Neutral Citation Number: [2024] EWCA Crim 409

Case No: 202303085 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN
Recorder Ashley-Norman KC
S20230313

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 May 2024

Before :

LORD JUSTICE GREEN
MRS JUSTICE MAY
and
MRS JUSTICE YIP

- -

Between :

DEWEY		**Appellant**
- and -		
REX		**Respondent**

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- -

Ms R Sadler (instructed by **Olliers Solicitors**) for the **Appellant**
Ms M Mostafa (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date : 7 March 2024

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Approved Judgment

This judgment was handed down remotely at 11.00am on 22 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, no matter relating to any of the complainants in this case shall during their lifetime be included in any publication if it is likely to lead members of the public to identify them as a complainant in that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act

Mrs Justice May :

Introduction

1. This appeal, brought with leave of the single judge, concerns the proper terms of a Sexual Harm Prevention Order ("SHPO").

2. On 18 July 2023 the appellant pleaded guilty at West London Magistrates' Court to four offences of making (ie downloading) or possessing indecent images of children and one offence of possessing extreme pornographic images. He was committed for sentence to the Crown Court. On 15 August 2023 in the Crown Court at Wood Green, the appellant was sentenced to a total of 12 months imprisonment suspended for 2 years with a rehabilitation activity requirement and unpaid work. Having been convicted of offences listed in Schedule 3 of the Sexual Offences Act 2003 the appellant was required to comply with notification provisions for a period of 10 years; in addition to this, the appellant will or may be included in the relevant list by the Disclosure and Barring Service.

3. On the day of the sentencing hearing, shortly before the case was called on, the prosecution uploaded a draft SHPO to DCS. There followed exchanges between counsel as to the proper terms of such an order. There was no objection in principle to the making of one. It seems that counsel were unable to agree the final terms, accordingly the court at and after the sentencing hearing was required to decide the scope and terms of the final order.

4. There is no appeal against sentence or any other ancillary order, the challenge is restricted to certain terms of the final SHPO.

Facts of the offending

5. The National Crime Agency received reports that the appellant had uploaded indecent and prohibited images to his online storage. On 29 April 2022 at around 7am plain clothes police officers executed a search warrant at the appellant's home address. On being told that the premises were to be searched he replied "I suspect you'll need things such as electronic devices" and went on to identify and produce a number of digital devices including his mobile phone and two laptops, for which he provided the PINs and passwords as well as his email address and password. Ten devices were seized and analysed. On five of those devices police found 5 category A indecent images of children (offence 1), 41 category B indecent images of children (offence 2), 203 category C indecent images of children (offence 3), 78 extreme pornographic images (offence 4) and 1,523 prohibited images of children (offence 5).

Information at sentence and the terms of the SHPO

6. The court below was provided with a schedule of representative images, which we have also seen. The schedule describes the content of images from each of the categories. The child images are all of male children.

7. The appellant was aged 37 at sentence and of previous good character. He had been employed in a senior role at a political consultancy, but had lost that job as a result of these offences. He had also been elected a local councillor shortly before his arrest and had long-standing political interests, from all of which he resigned as a consequence of these offences coming to light. The appellant appears to have been open with his family from the moment of his arrest; we have seen the letters of support from his parents and his sister which were before the sentencing judge. His family refer to the appellant's difficulties as a gay man with political ambitions and

his increasing isolation during his late 20s and 30s. They draw attention to the steps he has taken to confront his offending behaviour and to re-set his life following his arrest for these offences, obtaining a place on an MA course at Bristol University, subject to confirmation after disclosure of these offences.

8. A pre-sentence report (PSR) observed that "there is evidence of a lack of sexual intimacy, sexual pre-occupation and difficulties forming relationships and him socially isolating himself, which appears to have acted as a trigger to his use of the internet for sexual stimulation". The author noted that the appellant was full of shame and remorse. He had voluntarily signed up to and completed a series of five sessions with "Safer Lives" and was attending one-to-one weekly counselling sessions to address his addiction to illegal images. In addition to his employment being terminated and resigning from his political positions he had given up the flat which he shared with others and had moved back home with his parents. As to the likelihood of further offending, the author of the report concluded that the appellant was "a medium risk of re-conviction for an internet sexual offence…and a low risk for a contact offence" Slightly confusingly, under a further heading "risk of serious harm" the author concluded that "based on the information in this report [the appellant] has been assessed as medium risk of harm to children, most likely teenage boys".

9. As appears from a transcript of the hearing, the recorder heard submissions from counsel on the need for a non-contact provision in the SHPO, deciding during the hearing that one should be included, relying on the "medium risk" assessment of harm in the PSR to which we have referred above. He left the remaining terms to be agreed between counsel; however, as appears from a widely shared side note on DCS, he later resolved two remaining issues administratively, after the hearing.

10. The SHPO as finally ordered by the court restricted the appellant's activities in the following terms:

(1) Having any contact or communication of any kind with any child under the aged of 18, other than
(i) Such as is inadvertent and not reasonably avoidable in the course of lawful daily life (such as being served by a young person in a shop,) or
(ii) With the consent of the child's parent or guardian who has been made aware of his convictions by Police and/or Social Services and this person has been approved by Police of Social Services.
(2) Possessing or using any computer or other internet enabled device (including mobile phone and tablet PC), without Risk Management software approved by Police Visor Officers for the area which he lives, being installed. With the exceptions of:
(i) A business/educational environment or Library, or an internet enabled device that does not have a search facility (such as some digital TV boxes), which must have been deemed suitable in writing by the managing Police Visor Officers,
(ii) Any internet enabled device which has been approved in writing by the managing Police Visor Officers not to have monitoring software installed.
(3) Possessing, owning or using a mobile phone other than a mobile phone that you have provided the telephone number and IMEI number of to your managing Police Visor Officer.
(4) Downloading or using any password protected, hidden or disguised apps/programs that provide secret or secure storage for digital images on any Internet enabled device.
(5) Possessing any device capable of capturing an image (moving, still, digital or otherwise) unless he makes his Police Visor Officer aware of the device and provides access to it on request for inspection.
(6) Using any 'cloud' or similar remote storage media capable of storing digital images (other than that which is intrinsic to the operation of the device) unless you have prior written permission from your Police Visor Officer, and provides access to such storage on request for inspection by a police officer or police staff employee.
(7) Refusing or hindering access to any device in the possession of the defendant or in premises where he is present, resides or otherwise controls on request by a police officer seeking to check his compliance with the terms of this order.

Grounds of appeal

11. Ms Sadler appeared for the appellant on the appeal, as she did at sentence. We are grateful to her for her full and clear written grounds, supplemented by concise oral submissions at the hearing. Referring to the guidance on SHPOs given by this court in the case of *Parsons and Morgan* [2017] EWCA Crim 2163 she argued that certain

terms of the SHPO ordered here were unnecessary and/or disproportionate and should be amended:

(1) She submitted that the contact provision ought to be removed altogether, there being no evidence of the appellant having committed any contact offence, or even of having prepared to do so, and where the PSR concluded that he was "low risk" of committing that type of offence.

(2) The term covering risk management software at paragraph (2) of the order ought to be replaced with a term of the kind preferred by the court in *Parsons,* as being a more manageable and proportionate way of affording the required level of protection.

(3) It was said that paragraph (3) was otiose, given that all devices (which would include any mobile phone) would be covered by the requirements of paragraph (2) of the order so far as internet usage is concerned. Insofar as paragraph (3) covers calls or texts, such a provision was unnecessary as there was no evidence that the appellant had ever sought to contact a child.

(4) As many regular programmes or apps now have password protected secure storage, paragraph (4) of the order preventing use of any such apps or programs was unnecessarily restrictive; Ms Sadler suggested that amending to require the appellant to provide police with details upon request would be a more proportionate requirement.

(5) Ms Sadler questioned the necessity for a prohibition on possessing any image-capturing device, pointing to the absence of any evidence that the appellant had

himself ever taken indecent images. The images on his devices had all been downloaded from the internet, from content uploaded by others.

(6) The current formulation of the term relating to "cloud" and remote storage was subject to the administrative difficulties identified by the court in *Parsons* and should be amended as discussed by the court in that case.

(7) Finally, a term which appeared to give the police powers of entry to any premises was too wide. A proportionate requirement was for the appellant to give immediate access to his devices for inspection upon request.

12. Ms Sadler pointed out that her points at (1) to (7) above had all been reflected in the draft which she initially proposed at the time of sentence. That draft was itself based upon the terms currently indicated as suitable in the Judicial College Crown Court Compendium. She suggested that the last minute back and forth of drafts at the sentencing hearing had distracted the recorder, who had wrongly adopted the prosecution draft, which was not in accordance with the guidance in *Parsons* nor the proforma terms suggested in the Compendium.

13. Ms Mostafa, for the crown, emphasised the extreme nature of the images and the length of time over which the appellant had pursued his interest in such material. She pointed out that relevant pages of the Compendium, as well as the *Parsons* authority, had been provided to the recorder in advance of sentence. He had read and considered them carefully, as the transcript makes plain. So far as the contact provision was concerned, Ms Mostafa pointed out that it was not unworkable or oppressive as it did not prevent any contact, but only required parents or guardians to be informed first. Referring to the extreme nature of some of the images, and the assessment of the PSR author that the appellant was a medium risk of harm to

children, she submitted that the term was appropriately included. The risk management software was a necessary monitoring requirement and the term was drafted in such a way as to allow for it not to be installed in the event that it was considered by police to be unnecessary or overly burdensome. As to the phone, Ms Mostafa submitted that providing the required information was necessary and proportionate, bearing in mind the offences committed. The term as to password protected apps covered only secret or secure ie more inaccessible storage, which she maintained was a necessary and proportionate restriction. A ban on image capturing devices was likewise necessary. Seeking permission for the use of cloud or remote storage was not too onerous a requirement, she submitted. Finally, requiring the appellant simply to deliver up devices on request would not be sufficient, given the number of devices in his possession (10 at the time of his arrest); enabling the police to obtain access to his property would afford a further proportionate check.

Discussion and conclusion

14. It is regrettable that the rules requiring service of a draft order not less than two business days in advance of the hearing, as provided for by Crim PR rule 31.3(1)(b) and (5) were not followed. The production of a timeous draft is a prosecution responsibility. We are quite satisfied that Ms Mostafa did all she could to prompt early production of draft terms, no doubt she also would have wished to see a draft before the morning of the hearing, yet there was no draft forthcoming from those instructing her until the day of sentence. The terms of restrictive orders will always require careful consideration which is why the rules require a draft to be produced in good time. The last-minute rush in this case precluded a sensible discussion between counsel before the hearing, both as to the need for certain terms (in particular the non-

contact provision) but also as to the proper wording of terms, so as to ensure that necessary restrictions were also manageable and proportionate.

Contact restriction

15. The touchstone when considering the precise terms of a restrictive order such as a SHPO is always necessity and proportionality. A SHPO may be imposed where it is necessary to protect "the public or any particular members of the public from sexual harm" – see section 346 of the Sentencing Act 2000s 103A and following of the Sexual Offences act 2003. The terms which are necessary in an individual case must be carefully considered and weighed against the facts of that case. Further, when considering what is necessary, it will be important to bear in mind the protection afforded to the public by the offender being on the Sexual Offences Register and subject also to the Disclosure and Barring Service. Any restriction beyond those necessarily involved in notification and disclosure/barring must be justified, not just as "appropriate" but as <u>necessary</u>. As was pointed out recently by this court in *Hanna* [2023] EWCA Crim 33 there will be cases, for instance where an offender has actively sought out contact opportunities with children, where a wide-ranging order will be necessary.

16. We doubted whether a non-contact provision was necessary here, certainly in the wide terms of the SHPO which the court ordered. Having regard to the concerns expressed by Ms Mostafa, however, we decided to reserve judgment, asking counsel to go away and give consideration to the possibility of a more circumscribed non-contact provision, directed solely at limiting contact with teenage boys. We have been very much assisted by counsel's response, which has highlighted a number of difficulties in arriving at the narrower limitation. On balance, we have concluded that

it is not necessary or proportionate for a non-contact provision be imposed in the circumstances of this case. As Ms Sadler pointed out, despite extensive analysis of all 10 devices taken from the appellant police found no evidence of any attempt at contact with children, whether through internet chatrooms or in any other way, on the part of the appellant. The absence of any such evidence distinguishes this case from the facts of *Morgan* (the conjoined appeal heard with *Parsons*) where the court upheld a non-contact provision in a case involving indecent images offences. As we have already observed, the conclusions as to risk set out in the PSR here are on their face slightly contradictory, but it is nevertheless clear that the risk of this appellant committing contact offences was assessed as low.

17. We bear in mind also the mandatory notification provisions, the involvement of the Disclosure and Barring Service and the other restrictions contained in the SHPO. Taken together, these requirements appear to us to afford sufficient protection in the circumstances of this case.

Restrictions contained in other terms

18. The seriousness of the appellant's offending was in the time over which he had downloaded indecent images of children, the number of devices which he used and the number and nature of Cat A images, showing gross abuse of teenage boys. An order which restricted and controlled his continuing use of internet-enabled devices was always going to be necessary and Ms Sadler has never suggested otherwise. Her concerns have been with the scope and wording of the restrictions which the prosecution proposed and which the recorder subsequently accepted.

19. In *Parsons* the court updated the form of restrictions discussed and applied by courts following the earlier case of *Smith* [2011] EWCA Crim 1772. The court in *Parsons*

emphasised that any necessary restriction must be in a form that is effective, clear and realistic, "readily capable of simple compliance and enforcement" (at [5]). To that end, the court sought and obtained expert evidence on internet access and business software in the form of two reports prepared for the purposes of the two conjoined appeals before them. The concern of the court was to consider not only what restrictions on the use of internet-enabled devices were necessary but further how they could sensibly and practically be achieved, bearing in mind the "realities of Police time and resource constraints" (*Parsons,* at [18]). Having considered the evidence and submissions in connection with it, the court in *Parsons* concluded that routine installation of risk management software and/or approval of such software by the police would be administratively unworkable; a more practical solution would be to require notification to the police of any device capable of accessing the internet, together with a ban on deleting internet history, a requirement to produce the device for inspection and to allow installation of risk management software if required (at [19]). The court went on to determine that a general restriction on cloud storage was too blunt an approach; the specific vice to be protected against was the deliberate installation of a remote storage facility without notice to the police ([25]) and the order should be fashioned accordingly.

20. The terms of the SHPO which the court in *Parsons* finally determined as appropriate and necessary are helpfully discussed and set out in the current Crown Court Compendium volume 2 (Sentencing), at section 6.3. No evidence has been produced to us to suggest that technology has moved on in such a way as to require further updating at this time (see, however, the note at the end of this judgment). In the absence of such evidence we see no reason to depart from the form of the restrictions

which the court in *Parsons* decided afforded the necessary protection, in practical and effective terms, in the cases before it.

21. We do not consider that a term restricting the use of a mobile phone or an image capturing device is necessary: there is no evidence that the appellant has used his phone to communicate with a child and no evidence that he has ever sought to make or capture any image himself, despite his preoccupation with teenage boys having existed and associated downloading activity having occurred over many years (since 2008 in some cases). Necessary control over the use of such devices for downloading or viewing indecent images is in our view properly and proportionately achieved by the *Parsons*-type provisions regarding notification, production for inspection and manner of operating such devices.

22. Finally we regard a term giving police power to enter any premises as unnecessarily wide and disproportionate. The other requirements, covering notification, production and inspection are sufficient. That is particularly so in the case of this appellant, who appears on his arrest to have rendered instant and entire compliance with police requests regarding his devices, as we have noted above.

23. With grateful thanks to the joint endeavours of counsel, we conclude that the SHPO in its current form requires amendment. The appeal will accordingly be allowed to the extent of replacing the existing order with one in these terms:

"Thomas Dewey (TD) is prohibited, for a period of ten (10) years from:

(1) Using any device capable of accessing the internet unless:

(i) He has notified the police VISOR/Public Protection Unit team within three days of the making of this order of any devices already within his possession and three days of the acquisition of any such device thereafter;

(ii) it has the capacity to retain and display the history of internet use, is at all times set so as to retain the history of internet use and he does not delete

such history without permission of the VISOR/Public Protection Unit for the area in which he resides;

(iii) he makes the device immediately available on request for inspection by a police officer, or police staff employee, and allows such person to install risk management monitoring software if they so choose.

This prohibition shall not apply to a computer at TD's place of work, Job Centre Plus, Public Library, educational establishment or other such place, provided that in relation to his place of work, within three days of him commencing use of such computer, he notifies the police VISOR team of this use.

(2) Interfering with or bypassing the normal running of any such computer monitoring software.

(3) Using or activating any function of any software which prevents a computer or device from retaining and/or displaying the history of internet use, for example using 'incognito' mode or private browsing.

(4) Using any 'cloud' or similar remote storage media capable of storing digital images (other than that which is intrinsic to the operation of the device) unless, within three days of the creation of an account for such storage, he notifies the police of that activity, and provides access to such storage on request for inspection by a police officer or police staff employee.

(5) Possessing any device capable of storing digital images (moving or still) unless he provides access to such storage on request for inspection by a police officer or police staff employee.

(6) Downloading or using any apps/programs which provide a facility to store digital images, on any internet-enabled device, unless he provides access to such storage facility on request for inspection by a police officer or police staff employee.

(7) Installing any encryption or wiping software on any device other than that which is intrinsic to the operation of the device.

24. The appeal is allowed only to the extent of amending the terms of the SHPO as above; the sentence itself and all other orders remain unchanged.

25. Finally, we note that, in the course of submissions on this appeal, Ms Mostafa for the prosecution informed us that in her recent experience she had come across at least 50 different forms of SHPO wording covering restrictions on internet-enabled devices. These variations are likely to reflect changes in technology, as devices and programmes advance and become more sophisticated. We had no expert evidence before us on this appeal, but having regard to the years which have passed since *Parsons* (which was decided in 2016), the time may now be approaching where the

precise wording of proportionate and realistic restrictions needs to be addressed once more, with appropriate contemporary expert evidence.

Defence Costs Order

26. During the course of finalising this judgment, Ms Sadler notified us of her intention to seek a Defence Costs Order ("DCO"). The court has power under s.19(4) Prosecution of Offence Act 1985 ("POA") to order payment out of central funds of such sums as appear to it to be reasonable to compensate an appellant who is not in custody and attends court in relation to an appeal against conviction or sentence. s.16A of the POA precludes the reimbursement of legal costs under a DCO (subject to certain exceptions which do not apply here), accordingly the amount which we are able to order is restricted to the costs of obtaining a transcript and of the appellant's travel to attend the hearing. Proper receipts having been provided to us, we make a DCO in the total amount of £145.69.