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2018/03149/A4
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 21st February 2019

B e f o r e:

LORD JUSTICE IRWIN

MRS JUSTICE LAMBERT DBE

and

SIR KENNETH PARKER

R E G I N A

- v -

ABDULLAH AL MAHMOOD

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Miss J Knight appeared on behalf of the Appellant

Miss B Cripps appeared on behalf of the Crown

J U D G M E N T
(Approved)

Thursday 21st February 2019

LORD JUSTICE IRWIN: I shall ask Sir Kenneth Parker to give the judgment of the court.

SIR KENNETH PARKER:

1. On 18th January 2018, in the Crown Court at Lewes, the appellant, Abdullah Al Mahmood, who is now aged 43, pleaded guilty to three offences of possession of indecent photographs of a child (counts 1, 2 and 3) (category A, B and C respectively) and one offence of possessing an extreme pornographic image (count 4). On 22nd February 2018, he was sentenced by His Honour Judge Tain to concurrent terms of twelve months' imprisonment, suspended for eighteen months on each count, with a rehabilitation activity requirement for a maximum of twenty days and also an unpaid work requirement for 100 hours. Importantly, in the context of this appeal, there was a Sexual Harm Prevention Order under section 103 of the Sexual Offences Act 2003, made until further order.

2. The appellant appeals against sentence by leave of the single judge.

3. The facts in outline are as follows. The appellant was arrested in relation to another matter which was not proceeded with, but during the course of the investigation his phone was seized. The appellant wanted to get some numbers off it before it was interrogated but he was not allowed to. There was some issue about the provision of a PIN. He gave an incorrect number to the police but he eventually provided his PIN through his solicitor. There were a number of images found: sixteen category A indecent photographs of a child (count 1); five category B indecent photographs of a child (count 2); 22 category C indecent photographs of a child (count 3); and one extreme pornographic image of a boy aged three to five years old performing oral sex on a large animal's penis (count 4). All of the images depicted male and female children.

4. When he was interviewed by the police, he made no comment.

5. In sentencing, the judge said that the appellant's incapacity to acknowledge that he had an interest in child pornography, which he obviously had as demonstrated by the photographs, otherwise he would not have the photographs, was troubling. As a result, it seemed that there was a risk, as the probation officer said in the report prepared for his having to return to court for something else, but it was hoped that his shame and those more responsible than him would keep him out of the court system. He was given due credit for his guilty plea. The starting point was twelve months' imprisonment, and that applied on each count which, as they ran concurrently, did not require differentiation. The sentence was suspended for eighteen months and there were the requirements to which we have already referred.

6. In his sentencing remarks, the judge made no explicit reference to the Sexual Harm Prevention Order. However, it appears from the transcript of the prosecution opening that Miss Cripps, on behalf of the prosecution, drew the judge's attention to the draft Sexual Harm Prevention Order. She stated that Miss Thorne, who represented the appellant in the court below, had only "very recently" been given a copy of the draft order and that there appeared to be no objection to it. The judge then asked the question whether the order was "until further order". Miss Thorne confirmed that to be the case. The judge simply said, "Yes, okay". It does not appear that Miss Thorne made any submissions to the judge on the terms or duration of the Sexual Harm Prevention Order.

7. We turn to the grounds of appeal. The appellant does not seek to challenge the custodial sentence imposed for the relevant offences. There is only one ground of appeal, namely, that the judge was wrong to impose a Sexual Harm Prevention Order that would last indefinitely, until

further order. It is submitted, in short, on behalf of the appellant that such an indefinite order was not necessary or proportionate. The appellant was a man of good character and he had the benefit of eight character references. The judge did not give explicit reasons to support the making of such an order when, it is submitted, he should have done so.

8. In the light of that submission, it is appropriate at the outset to consider in a little more detail than would ordinarily be required some of the matters set out in the pre-sentence report of Miss Catherine Mahoney, dated 22nd February 2018. She said the following:

> "1.3 During the pre-sentence report interview, [the appellant] accepted that he possessed indecent images of children, and an extreme pornographic image. He reported that a number of the images which depicted male genitalia had been sent to him by the children's parents, with requests for him to check whether their recent circumcisions required medical attention. He reported that, as an Imam, he referred members of his community to doctors for this procedure, and therefore became a point of contact. He denied requesting these images, reported that he was unable to recall the names of the parents or children, and denied gaining any sexual gratification from the images. [The appellant] also reported that a number of the images, including those depicting a boy, aged three to five years, performing oral sex on a large animal's penis, and a naked boy, aged one to three years, on his hands and knees with a lead around his neck, eating from a bowl on the floor, were posted onto the social networking site, Facebook, 'in the comments section under things'. He reported that the images 'just came onto [his] phone'. However, when challenged on this, he accepted that he saved the images. [The appellant] reported that he was 'disgusted' by the images, and was going to 'bring them to the police'. When asked why he did not do so, he replied, 'I don't know'. [The appellant] reported that he stored images he came across over a two week period, and possessed them for approximately six months. He denied seeking the images and vehemently denied any capacity to be aroused by children or extreme pornography. He denied that the index offences were underpinned by sexual gratification, and reported that he has 'just made a true and honest mistake'.
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> 1.4 Due to the account provided by [the appellant] during our interview, I have been unable to fully explore the factors underpinning his offending behaviour. The court will take a view on the account he provided during our interview, and in my respectful submission it lacks credibility.

...

2.3 During our interview [the appellant] described a history of sexual contact with adult females only. When asked about his sexual interests, he responded 'I have no sexual feelings', 'I do not have dirty thoughts'. During an exploration of this, [the appellant] repeatedly asserted that he does not, and has never had, any sexual desires or interests, and vehemently denied any sexual interest in children. His denial of any sexual interest raises concerns with regards to his genuine engagement during the interview. Whilst [the appellant] was encouraged to consider adult hormones and their impact on, what is often considered to be, an innate driver for sexual gratification, he consistently denied feelings of this nature. This will be explored further post-sentence.

2.4 With regards to his lifestyle and personal circumstances, [the appellant] is an Imam and reported that, when he was not working at a local restaurant, he spent his time at his local Mosque, as well as teaching Arabic to a number of children in his community. He also reported that, as a point of contact for parents seeking to arrange circumcisions for their children, he is a highly regarded and respected member of his local community. [The appellant] reported that, in spite of his community being aware of his arrest, he has maintained his position as an Imam. He reported that his community 'know [he is] a good man, a man who protects and cares for children'. He reported that he is 'trusted' and 'respected', and hopes to continue to work with children in his community. Considering [the appellant's] unaddressed offending behaviour, his access to children raises serious concerns. Furthermore, his account that a number of the images were sent to him by parents of children in his local community compounds these concerns. That said, it must be noted that there is no evidence available to me to suggest that [the appellant] has sought, or had, sexual contact with a child. This will be monitored and explored further post-sentence.

2.5 During our interview [the appellant] reported that he resides alone in rented accommodation. However, liaison with Sussex Police has confirmed that, when the pre-sentence report interview took place, [the appellant] was residing in shared accommodation with a family, including two children. [The appellant's] failure to disclose this information, which is considered to be pertinent to risk management, raises serious concerns with regards to his genuine engagement during our interview. Sussex Police have also confirmed that [the appellant] is no longer authorised to reside at this address. However, I have been unable to establish contact with him since our interview to establish his current circumstances in respect of this accommodation."

In concluding her report, under the heading "Risk of Serious Harm", Miss Mahoney said as follows:

> "4.2 ... Extensive consideration has been given to the risk posed by [the appellant]. Whilst the index offences represent his first conviction, his apparent lack of genuine motivation to engage with the Probation Service, [his] access to children, [his] trusted status within his community, and unaddressed offending behaviour suggest that the risk of serious harm to children may currently be imminent. However, over five months have passed since the commission of the index offences, and there is no evidence available to me to suggest that [the appellant] has not complied with bail conditions in place. Considering this, restrictive measures are deemed to be a critical risk factor in this case. As such, should a Sexual Harm Prevention Order be imposed today? The risk of serious harm would not be considered to be imminent and would therefore be medium. A medium risk is assessed when there is a risk of serious harm, but that this is unlikely to occur unless there is a change in circumstances. However, in the absence of appropriate restrictions, the risk of serious harm would be imminent and therefore high. A high risk is assessed when there 'are identifiable indicators or risk of serious harm. The potential event could happen at any time and the impact would be serious'."

The Applicable Law

9. Having been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003, the appellant was required to comply with the provisions of Part 2 of that Act (notification to the police). This requirement arises under the legislation and does not depend on any order of a court. Had the appellant's suspended sentence of imprisonment stood alone, its length meant that the appellant would be subject to the statutory notification requirements for ten years. However, by reason of section 103G(1) of the 2003 Act, where an SHPO is made, the defendant concerned automatically remains subject to the notification requirements while the SHPO has effect. Accordingly, in this case the effect of the SHPO being made until further order meant that the appellant remained subject to the notification requirements indefinitely or until the

SHPO ceases to have effect.

10. In *R v Steven Smith and others* [2011] EWCA Crim 1772, the Vice-President of the Court of Appeal Criminal Division (Hughes LJ, as he then was) stated as follows at [16] and [17]:

> "Notification/SOPO [as it then was]
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> 16. In *R v Hammond* [2008] EWCA Crim 1358, this court remarked that any SOPO has to run in parallel with the notification requirements. It added that accordingly it would normally be important that the terms of any SOPO were consistent with the duration of the notification requirements. In *R v Hemsley* [2010] EWCA Crim 225 this court, in reducing the length of a SOPO, relied in part on this proposition and, although this was unnecessary to the decision, appears to have read *Hammond* as meaning that the duration of a SOPO ought ordinarily to mirror that of the notification requirements.
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> 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. Notification requirements and the conditions of a SOPO are generally two different things. The first require positive action by the defendant, who must report his movements to the police. The second prohibit him from doing specified things. Ordinarily there ought to be little or no overlap between them. If the circumstances require it, we can see no objection to the prohibitory provisions of a SOPO extending beyond the notification requirements of the statute. It may also be possible that a SOPO for less than an indefinite period might be found to be the right order in a case where the notification requirements endure for ever; that also is permissible in law."

11. In *R v McLellan and Bingley* [2017] EWCA Crim 1464, Gross LJ made further general observations on the relationship between SHPOs and notification requirements. He said as

follows:

> "25. We were invited by Mr Wood to give guidance as to principle on the correlation between the duration of SHPOs and notification requirements. With respect, we are not minded to go beyond the following observations:
> 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: section 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.
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> 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.
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> 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: section 103G(1) of the 2003 Act. Notification requirements have real, practical, consequences for those subject to them; inadvertent extension is to be avoided.
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> 26. We are likewise not persuaded of the need for a specific warning as such from the Judge merely because a SHPO of longer duration than the applicable notification requirements is contemplated. In our judgment, this topic is best dealt with under the umbrella and by careful observance of, the Criminal Procedure Rules ("Crim PR"), reflecting, in this context, the observations in *Smith*, at [26]. Thus Crim PR part 31.3 (5) already provides for service by the prosecutor of a draft SHPO not less than two business days before the hearing at which the order might be made. Moreover, that draft order must specify the proposed prohibitions. As it seems to us, the draft SHPO should indicate the proposed duration of the SHPO or, at the least, flag the question of duration for consideration. In any event, a defendant's legal representatives should be alert to questions of duration, as part of their ordinary preparation in

> such cases. Without being unduly critical, inadvertence in the present case serves as a cautionary reminder of what can happen otherwise."

In *McLellan* the court concluded in the particular circumstances that the duration of the SHPO should be made for five years and not indefinitely. The ten year notification period under the 2003 Act was of course unaffected.

12. Drawing these observations together, it seems to us that where the custodial term was less than 30 months (as here), a clear case would be required to justify an SHPO of indefinite duration, bearing in mind a point emphasised on the appellant's behalf that a SHPO of indefinite duration would automatically extend the duration of the statutory notification period of ten years. That is a not inconsiderable burden. No rule of law, it can be seen, prohibits an indefinite SHPO in those circumstances, and of course there will be clear cases where an indefinite SHPO is necessary and proportionate, notwithstanding the knock-on effect on the duration of the notification requirements. However, caution and consideration are required before imposing an indefinite SHPO in the circumstances and the court must look critically at the particular circumstances of the case to determine whether such an order is justified.

13. We refer again to the content of the pre-sentence report that has been set out extensively in this judgment. That evidences that the appellant totally refused to acknowledge his offending behaviour or its causes. He also told a very material lie to the probation officer, to which reference has been made, and he gave no indication whatsoever that he would address his offending behaviour and its causes. This is of very great concern in a case in which it is obvious from the appellant's status and connections that he does have access to children and is generally trusted to behave lawfully and responsibly to them.

14. On this material, in these particular circumstances, where the risk would, in our judgment, be a continuing one, the SHPO would be necessary and proportionate for an indefinite duration in order to achieve the statutory purpose of protecting the public or any particular members of the public from sexual harm from the appellant in terms of physical or psychological harm caused by the appellant committing one or more offences listed in Schedule 3 to the 2003 Act.

15. It was urged on us by Miss Knight, who represents the appellant before us today, that the burden in this case should be on the State to justify at the end of a putative ten year duration for the Sexual Harm Prevention Order that the risk so clearly and articulately identified in the pre-sentence report continued to be a real and concerning one.

16. We do not agree with that analysis. In our judgment, in a case of this kind, where the very serious risk has been so explicitly explained and identified, then the evidential burden is quite fairly put upon the appellant himself to demonstrate during the course of the ten year period that indeed things have materially changed. In the absence of material change, there is no good reason to believe that the risk, so clearly identified, would recede to an acceptable level.

17. Accordingly, we consider that the Sexual Harm Prevention Order that was imposed by the judge in the circumstances that we have explained, which obviously were far from satisfactory and were not in accordance with the clear mandate of the Criminal Procedure Rules, should nonetheless for the reasons that we have stated be upheld.

18. We would only add this. It might be, with the passage of time, that the appellant might come to realise that he does have a serious problem which he needs to address honestly, conscientiously and with determination, and to engage willingly and constructively with those who have the expertise and experience to help him so that the risk so clearly identified can be

reduced and managed to an acceptable level. He would then be in a position at an appropriate moment to make his own application for a variation of the order that the court has made.

19. However, for all these reasons, this appeal against sentence is dismissed.

20. The court made an order for confiscation under section 1 of the Obscene Publications Act 1964. That is manifestly wrong. That Act had no application here. The order should, as is normally the case, have been made under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000. The record needs, under the slip rule, to be amended accordingly.
