Neutral Citation No. [2019] EWCA Crim 182
2018/02032/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 8th February 2019

B e f o r e:

LORD JUSTICE IRWIN

MRS JUSTICE CUTTS DBE

and

HIS HONOUR JUDGE PAUL THOMAS QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

MARCO CHEYNE

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Mr S Field (Solicitor Advocate) appeared on behalf of the Appellant

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J U D G M E N T
(Approved)

Friday 8th February 2019

LORD JUSTICE IRWIN:

1. On 27th November 2012, having pleaded guilty before magistrates, the appellant was committed to the Crown Court for sentence, pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, in respect of the offences which we will summarise in a moment.

2. On 27th December 2012, the appellant was due to appear in the Crown Court at Leeds. He failed to attend. A bench warrant not backed for bail was issued.

3. On 31st December 2017 (five years later), the appellant was arrested under that bench warrant and on 2nd January 2018 he reappeared before the Crown Court.

4. On 23rd January 2018, he was sentenced by His Honour Judge Kearl QC for two offences of voyeurism, contrary to section 67 of the Sexual Offences Act 2003, to six months' imprisonment on each count, to run concurrently, but suspended for 24 months, with a 90 day treatment programme requirement. He admitted the failure to surrender to custody and was sentenced to a consecutive term of two months' imprisonment, again suspended for 24 months.

5. On 30th April 2018, in the Crown Court at Leeds, again in front of His Honour Judge Kearl, the Sexual Harm Prevention Order, which had been imposed on the first occasion, was varied so as to include a further prohibition: preventing travel to any country outside the United Kingdom. The written record of that order indicates that the period of the foreign travel prohibition was expressed to be seven years.

6. The appellant appeals by leave of the single judge against the variation of the Sexual Harm

Prevention Order made in April 2018. We stress that there has been no application for leave to appeal against the substantive sentences, or the Sexual Harm Prevention Order as imposed in January 2018. It is the variation only which is the subject of the appeal.

7. The underlying offending, which took place in 2012, was that in the university sports hall in Leeds a female student noticed that someone was holding a mobile phone underneath the bottom of the next cubicle in the changing room and was doing so as she was changing. She reported it to staff and the appellant was apprehended. As we have indicated, sentence was passed in respect of that offending.

8. At the time when the initial sentence was passed in January 2018, it was not known and not placed fully before the court, what the appellant had been doing between failing to appear in 2012 and his re-arrest. As Mr Field has pointed out, the arrest took place at the airport on the appellant's return from abroad. It will have been clear at that point to those who enquired that he had come from abroad; that he had been away for five years; that his passport was within a very short time of expiry; and the entries in the passport, which subsequently took on significance, could have been looked at. However, the order was made without reference to those facts.

9. Subsequently, the appellant had contact with Detective Constable Birch of the Integrated Offender Management Unit of the West Yorkshire Police. In a statement dated 4th April 2018 DC Birch states, amongst other things, as follows:

> "5. West Yorkshire Police are making an application to vary the Order against [the appellant] to include a foreign travel restriction. I make this statement to assist the court in this application.
>
> 6. [The appellant] has several convictions for theft, drugs, firearms and sexual offences. I attach a copy of his previous convictions.

> 7. [The appellant's] first conviction of a sexual nature was in November 2001 when he was convicted of (1) burglary with intent to rape and (2) indecent assault on a female. I attach the Certificate of Conviction.
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> 8. The circumstances of the 2001 offence were that [the appellant] broke into a dwelling house at night by climbing up a ladder and into an open bedroom window. A 16 year old female was asleep in the room at the time and [the appellant] got into her bed, grabbed her wrist and put his hand over her mouth. The victim was terrified and managed to raise the alarm and [the appellant] fled the scene.
>
> 9. [He] was convicted at Leeds Crown Court. He was placed on the Sex Offenders Register as a result of this offence and given five years' imprisonment for the burglary with intent to rape and 18 months' imprisonment for the indecent assault."

The statement went on to recite the two further offences of voyeurism which led to the original Sexual Harm Prevention Order. The officer then continued as follows:

> "13. It transpired that [the appellant] had absconded and evaded the police by spending a number of years overseas, in particular in Thailand and the surrounding countries. He was not in fact located until 2017 and on his return to the UK the warrant was exercised and [the appellant] was arrested."

He outlined the facts of the offence in the January hearing which had led to the Sexual Harm Prevention Order. He then said this:

> "16. I have recently visited [the appellant] and discussed his current situation with him. It is the first time that I have been able to actively manage him as an offender since the 2012 offence due to him absconding abroad.
>
> 17. I have seen stamps in his passport which show that he has spent the last five years in Thailand whilst a warrant was in force for his arrest in the UK. He has numerous passport stamps which indicate a regular pattern of him leaving the border of Thailand, entering a neighbouring country and returning to Thailand the same day. In doing so, he has obtained a further thirty day tourist

> visa stamp on each occasion. I have confirmed these actions with [the appellant] in person."

DC Birch notes that on his return to England at the end of 2017, the appellant brought only one suitcase. He recites the fact that the passport expired on 11th January 2018 and that, as he had explained, the appellant's motivation for return to this country was his need to obtain a new passport. The statement goes on as follows:

> "20. I have made enquiries and in the course of assessing [the appellant] I do not believe that he has any reason to stay in the UK. He has no financial ties to a permanent abode, no family support or work/community commitment.
>
> 21. I have discussed with [the appellant] his future plans and he has told me that he intends to go back to Thailand. [The appellant] has now already applied for a renewal or new passport, and his application is currently with the Passport Office in Durham for consideration.
>
> 22. I would therefore like to make an application to vary [the appellant's] current SHPO to include a prohibition on travelling to any country outside the UK,
>
> 23. [The appellant] is a repeat offender and unless he is in the UK I cannot assess and manage the continuing risk he poses to the public, young people and vulnerable adults.
>
> 24. Nothing is known of his movements and actions whilst in Thailand. I have asked him to account for his actions whilst abroad, but he is not prepared to disclose what he did other than to say he worked in hospitality between hotels, casinos and bars. Given that his previous offending involved an attack in a bedroom and voyeurism, these environments are highly inappropriate and raise significant concerns. I do not believe that he should be working or within environments such as these, especially where there is no supervision or monitoring in place.
>
> 25. Under the current Order and in line with the Sex Offender requirements, [the appellant] is only subject to a standard requirement to notify the police seven or more days of intended foreign travel. However, once he has done this, there is nothing requiring him to come back to England for offender management or any other reason.
>
> 26. If [the appellant] were permitted to travel to Thailand, then I

> believe that he would remain there as he did in 2012. This would not enable me to suitably manage him under the terms of the Sex Offenders Register and ensure that he conforms to all the requirements he has. Neither would I be able to ensure that children and vulnerable adults are kept safe in the UK and abroad."

The officer went on to outline his concerns: that the appellant had evidenced a lack of regard for the legal system; that he knew he would be able to evade his requirements under the Sex Offenders Register; and that he had purposefully chosen to leave for Thailand which, as the officer put it, "is a country known for sexual exploitation and where monitoring of sex offenders is scarce and poor". The officer contrasts that situation with the capacity of he and his colleagues to monitor the appellant if he remains in this country.

10. It was on that basis that Judge Kearl made the variation.

11. The first matter to deal with is the period of travel prohibition. It is clear that the statute, by section 103D(1) of the Sexual Offences Act 2003, limits the period of a travel prohibition to five years.

12. The court record of the order states that the travel prohibition has a duration of seven years – that is to say, the duration of the remainder of the Sexual Harm Prevention Order. Such an order would be *ultra vires*: the court would have no power to make it. However, it is in this instance clear that it is the record of the order that is in error, not the order that the judge made. The application was for a five year prohibition and the notes of hearing indicate that that is what the judge in fact ordered. There was no error in the sentence; there is an error in the record of the sentence which has been made by the court staff. The period of the prohibition was lawful. What is required here is not an appeal, but a correction of the court record. Certainly, the appellant must be given a copy of the corrected order once it has been made.

13. The terms of the prohibition are straightforward. They read as follows:

> "Foreign Travel Prohibition
>
> The [appellant] is prohibited from foreign travel … from travelling to any country outside the United Kingdom until 4pm on 29th April 2023 or further order."

That, of course, is five years from the time when the order was made. That is appropriate and correct.

14. We turn to the more significant point taken by the appellant. The submission is that the variation was unlawful because it is said that there is a requirement of law of a change in circumstances before such a variation can be made. In his written submissions, Mr Field puts the matter this way:

> "It is submitted that there is little in the application which (even if it were conceded, which it is not) which was not known at the date of the making of the order, and as there has been no change in circumstances it seems the [appellant] is not, in fact, seeking a variation of the order, but in effect appealing against its terms."

Mr Field then refers to *R v Hoath and Standage* [2011] EWCA Crim 274.

15. *Hoath and Standage* arose in relation to the allied provisions which created a Sexual Offences Prevention Order under the Sexual Offences Act 2003, before it was amended to allow for the Sexual Harm Prevention Order, the order in question. As the judgment in that case indicates, the problem at that stage was that it was unclear what was the route of appeal from a Sexual Offences Prevention Order. Such a problem does not arise in relation to a Sexual Harm

Prevention Order.

16. It is correct that merely to return to the Crown Court where an order of this kind (or a Sexual Offences Prevention Order) was made and to say: "I would like a variation" would be wrong in principle, because it would, in effect, undermine the finality of the order as originally made. So, in general terms, it is correct (although not particularly based on the position in *Hoath and Standage*) that a variation must have some basis, rather than be, in effect, an illegitimate attempt to appeal.

17. However, it seems to us that the submission made by Mr Field goes far too far. He asks us to conclude that there is a general principle through the criminal law of a need for change before a protective order can be varied. He goes as far as to say that a variation is precluded as a matter of law by reference to the requirement for change, even where the evidence which provides the basis for the variation in the order was not known by the court who made the original order, but should have been. The effect of that would be that a protective order of this kind could not be corrected, if it could be said by any party affected that the applicant for the order in the first place had missed something. That goes far too far. There cannot be a requirement of that kind in relation to a protective order which places on the relevant authorities – in this instance the Chief Constable – a continuing obligation to protect children or vulnerable adults. It is relevant in this particular case that that obligation to protect children or vulnerable adults is explicitly imposed in relation to such people both inside and outside the United Kingdom. That is the very basis upon which the power to make a travel prohibition is based. Section 103E(5)(b) recites that the power is present for the purpose of "protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom". So, the duty is clear. The Chief Constable in any given instance cannot abandon a protective duty to those outside this country. That is the statutory basis for the

imposition of such an order.

18. In this case it is in our judgment clear that, even if there was fault on the part of the Police Force in not learning as much as they did do by April, and if that should have been learned in January, then that would be a perfectly proper basis – indeed a compelling basis – for the application for the variation as it was sought here. The order proceeds from a protective duty and after-gained knowledge does justify an application of this kind.

19. In his oral submissions, Mr Field goes on to say that on the facts of this case such a variation is not proportionate. He says that there is in this instance no evidence of sexual tourism. He submits that the instant offences represented a breach of privacy, but not serious sexual offending and that, therefore, there is no proper basis for the order.

20. We roundly reject those submissions. In looking at the risk posed by any sexual offender, the background of that sexual offender is important. The risk is a future consideration. Estimating the risk in relation to any offender, where that is required, must involve looking not merely at the instant offences but at the background of the offender, because the authorities have to prognosticate as to the future risk posed by that individual. It is, therefore, proper and indeed necessary in an exercise of this kind to look at the whole background.

21. This order was perfectly properly made. It was applied for in a proper fashion. Accordingly, the appeal is dismissed.

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

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