Regina v Nigel Wilkinson

[2019] EWCA Crim 641

Before: Lord Justice Singh Mr Justice Soole His Honour Judge Wall QC (Sitting as a Judge of the CACD)

Tuesday, 19 February 2019

Representation

Mr B Waters appeared on behalf of the Appellant.

Judgment

His Honour Judge Wall:

1 This appellant pleaded guilty to three counts of possessing indecent photographs of a child, one count of possessing a prohibited image of a child and one of possessing an extreme pornographic image. He was sentenced on 31 August 2018 to a total term of 20 weeks' imprisonment. As a result of that sentence he was automatically made subject to the notification provisions for a period of 10 years. There is no appeal against the custodial element of this sentence.

2 He was also made subject to a sexual harm prevention order without limitation of time. On his behalf in succinct and well-focused submissions, Mr Waters does not take issue with the terms of the order but does seek to challenge its length, suggesting that it was disproportionate and that an order perhaps of similar length to the automatic notification period of 10 years would have met the justice of the case.

3 The short facts of the case were as follows. The police executed a search warrant at the home of the appellant who was aged 56 and of good character at the time. He was found to be in possession of a number of computers and electronic storage devices on which were found a total of 1163 films and images at category A, 610 films and images at category B and 14,373 films and images at category C. Many of these images were particularly depraved and showed children as young as 2 being subjected to penetrative abuse. The computers that were examined by the police were also found to contain images of bestiality. The appellant, when challenged, made immediate admissions and entered guilty pleas.

4 There was a pre-sentence report available to the sentencing judge which assessed the appellant as being of low risk of re-offending such that he was not

eligible for a sex offender treatment programme.

5 The terms of the sexual harm prevention order were set so as to allow the appellant to use computer equipment but to ensure, in a variety of ways, that he should not do so to commit offences similar to those with which he was then being dealt with by the Crown Court. They also served to allow the police to monitor his use of such equipment. Given that there is no challenge to the terms of the order, we do not need to set them out more fully than that.

6 This order, obviously, has a significant impact on the appellant's life day-to-day. It also automatically extends the period of time during which the notification provisions apply. The period of notification is automatically extended by operation of law to cover the full period of any sexual harm prevention order.

7 In submitting that it was disproportionate to pass an order without limitation of time, the appellant relies on the out authority of *R v Smith [2011] EWCA Crim 1772* . At paragraph 17 of that judgment Hughes LJ (as he then was) said the following:

> "17. We entirely agree that a SOPO must operate in tandem with the statutory notification requirements. It must therefore not conflict with any of those requirements. Secondly, we agree that it is not normally a proper use of the power to impose a SOPO to use it to extend notification requirements beyond the period prescribed by law. Absent some unusual feature, it would therefore be wrong to add to a SOPO terms which although couched as prohibitions amounted in effect to no more than notification requirements, but for a period longer than the law provides for. But it does not follow that the duration of a SOPO ought generally to be the same as the duration of notification requirements."

8 That authority was considered further in the case of *R v McLellan [2017] EWCA Crim 1464* , by which time sexual harm prevention orders had replaced SOPOs. At paragraph 25 Gross LJ set out the following considerations to be applied:

> "i) First, there is no requirement of principle that the duration of a SHPO should not exceed the duration of the applicable notification requirements. As explained in Smith, at [17], it all depends on the circumstances.
>
> ii) Secondly (so far as here relevant), a SHPO may be made when the Court is satisfied that it is necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant: s.103A (1) and (2)(b)(i) of the 2003 Act. As with any sentence, a SHPO should not be made for longer than is necessary.
>
> iii) A SHPO should not be made for an indefinite period (rather than a fixed period) unless the Court is satisfied of the need to do so. An

indefinite SHPO should not be made without careful consideration or as a default option. Ordinarily, as a matter of good practice, a Court should explain, however briefly, the justification for making an indefinite SHPO, though there are cases where that justification will be obvious.

iv) All concerned should be alert to the fact – as this case highlights – that the effect of a SHPO of longer duration than the statutory notification requirements has the effect of extending the operation of those notification requirements; an indefinite SHPO will result in indefinite notification requirements: s.103G(1) of the 2003 Act. Notification requirements have real, practical, consequences for those subject to them; inadvertent extension is to be avoided."

9 Applying the principles set out in those cases to the facts of the one in hand, we reach the following conclusions. Firstly, there was no explanation as to why the judge took the view in this case that an order without limitation of time was necessary. When making the order he initially said:

"…I make a Sexual Harm Prevention Order against you effective from today for a period of 10 years…"

He then went on to say:

"…in fact I don't see any reason why it shouldn't be without limitation of time until further order."

The way in which the judge expressed himself suggested that he was looking to see whether there was a good reason not to make an indefinite order rather, as would have been the proper approach, looking for a reason why making such a draconian order was necessary.

10 Secondly, we do not find this to be a case in which the need for an indefinite order is obvious, such that explanation is unnecessary. There are very few, if any factors in play here, which are not in play in many cases of this type.

11 Thirdly, the appellant's age, remorse, admissions and good character, coupled with the views expressed in the pre-sentence report as to the unlikelihood of him offending in future, were all factors pointing to the suitability of a determinate order rather than one without time limitation.

12 Having considered all of those matters, we conclude that the length of the sexual harm prevention order made in this case was disproportionate to the criminal activity and the limited harm posed by the appellant into the future.

Therefore we propose to limit the length of the order to 10 years to tie in with the period of notification which follows on automatically from the sentence passed.

13 To that extent only, this appeal is allowed.