Neutral Citation Number: [2021] EWCA Crim 1008

Case No: 202100771 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
HIS HONOUR JUDGE PICTON
T2020744

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 July 2021

Before :

LORD JUSTICE STUART-SMITH
MR JUSTICE WILLIAM DAVIS
and
HER HONOUR JUDGE DHIR QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

- -

Between :

ROBERT ANTONIO HANSON

Appellant

- and –

REGINA

Respondent

- -

Michael Magarian QC (instructed by **Wells Burcombe LLP**) for the **Appellant**

Hearing date: 30 June 2021

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Approved Judgment

Lord Justice Stuart-Smith:

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this offence. Under those provisions, where a sexual offence has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with s.3 of the Act.

Introduction

2. On 23 March 2020, in the Crown Court at Bristol, the appellant, who was then aged 29, pleaded guilty to the two offences we detail below. On 17 April 2020 he was sentenced by HHJ Picton as follows:

    i) On Count 1, which was an offence of Meeting A Child Following Sexual Grooming, no separate penalty was imposed;

    ii) On Count 2, which was an offence of Sexual Activity With a Child, he was sentenced to 4 years imprisonment;

    iii) A Sexual Harm Protection Order ("SHPO") was ordered, pursuant to s. 103A Sexual Offences Act 2003, to last for 15 years;

    iv) Having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003, the appellant was required to comply with the notification provisions of Part 2 of the Act for an indefinite period.

3. He now appeals with the leave of the single judge against the length of the SHPO. He is represented before us by Mr Magarian QC, who was not his counsel at trial. His submission is short and succinct, namely that there was no justification for imposing the SHPO for such a long period, that such a period was unnecessary and disproportionate, and that the period of 15 years should therefore be set aside and a shorter period substituted. The Crown has not submitted a Respondent's Notice or written submissions and has not appeared before us today.

The Factual Background

4. The appellant was, at the material time, a 27 year old primary school teacher who was of previous good character.

5. On 19th April 2019, the appellant attended the Insomnia Gaming conference at Birmingham NEC. Whilst he was there, he met the complainant, aged 14, and her friend. They engaged in conversation along with the complainant's friend's mother. On 1st June 2019, the complainant's mother discovered an empty blister packet for a "morning after" contraceptive in the complainant's bin. The complainant was questioned by her mother who discovered that her daughter had slept with someone called "Rob". The complainant's mother confiscated the complainant's mobile phone and found a series of messages between her daughter and the appellant. They included a photograph of the appellant, making it clear to the complainant's mother that he was an adult in his 20s. She was able to trace the appellant on Twitter, discovered that he worked as a teacher in Bristol and contacted the police.

6. The messages between the appellant and the complainant which were discovered on the phone included discussion about the complainant's school work and daily routine, references to using contraception and direct comments about the complainant's age. The appellant was arrested on 3rd June 2019 at the school where he was a Year 4 teacher. In interview, he admitted that sexual intercourse had taken place between him and the complainant but said that he did not know that she was under 16 years old, despite him admitting that he had bought the complainant a child's train ticket. He was re-interviewed on 4th October 2019 and provided no comment to any of the questions asked.

7. Despite his initial denials, from a fairly early stage the appellant admitted that he knew the complainant was under age; and he pleaded guilty to the two charges he faced sufficiently early for the Judge to extend a full 1/3 reduction in sentence on that account.

8. The Judge had additional materials available to him including Victim Impact Statements from the complainant and her mother. We have read them. They go to harm and culpability but do not directly affect the issue we have to decide. It is therefore not necessary to refer to them in further detail in this judgment.

The Sentencing Remarks

9. In the course of his sentencing remarks the Judge accepted that the appellant now regretted his actions and was remorseful. But he made the obvious point that the appellant was the adult, had choices to make, had made those choices and now had to pay the penalty. It was accepted that Count 2 was a Category 1A offence. It was Category 1 harm because it involved penetration of the complainant's vagina with his penis. It was in culpability category A for three reasons: first, the significant degree of planning involved; second, the grooming behaviour; and, third, the significant disparity in age. Those features required movement up from the starting point of 5 years within the range of 4 to 10 years. The Judge sentenced the appellant on the basis that he had used protection, though there was some doubt about this.

10. The Judge then said:

> "I do have the advantage of the psychiatric report that tells me a very great deal about you. It seemed to me then and seems to me now that whilst the offences could attract public protection sentences there is not about this case the sort of features that might point towards a need for some public protection factor to be built into the sentencing exercise because the future risk that you pose because of your demonstrable failure to control yourself in respect of this victim can be catered for by reference to the sentence I have to impose but also the Sexual Harm Prevention Order that will accompany it."

11. Turning to the SHPO the Judge said:

> "So far as that Sexual Harm Prevention Order is concerned, the terms of that address your use of the internet and ensuring that there is a history maintained of such usage, including by way of online multiplayer gaming which is an interest of yours and which was a circumstance that was relevant to this offending. It controls your deletion of files, prevents your use of software that could prevent the retention of the history of internet usage. It has a clause prohibiting you from approaching your victim in the future, whether directly or indirectly, and I am glad to hear you have no intention of so doing but it means you must not because she would suffer harm if you did and sexual harm, and it prohibits you having unsupervised contact with young people under the age of 16 save for the usual inadvertent contact saving clause that is appropriate to have in place and it also prohibits you from seeking or undertaking employment, whether paid or voluntary, that puts you in touch with children under 16.
>
> That is in addition to the barred list upon which you will be placed by reason of the conviction for this offence. Because of the length of sentence that I have to impose the sex offender registration period is indefinite and this Sexual Harm Prevention Order will be for 15 years."

12. The Judge then passed sentence as follows:

> "In terms of the sentence I have to impose, as I say there is upward movement from the starting point. The mitigation available stops that upward movement at 6 years. I am giving you a full credit for plea, that reduces the sentence to 4 years and that will be imposed on Count 2. There will be no separate penalty on Count 1 because it is encompassed within the sentence on Count 2. The other ancillary matters I have already mentioned."

13. The relevant terms of the SHPO were:

> "The defendant is prohibited from:
>
> 1. Using any device capable of accessing the internet unless; a). It has the capacity to retain and display the history of internet use including contact via online multiplayer gaming, and b). He makes the device available on request for inspection by a police officer.
>
> 2. Intentionally deleting such history or any other files which record internet, online multiplayer gaming contact or file browsing history.

> 3. Using any software which prevents an internet enabled device from retaining and/or displaying the history of internet use including contacts via online multiplayer gaming.
>
> 4. Using any false Internet Protocol (IP) address, name, alias or persona whilst using the internet.
>
> 5. Approaching, seeking to approach or communicate by whatever means, directly or indirectly with [the complainant].
>
> 6. Having any unsupervised contact with any young person under the age of 16 years, except in the presence of that child's parent or guardian. (Save for any inadvertent or unavoidable contact with a child under 16 years).
>
> 7. Seeking or undertaking any employment, including voluntary work, whether for payment or otherwise, which is likely to allow you unsupervised access to a child under the age of 16 years.
>
> The order is to remain in force for 15 years"

14. There can be no possible criticism of the sentence of 4 years to reflect the overall criminality involved in the two counts or the Judge's reasons for imposing it. Equally, there is no criticism of the terms of the SHPO other than its duration. We therefore concentrate upon the evidence that is relevant to the duration of the SHPO.

Relevant Evidence

15. The psychiatric report from Dr Thirumalai, to which the Judge referred, was a full and thorough report which, as the Judge said, provided a great deal of information about the appellant. He recorded that, because of lockdown, the Appellant was living alone, isolated and lonely at the time of the offence. He expressed considerable regret and remorse. He was by the time of the report on anti-depressant medication prescribed by his GP, having been seen by the Crisis Team in the Community in February 2020 because he said he was feeling suicidal. And he described himself as feeling like a shadow some days and how, after a successful period as a teacher "now … everything … is gone." The appellant categorically denied any interest in paedophilia and denied ever having accessed child pornography.

16. On psychiatric examination his mood was described as anxious; but he was not having strong suicidal thoughts. He reported that his sleep, appetite, weight and energy levels all fluctuated. Although there was evidence of generalised non-specific paranoia ideation, there was no evidence of obsessive compulsive phenomenon or cognitions.

17. Dr Thirumalai conducted a risk assessment using an established approach to Sexual Violence Risk. This assessed risk factors under three main headings. First, psychosocial adjustment including the presence of a mental disorder or general social and antisocial behaviour. Second, previous sexual offending and the circumstances of

the current offence. Third, the ability to establish future plans and attitudes towards intervention on the presumption of guilty pleas being entered.

18. Under the first heading, Dr Thirumalai relied upon the appellant's information that was not having sexual interests around pre and post pubescent girls, which we understand to mean that he did not have and had not had an interest in pre or post pubescent girls apart from the facts of this case. He did not report having been himself a victim of child sexual abuse. Dr Thirumalai found no evidence of a psychopathic risk factor or of any major mental illness or psychological conditions. There was no evidence of substance misuse. He found evidence of suicidal ideations and formed the view that the appellant comes across as someone who is socially inept in his presentation. He had attended mainstream school and worked in a variety of jobs.

19. Turning to past offending, there was no evidence of past non-sexual violent or non-violent offending or failures in past supervision. Dr Thirulamai was of the view that the index offences did not amount to "high density offending". There was no evidence of multiple sex offence types in the past and significant force was not a feature of his current offending. There was no suggestion of the use of a weapon and no history of escalating frequency or severity in sex offending. The appellant did not minimise or deny his offending and was able to recognise the impact of his offending on the complainant. He had expressed appropriate levels of remorse and did not demonstrate deviant attitudes or recidivist tendencies.

20. Third, while he lacked plans for the future, Dr Thirumalai formed the view that he would be suitable for offence-focused intervention to change his attitudes and recognise the risk he presents to others.

21. Taking all these factors into account, Dr Thirumalai estimated that his risk of re-offending was low.

22. Dr Thirumalai's opinion and conclusion was as follows:

> "12.15 The defendant has expressed appropriate level of remorse and has not denied his involvement in the allegation. He was willing to take responsibility for his actions. He is keen and motivated to make necessary changes to his life. He is willing to engage with any supervising authorities in the community should he be made a subject of non-custodial sentence. He is willing to attend courses as seen appropriate by the probation service including sex offenders' treatment program. He is also willing to be subjected to monitoring arrangements by the police. He is keen and motivated to engage with psychological treatments offered by the probation and also seek independent access to psychological treatments for depression and anxiety in the future organised by his GP and Community Mental Health Team. He also was willing to consider other organisation such as Lucy Faithful Foundation for further assistance. He was keen and motivated to continue the antidepressant medication for the foreseeable future."

> 12.16 In my opinion, the defendant has gained insight and was reflective in his thinking. He is keen and motivated to make necessary changes. In my opinion, should he engage well with the supervising authorities along with the health service, under those circumstances, his risk of similar reoffending would significantly reduce. It is my opinion that his risk could be adequately managed through the multiagency working in the community."

23. It is fair to note that much of the information upon which Dr Thirumalai's conclusions and opinion was based came from the appellant himself. To that extent it may be regarded as self-serving. However, Dr Thirmalai did not identify any inconsistencies in the account that he was given; and there is no reason to suppose that he would simply have swallowed uncritically anything and everything the appellant told him.

24. In addition to the psychiatric report, the judge had the benefit of character references from each of the appellant's parents. His father spoke of his concern for the appellant's mental state and concluded by saying that the appellant "is a very helpful and caring person who, as far as I know, has never even got a parking ticket." His mother spoke of his present unstable mental state and said that he is "a kind person and this situation is totally out of character." She said that the family would continue to support him always. Once again, it may fairly be said that this information came from those who were favourably disposed towards the appellant and therefore needed to be treated with suitable caution. But, on the other hand, there is no information before us that serves to cast doubt on what his parents said. Nor, as we are informed and understand the position, was there any such evidence before the sentencing Judge.

The Legal Framework

25. For the purposes of this judgment it is not necessary to refer to the framework for SHPOs intended to protect people from sexual harm from the defendant outside the United Kingdom.

26. S. 103A(1) and (3)(b) enables the Court to make a SHPO in respect of a person who has been convicted of a qualifying offence where an application has been made and it is proved that the defendant is a qualifying offender and the court is satisfied that the defendant's behaviour makes it necessary to make a SHPO for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant. A SHPO prohibits the defendant from doing anything described in the order: see s. 103C(1). Subject to an exception that does not apply here, a prohibition contained in a SHPO has effect either (a) for a fixed period, specified in the order, of at least 5 years, or (b) until further order: see s. 103C(2). A SHPO may specify that some of its prohibitions have effect until further order and some for a fixed period; and it may specify different periods for different prohibitions: see s. 103C(3). That said, the only prohibitions that may be included in a SHPO are those necessary for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant: see s. 103C(4)(a).

27. Pursuant to s. 103E(1) and (2), the defendant, the chief officer of police for the area in which the defendant resides and two other categories of people may apply to the appropriate court for an order varying, renewing or discharging a SHPO. On hearing

the relevant parties the court may make any order, varying, renewing or discharging the SHPO, that the court considers appropriate. On such an application, the SHPO may be renewed or varied so as to impose additional prohibitions on the defendant only if it is necessary to do so for the purpose of protecting the public or any particular members of the public from sexual harm from the defendant: see s. 103E(5)(a). In other words, the same criteria apply to the variation or renewal of a SHPO as to the original making of an order. By s. 130E(7) the court must not discharge an SHPO before the end of 5 years beginning with the date on which the order was made without the consent of the defendant and the relevant chief officer of police.

28. S. 103G provides that where a SHPO is in place in respect of a person who would not otherwise be subject to the notification requirements under Part 2 of the Act, they shall either become or remain subject to those requirements.

29. The notification requirements under Part 2 of the Act arise pursuant to the provisions of the Act and do not depend upon the making of an order by the Court. Different circumstances give rise to different periods during which notification requirements will apply. For present purposes, it is only necessary to note that the imposition of a term of imprisonment of more than 30 months for a relevant offence gives rise to an indefinite notification period. By contrast, the imposition of a term of imprisonment of more than 6 months but less than 30 months for a relevant offence gives rise to a notification period of 10 years. In the present case, the term of imprisonment was 4 years, with the result that the notification period was indefinite. Thus an SHPO that remained in force for 15 years or until further order would not affect the notification period. But if someone were to be sentenced to a term of imprisonment of 6 months, a 15 year SHPO would have the effect that the defendant would remain subject to the notification requirements for a further 5 years in addition to the 10 that would arise automatically under the Act.

30. The principles that apply to the making of an SHPO and its inter-relationship with notification requirements were set out by a different constitution of this court in *R v McLellan* [2017] EWCA Crim 1464. Giving the judgment of the court, Gross LJ said:

> "20. *Principle:* It is unnecessary to refer to authority other than to the guidance furnished by Hughes LJ, VPCACD (as he then was) in *R v Steven Smith* [2011] EWCA Crim 1772, dealing with the making of SOPOs (not SHPOs)."
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> 21. At [8], Hughes LJ repeated the questions, formulated in previous authority, which needed addressing when the making of a SOPO was under consideration:
>
> " i) Is the making of an order *necessary* to protect from serious sexual harm through the commission of scheduled offences?
>
> ii) If some order is necessary, are the terms proposed nevertheless oppressive?
>
> iii) Overall are the terms proportionate? "

22. At [17], Hughes LJ addressed the relationship between the duration of a SOPO and the statutory notification requirements:

" 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 features, 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. "

23. Instructively, the flavour of these observations was captured in Judicial College course materials of 2015, under the authorship of HHJ Picton:

" Consider with care the length of any SHPO ….. There is a need to justify a SHPO that extends beyond the automatic …[notification requirement] period but in an appropriate case legitimate for it to do so. Bear in mind that a defendant subject to a SHPO is automatically subject to ….[a notification requirement] by reason thereof."

24. Returning to *Smith*, the importance of providing a written draft of a proposed SOPO, to be properly considered in advance of the sentencing hearing, was highlighted at [26].

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: 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 have real, practical, consequences for those subject to them; inadvertent extension is to be avoided."

31. These principles are well established and are not controversial. The current edition of the Compendium refers to them in outline and cites *McLellan* as the relevant authority.

Discussion

32. It is axiomatic that the only legitimate purpose of a SHPO is to protect "the public or any particular members of the public from sexual harm from the Defendant": see s. 103A(2) of the Sexual Offences Act 2003. SHPOs are, by their nature, dealing with risk, the eventuation of which is necessarily unpredictable. It is therefore appropriate for a Court to be cautious, particularly in the case of an offender who has been convicted of a serious offence, such as one that would justify a sentence of 6 years before discount for plea.

33. We endorse the observations of this Court in *R v NC* [2016] EWCA Crim 1448, drawing on the earlier formulation in *Steven Smith* and *McLellan* that the relevant questions are:

> "(i) is the making of an order necessary to protect the public from sexual harm through the commission of scheduled offences?; (ii) if some order is necessary, are the terms imposed nevertheless oppressive?; (iii) overall, are the terms proportionate?"

34. These questions are entirely consistent with the principle enunciated in *McLellan* that an 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; and that an indefinite SHPO should not be made without careful consideration or as a default option. It follows that in all

cases the court has to strike a balance taking into account the nature of the perceived risk of sexual harm and the perceived likelihood of that risk eventuating.

35. As we have indicated, it is not suggested that the terms of the SHPO in the present case other than as to duration are either oppressive or disproportionate in the light of the appellant's offending. That said, it must be acknowledged that the prohibitions themselves are, and were evidently intended to be, extensive and intrusive.

36. Turning to duration, the Judge did not explain his reasons for settling on a period of 15 years. Although the Judge referred to the psychiatric report, he did not state any conclusions about the risk posed by the defendant either in reliance on or rejecting the opinions of Dr Thuramalai. In the absence of any explanation, it is not clear to us what features of the evidence before him he was relying upon (or rejecting) to justify such an order. As appears from the summary and citation we have set out above, Dr Thuramalai did not suggest that there was no risk of re-offending; and his stated opinion that "should he engage well with the supervising authorities along with the health service, under those circumstances, his risk of similar reoffending would significantly reduce" of itself implies the presence of material risk that requires the appellant to engage "well" if it is to be significantly reduced. His assessment that the risk of re-offending overall was low must be seen in that context.

37. That said, it appears from the sentencing remarks that we have set out above, that this very experienced judge gave specific thought to the duration of the SHPO and did not fall into the trap of treating an indefinite order as the default. Furthermore, he expressly had in mind the indefinite notification period that would apply because of the 4 year sentence of imprisonment that he was imposing; and he did not fall into the unprincipled trap of simply ordering a indefinite period for the SHPO to match the notification period. It is therefore evident that, though the sentencing remarks do not disclose the precise reasoning that led the Judge to a period of 15 years, he gave thought to the issue and settled deliberately on 15 years, albeit for reasons that he did not explain.

38. In his submissions on the appellant's behalf, Mr Magarian accepts that a SHPO should be longer in a contact case than in a case limited to the use of pornography. But he submits that there was no evidence that the appellant was an enduringly dangerous paedophile, and he highlights the intrusive nature of the other terms of the order and their potential impact upon the appellant's private life while the order subsists.

39. We think it possible that another judge or judges, confronted by this difficult sentencing exercise, might have settled on a shorter period than 15 years for the SHPO. The appellant's offences were undoubtedly serious but, on the evidence, they were out of character. Furthermore, the purpose of the SHPO was not to punish the appellant for committing the offences but to protect the public or any particular members of the public from harm in the future. As to that, Mr Thirumalai's report identified that there were few serious adverse risk factors and a number of positive features, including his insight, remorse and motivation to make necessary changes. It is to be borne in mind that the central finding by Dr Thirumalai in the light of his risk assessment was that the risk of reoffending was low, though, as we have said, that assessment must be taken in context.

40. However, as we have also said, a sentencing judge is entitled, if not obliged, to take a cautious approach to risk when dealing with a person who has committed serious sexual offences for which there is no satisfactory explanation. While we accept that being locked down during the pandemic has imposed significant pressures, including pressures of isolation, on many people, the ease with which the appellant, a teacher, found his way to grooming and then committing serious sexual assaults on a girl who he knew to be well under-age is deeply troubling. That he did so during a relatively short period of six weeks does not make the case any the less troubling when considering future risk.

41. The ultimate question for us is whether, taking into account the lack of reasons from the sentencing Judge, the duration of the SHPO was wrong in principle or manifestly excessive. As we have indicated, we think it possible that another judge or judges might have settled on a shorter period. However, for the reasons set out above, we consider that a cautious approach was justified on the facts of this case and that, adopting such an approach, it cannot be said that the duration of the SHPO imposed by the Judge was manifestly excessive or wrong in principle.

42. We are conscious of the ability of the appellant to apply in the future for the SHPO to be varied or discharged. This is a substantial protection for the appellant, just as the ability of the chief officer to apply for an adverse variation or extension of the SHPO is substantial protection for the public that the SHPO is designed to protect. However, it would not be a sound reason to uphold the current order if we were satisfied that it was manifestly excessive or wrong in principle. We therefore make clear that, although conscious of the protection, it has not determined the outcome of this appeal.

43. For these reasons, the appeal is dismissed.