terms of the order made by the Recorder, they followed very closely the model order approved in *Parsons and Morgan*. Miss Begum very properly did not feel able to identify any significant departure which prejudiced the appellant or made the order oppressive. Her submissions were directed purely to whether the order should have been made at all.

24. For all these reasons, and despite Miss Begum's able and attractive submissions, the appeal must be dismissed.

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