Neutral Citation Number: [2018] EWCA Crim 2309

Case No: 201704003 A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM CHESTER CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/06/2018

Before :

LORD JUSTICE HOLROYDE
MS JUSTICE RUSSELL
and
JUDGE MAYO QC

- -

Between :

RICHARD HEWITT	**Appellant**
- and -	
REGINA	**Respondent**

- -

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Miss M Masselis appeared on behalf of the Appellant

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MS JUSTICE RUSSELL :

The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence.

1. The appellant appeals against sentence with leave of the single judge, limited to the imposition of a Sexual Harm Prevention Order (SHPO). On 26th July 2017, in the Crown Court at Chester, the appellant pleaded guilty to five counts of sexual offences against children. He was sentenced on 28th July 2017 by the same judge to a total 4 years and 3 months imprisonment to be served consecutively to the two year term he was already serving,

2. The facts of the offences to which he pleaded guilty can be summarised in respect of each count. Count 1: on 28th January 2016 the appellant used a laptop computer from his home address to exchange messages with CS, a girl he believed to be aged 9, via Skype she confirmed her age more than once. During the exchange the appellant asked what CS was wearing and whether she felt "horny". He went on to ask, "Will you get naked for me?" and asked for pictures of herself. She sent pictures, but these were not recovered from the laptop. The appellant went on to ask, "You fingering your pussy now?" and was sent another picture to which he replied "Nice. Are you fingering now?" and then "How many fingers you using?" There appeared to be no further response. CS was never traced.

3. Count 2 concerned an exchange of messages between the appellant with HC, another girl, who he believed to be 12 years old, on a site called Chat Avenue and later on Skype. In fact, he was exchanging messages with an undercover Police Officer. On 4th August 2016 the Officer logged into the "Kids Chat" area of Chat Avenue, reserved for users under the age of 16. The appellant sent a private message asking where HC lived and how old she was and he was told that she was 12.

4. 12. He then engaged HC in conversation during which she asked his age, to which he replied, "Does age matter?" and then said, "Being honest, I want to meet and fuck you." HC replied that she had not done that, to which the appellant said, "I want to be your first". He asked her what she looked like and for her "tit size", repeatedly asked what colour underwear HC was wearing and said that he would like to know because they were going to meet up soon. He asked her for pictures and asked whether she was "ever horny". She responded that she did not know what the appellant meant he said that he would teach her. When HC said she had to go because her mother was home the appellant said, "I want to see you soon."

5. He contacted HC again on 5th August 2016 and said that he still wanted to meet her and asked for a picture. He sent a picture of himself and said that he was 39 years old. As the conversation progressed he asked, "Will you do anything for me?" and whether she wanted him to be her boyfriend. He said, "When we meet alone what will you wear for me?" He asked HC to take her knickers off and when she said she had done so he said, "Is your pussy getting wet?" He then told her to put a finger inside her vagina. When she replied that it hurt he said, "It's your first time and I'm teaching you." He went on to ask her to meet for the night at his house, her house or at a bed and breakfast. He then told her to get a hairbrush and penetrate her vagina with the handle. She said that she had done so and that it hurt.

He went on to ask when he could see her alone. He contacted her again on 8th August to ask about meeting up.

6. On 9th August the appellant was arrested after having travelled to Newcastle upon Tyne to meet who he understood to be a young girl who he had been grooming over the internet. This was a separate offence and resulted in the 2 year sentence which he was serving at the time of sentencing in the index offences. Following his arrest, the Police searched his home address in Ellesmere Port and seized devices capable of accessing the internet the results of that search formed the basis of count 4. On a Samsung laptop a chat log was discovered which showed the appellant exchanging messages with TM, aged 14, over Skype messenger. Those exchanges took place between 7th and 8th August 2016 during the course of which the appellant asked TM about the colour of her underwear and said that he wanted to kiss her and "touch her up". He asked whether she was on the pill and asked her to send photographs of herself. He asked her to digitally penetrate herself and to use three fingers. He told her to write his name "by her pussy," which she said she did, and asked whether she would like his "cum" in her mouth. He asked her to meet with him and stay the night at his address. He asked whether she would be his girlfriend. She replied that so long as he did not mind that she was 14 and would have to go back to school in September. There followed discussion about meeting that night and the appellant searched for directions on Google maps.

7. Count 6 related to a Category A image of a female child aged 7 to 9 years found on a grey laptop was also seized by the police. Count 7 was related to a breach of various prohibitions of his Sexual Offences Prevention Order imposed on 18th January 2007, as the appellant had communicating with CS, HC and TM, failing to make his devices available upon request by a Police Officer, by deleted his internet history and by failing to notify his supervising Officer of his user names.

8. In interview the appellant accepted that he had the electronic devices in his flat and said that he forgot to tell his supervising Officer and knew he was in breach of his SOPO. He said that he had regularly used software to clear the contents of his hard drive. In respect of the offences of causing or inciting a child to engage in sexual activity he said that his father had died recently and he was struggling to cope. He stated that evil voices in his head made him do it and that he was not sure what he was doing. He said that he was lonely and had made a huge mistake.

SENTENCE

9. When passing sentence, the Judge observed that the appellant had a very bad record for offences of this type in that he had persistently used the internet to seek out photographs of children which he knew to be illegal. He had persistently failed to comply with the terms of a Sexual Offences Prevention Order. He had previously sexually assaulted a 12 year old child. He admitted at Newcastle Crown Court that he had travelled to Newcastle to meet a child he had groomed on the internet. There were three further occasions when his computer was checked that showed contact with three girls, although one of them was in fact a Police Officer, and whom the appellant had expressed a desire to meet. The judge said that appellant's position was very serious; he was already serving a 2 year sentence imposed at Newcastle and it was as a result of that offending that the

current matters had come to light when his computer was searched. That was a computer which, under the terms of his then licence, he should not have had and which he had hidden.

10. The Judge had to put himself in the position of the Judge in Newcastle had he been sentencing the appellant for all the offending and then reduce that by the figure the appellant had already received in Newcastle, bearing in mind totality. Had the Judge been sitting in Newcastle dealing with all matters he would have considered the appellant to be a dangerous offender and made an extended sentence, but as the Newcastle offence was the most serious and had not resulted in such a finding such a sentence was not imposed. The judge that a Category 2A sentence was appropriate in relation to the attempt to engage in sexual activity. The appellant had asked the children to do things to themselves for him to look at, it was probable that he got no more than a picture back, but the appropriate sentence after trial was 3 years; bearing in mind totality, and despite the aggravating feature of the appellant's previous conviction, that would not be increased. The appellant was entitled to full credit for his guilty plea and so the sentence on Counts 1, 2 and 4 was 2 years consecutive to the sentence presently being served. In relation to Count 4, a single photograph, it was 3 months concurrent. An additional sentence for the breach of the Sexual Offences Prevention Order was 16 months imprisonment, giving full credit for the plea and still bearing in mind totality. The total sentence was 3 years and 4 months imprisonment consecutive to the sentence already being served.

11. The judge imposed a Sexual Harm Prevention Order (SHPO). He considered the case of *Smith* [2012] 1 All ER 451 but conclude that Smith did not deal with an offender like the appellant who persistently breached orders of this nature and ignored them. The appellant's licence had the similar conditions as were proposed for the SHPO, but the judge was persuaded that as it was for a shorter term a SHPO was to be imposed indefinitely, which could be reviewed if the appellant had not offended for 5 years or more. If the appellant obtained some form of employment where he had to have a computer he would have to return to court so that could be incorporated in the order. He would not be prevented from having a legitimate job, but the SHPO was to prevent him from owning, possessing or using any computer other than he may use a public computer in a library. The rest of the prohibitions were orders that would be expected and involved the appellant not contacting any children or to have any contact with any child. The judge concluded that the appellant had brought it upon himself.

12. The Sexual Harm Prevention Order, made until further Order, had following prohibitions:

    1) Not to own, possess or use any computer (including, but not restricted to, any PC, laptop or tablet) other than you may use a public computer in a library;

    2) Not to delete, alter or manipulate the internet search history from any device you have used;

    3) Not to use any software which does not record internet history for examination on the device using it;

4) Not to use any software which is intended to conceal the user's identity, including the internet protocol address;

5) Not to subscribe to, or utilise, any 'cloud' or similar remote storage media;

6) Not to own, possess or use any mobile phone capable of accessing the internet;

7) Not to use any email address, or username, for any online accounts which may be used for communications with members of the public, or any phone number, unless within 3 days of first use you register it with your supervising police officer or accredited police staff;

8) Not to own or possess any device capable of storing digital images unless you make it available on request for inspection by a police officer or accredited police staff;

9) Not to have any contact with a child, knowing or believing that they are under 16 years of age, unless previously agreed by children's social care in the area in which the child resides, save for inadvertent contact;

10) Not to communicate with any person who is, or you believe to be, under 16 years of age by phone, electronic communication network, system or application;

11) Not to refuse entry to any police officer or accredited police staff deployed to monitor this order to your home or temporary address, or to refuse access to any police officer/staff to any computer or electronic equipment in your possession or to which you have access;

13. Counts 3 & 5 of attempting to meet a child following sexual grooming were ordered to lie on file against the appellant, and a forfeiture order was made in respect of the Samsung laptop computer, mini-book PC, LG telephone and packaging, Seagate external hard drive, envelope containing female underwear, tablet computer, USB memory stick and grey laptop computer. Having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply with the provisions of Part 2 of the Act (Notification to the police) indefinitely. There was a victim surcharge order.

14. The appellant was aged 40 at the time he was sentenced. He had 7 convictions spanning from 2007 to 2016; all of his previous convictions were relevant. On 18th January 2007 he received a 2 year Community Order for four offences of making/possessing indecent photographs of children. On 3rd December 2007 he received 6 months imprisonment for two offences of breach of Sexual Offences Prevention Order and ten offences of making indecent photographs of children. On 2nd March 2009 he received 8 months imprisonment for four offences of breach of Sexual Offences Prevention Order. On 17th November 2010, 2 ½ years' imprisonment for failing to comply with notification requirements and sexual assault. On 14th October 2014 2 years' imprisonment for four offences of making/possessing indecent photographs of children. On 18th October 2016 2

years' imprisonment for attempting to meet a girl under 16 following grooming and breach of a Sexual Offences Prevention Order.

APPEAL

15. The appellant was granted leave by the single judge to appeal against the imposition of the SHPO as wrong in principle in as a) it was wrong to find on the evidence that such a term was necessary to protect children from further sexual harm; b) it was wrong to conclude that such a term was proportionate on the facts of the case; c) insufficient regard was given to the appellant's legitimate need to have internet access in order to conduct his everyday life; and, d) no or no sufficient regard was given to the inherent difficulty in policing the term of the order as constructed. We agree with his reasoning and specifically with b) and d).

16. While it is understandable that the sentencing judge was concerned by the appellant's record of criminal convictions and his breaches of previous orders we consider that he failed properly to apply the principles in *Smith*. In the case of *Parsons & Morgan* [2017 EWCA 2013, this court underlined the following:

    i. First, as with SOPOs, no order should be made by way of SHPO unless *necessary* to protect the public from sexual harm as set out in the statutory language. If an order is necessary, then the prohibitions imposed must be *effective*; if not, the statutory purpose will not be achieved.

    ii. Secondly and equally, any SHPO prohibitions imposed must be *clear* and *realistic*. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.

    iii. Thirdly, as re-stated by *NC* (*supra*), none of the SHPO terms must be oppressive and, overall, the terms must be proportionate.

    iv. Fourthly, any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances.

17. In *Parsons* the court went on to consider, inter alia, blanket bans on internet access and use; cloud storage; risk management monitoring software; and encryption software. As observed the need to use, and the importance of, the internet in everyday living has increased since *Smith*, and we would add is increasing. There may be a case where a blanket ban such as has been imposed in this case is proportionate even though oppressive, but do not consider that the appellant's offending, repugnant as it is, would justify such a ban. The use of the internet is an essential and integral part of everyone's life and it's use essential to transactions between individuals, statutory bodies and other entities.

18. Secondly, we do not consider that the order is effective and therefore the statutory purpose would be defeated as it could not be enforced. The police do not have the

time or resources effectively to monitor the appellant's use any computer or hand-held device, to install monitoring software or to oversee and check on its' use even if it were installed. As to cloud storage, as referred to in *Parsons,* its use is practically ubiquitous as it is built in to most operating systems; any device used by the appellant, including were the SHPO to remain in place, those in public libraries, would utilise the cloud and fall foul of the prohibition 5) in the order. Those terms of the SHPO are unworkable and not capable of enforcement. They amount to a blanket ban and as such they are oppressive and disproportionate. We will quash terms 1), 5) and 6) of the SHPO.

19. As drawn to our attention by the Registrar it would appear that the victim surcharge order in the present matter is unlawful. A surcharge order under the Criminal Justice Act 2003 (Surcharge) Order 2012 (S.I. 2012/1696) only applies where all of the offending before the Court was committed on or after 1st October 2012 (Article 7(2)). In the present case, the offence on Count 6 spanned the coming into force of the current surcharge provisions. In accordance with the authorities *Bailey & Ors* [2014] 1 Cr.App.R.(S.) 59, CA and R v Poole [2015] 1 Cr.App.R.(S.) 2, CA, where an offence straddles a commencement date the provisions least punitive to the offender should apply. No Surcharge Order may be made in respect of any offence committed before 1st April 2007. The offence on Count 6 spans 1st January 2006 to 9th August 2016. It would appear that no surcharge order should have been imposed and we quash that order.

20. To that extent we allow the appeal.