NCN: [2020] EWCA Crim 982

2019/04131/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 17th July 2020

B e f o r e:

LADY JUSTICE CARR DBE

MR JUSTICE SWEENEY

and

THE COMMON SERJEANT OF LONDON
(His Honour Judge Marks QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

AMIR TOFAGSAZAN

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Miss B Rogers appeared on behalf of the Applicant

Mr E Hand appeared on behalf of the Crown

J U D G M E N T

Friday 17th July 2020

LADY JUSTICE CARR:

Introduction:

1. On 23rd November 2018, in the Crown Court at Lewes, the Applicant pleaded guilty to three counts of fraud, contrary to section 2 of the Fraud Act 2006. On 11th January 2019, he was sentenced to a total of three years' imprisonment. In addition, a Criminal Behaviour Order was imposed for a period of ten years which prohibited the Applicant from:

> 1. Owning or possessing more than one mobile phone handset;
>
> 2. Owing or possessing more than one mobile phone SIM card which must be registered in his full name and address with the service provider.
>
> 3. Owning or possessing more than one computer; and
>
> 4. Having access to or using dating services.

The Criminal Behaviour Order also imposed the following requirements:

> 1. Notify the police of his home address at the nearest operational police station; notify the police within seven days of moving to any subsequent new address.
>
> 2. Notify the police at the nearest operational police station for where he lives of any details of all devices he owns or possesses, including make, model, serial numbers and notify the police within three days of any subsequent devices that may be replaced/upgraded.
>
> 3. Make any of the above devices available on request by a police officer and allow access to any property where the device may be in order for it to be examined.

The Applicant was also required to keep in touch with his supervisor, whose identity was "to be advised", and to notify that supervisor if he changed his address.

3. The Applicant's application for leave to appeal against the first three prohibitions imposed by the order, together with an application for an extension of time (276 days), has been referred to the full court by the Single Judge.

The Facts

4. It is not necessary for us to refer in any detail to the facts, given the limited scope of the application. In short, the Applicant met three victims via various dating websites. He communicated with them using a false profile and provided false details about his professional background, namely that he was a surgeon working in London and elsewhere around the world, together with false details of his financial status. The Applicant was, in fact, at all material times a serving prisoner, having been sentenced in May 2015 for 16 similar offences of so-called "romance fraud".

5. The Applicant duped each of his victims into giving him money. He cited financial difficulties, said not to be his fault. He then used the fruits of his dishonesty for his own private exploits, and in particular for online gambling. One of the victims was also tricked into participating in degrading sexual activity.

6. He was described fairly at the time of sentence as a "committed fraudster who preyed on vulnerable and lonely women seeking a romantic partner". He had eight convictions for 40 offences spanning between 2008 and 2015. Relevant convictions included 31 offences of fraud and kindred offences.

Circumstances leading to the imposition of the Criminal Behaviour Order

7. The hearing on 11th January 2019 was listed as a *Newton* hearing. That did not, in the event, proceed in the light of agreement in relation to the financial sums involved. Rather the matter proceeded straight to sentence. A draft of the proposed order was provided to the Applicant, together with a Notice of Intention to Apply and a Proposed Application. The Notice indicated that the prosecution intended to rely on hearsay evidence from DC Lisa Hilliard. However, in the event, no such evidence was ever provided to, or required by, the Judge or the parties.

8. In answer to enquiry from this court before today's hearing, DC Lisa Hilliard stated that she had drafted the application on the understanding that it would be adjourned for a later hearing. She did not provide a statement at the time, as the officer in the case relayed to the court. The Judge, however, was minded to grant the order in the terms drafted. The matter therefore went ahead, without any additional evidence being required.

9. As indicated, the Judge granted the Criminal Behaviour Order in the terms presented and as had by then been agreed between the parties, after one amendment to the proposed order which limited the fourth prohibition to dating websites, as opposed to all social media platforms.

Grounds of Appeal

10. Miss Rogers, who appears for the Applicant, submits that the purpose of a Criminal Behaviour Order is to tackle serious and persistent offenders. The court, rather than considering whether an order is necessary, should consider whether it would "help" to prevent future offending conduct. In her submission, the fourth and final prohibition of the order, namely that preventing the Applicant from joining any dating organisations for ten years, prevents future offending conduct and is sufficient without more. The further prohibitions are unnecessary and fulfil no purpose other than to disrupt the Applicant's life (although she accepts that the disruption in question is not profound). She submits that it is not the access to devices that is the problem, but rather how the Applicant uses those devices. Thus, the final prohibition directly targets the offending behaviour and no other prohibitions are necessary. The first three prohibitions are simply extra terms which overload the order to no real end.

11. Opposing the application, Mr Hand submits that the application for the order complied with Part 31(2) of the Criminal Procedure Rules. It was made on notice and the Applicant was represented. The Applicant had the opportunity to oppose the imposition of the order, or to any of its terms. There was an amendment to the order before the terms were agreed and approved. This was not a box-ticking exercise of the type disapproved in *R v Khan (Kaman)* [2018] EWCA Crim 1472 at [20]. The officer in the case had been present at court and available had the court required any additional evidence. The effect on the victims in this case is said to be very significant, with persistent re-offending by the Applicant and failures to comply with previous court orders. Mr Hand submits that the test of necessity was met, and the order proportionate to the need to protect others from the Applicant's repeat offending.

Analysis

12. The Anti-social Behaviour, Crime and Policing Act 2014 ("the 2014 Act") came into force on 20th October 2014. Section 22 provides materially that where a person is convicted of an offence, the court may make a Criminal Behaviour Order against the offender if two conditions

are satisfied: first, that the court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person (see section 22(3)) and secondly: " … that the court considers that making the order will help in preventing the offender from engaging in such behaviour" (see section 22(4)). Section 33(5) of the 2014 Act states: "In deciding whether to make a Criminal Behaviour Order, a court may take account of conduct occurring up to one year before the commencement day". A recent and convenient summary of the relevant principles can be found in *R v Brain* [2020] EWCA Crim 457 at [28] to [32], which we simply adopt for present purposes.

13. It is rightly accepted that the Applicant, by virtue of his previous convictions, is a persistent offender. He is also a very serious offender. There can be no challenge in principle to the imposition of a Criminal Behaviour Order on the facts since both preconditions in section 22 are clearly made out.

14. In our judgment, the Judge was unarguably entitled to consider that the first three prohibitions, as well as the fourth, would "help" in preventing the Applicant from engaging further in fraudulent activity of the type in question. Limiting the number of devices and the internet accounts capable of facilitating offending of this type enables proportionate and effective monitoring. It acts as a deterrent. It is difficult to see how it can be said, for example, that being limited to one mobile telephone meaningfully disrupts the Applicant's life. In the context of this type of offending, and this offender, the fewer devices the Applicant has the better. The first three prohibitions, thus, have value over and above the fourth, and serve a meaningful purpose, as appears to have been accepted by all at the time of sentence.

15. For these reasons, we do not consider it to be arguable that the first three prohibitions were wrongly imposed. We would refuse the application for leave on that basis, and in the absence of any substantive merit would not grant the considerable necessary allied extension of time sought.

16. However, matters do not end there. As the Single Judge noted, the Criminal Behaviour Order does not comply with sections 24(1) and (2) of the 2014 Act, which provide as follows:

> "(1) A Criminal Behaviour Order that includes a requirement must specify the person who is to be responsible for supervising compliance with the requirement …
>
> (2) Before including a requirement, the court must receive evidence about its suitability and enforceability from:
>
> (a) the individual to be specified under sub-section (1) …"

17. These provisions contain important safeguards. Amongst other things, they ensure that any requirements imposed are both suitable and enforceable. The court is required, independently, to receive and consider evidence on these issues. This is a necessary discipline. It is not open to a sentencing court simply to disregard the legislation, even if no issue in relation to the proposed requirements is expressly taken by a defendant.

18. Here there were two material failures to comply with section 24: first, the supervisor for the purpose of the requirements was not identified; secondly, no evidence was received from the supervisor so identified.

19. We have the power to entertain evidence and to vary the Criminal Behaviour Order so as to cure these defects, provided that section 11(3) of the Criminal Appeal Act 1968 is not offended: see *R v AD* [2019] EWCA Crim 1339. In advance of this hearing, we invited the Respondent to be prepared to address the requirements of section 24 with evidence if necessary. Without objection from Miss Rogers on behalf of the Applicant, we heard oral evidence on oath from DC Lisa Hilliard. She stated that she had drafted the order and that in her opinion the requirements to which we have referred were both suitable and enforceable. She gave evidence to the effect that she had seen the Applicant upon his release on licence from prison on 4th November 2019 and had made clear to him that she was now the supervising officer upon his release on licence.

20. We consider it appropriate to vary the Criminal Behaviour Order so as to satisfy the requirements of section 24 of the 2014 Act. The variation will identify DC Lisa Hilliard as the supervising officer. There is no question of the Applicant being treated more harshly as a result of this. If anything, his position is improved by reason of the improved clarity of his obligations.

17. To this extent, and for these reasons, we grant leave and the necessary extension of time. The Criminal Behaviour Order will be varied as indicated.
