IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 324

CASE NO 202001201/B4 & 202002349/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 25 February 2021

LORD JUSTICE COULSON
MR JUSTICE WILLIAM DAVIS
THE RECORDER OF WESTMINSTER
HER HONOUR JUDGE DEBORAH TAYLOR
(Sitting as a Judge of the CACD)

REGINA
V
ROSS MORGAN ALISON

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MR P FLEMING appeared on behalf of the Appellant

MR J WALKER appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE COULSON:

1 The appellant is now 34. On 18 March 2020 at Durham Crown Court he was convicted of three counts of making indecent photographs of children, one count each for images in Categories A, B and C. On 24 April 2020 he was sentenced by His Honour Judge Adkin ("the judge") to 10 months' imprisonment suspended for two years with various requirements. He was also made the subject of a Sexual Harm Prevention Order ("SHPO"). His application for permission to appeal against conviction was refused by the single judge and he now seeks to renew it to the full court. He appeals against one part of the SHPO with leave of the single judge.

2 The facts are straightforward. On 12 April 2017 the police attended the appellant's home and seized a computer which was found to contain 153 indecent images or videos of children in Categories A, B and C. Many of the images, both moving and still, had been downloaded using Ares, an internet-based service that allows users to trade files across an open global network.

3 The expert who analysed the appellant's computer noted that the user of the computer had inputted a number of search terms into the Ares system, including "teen" and "pthc" (pre-teen hard core). An Apple device attached as back-up showed that the user had also used websites with paedophilic titles such as "teensexlolita.com" and "freepreteen.net".

4 It was the appellant's case that he had downloaded the images sent by others but that when he saw they involved children he deleted them. He did not give evidence. As we have said, he was subsequently convicted on all counts.

5 His renewed application for permission to appeal against conviction relies on two separate matters. The first is the suggestion that the judge erred in law in failing to accede to his application that the matter be stayed as an abuse of process. It was said that the appellant's mental health condition and the risk of suicide was such that it was not in the public interest for him to stand trial, and that a fair trial was not possible.

6 The judge ruled that a stay was inappropriate. As to the possibility of a fair trial, the judge said in his written ruling that various arrangements could be made which would accommodate the appellant in giving evidence. He referred, amongst other things, to the toolkit for questioning witnesses on the autistic spectrum.

7 As to the appellant's mental condition and whether that justified a stay, in his written ruling the judge said:

> "6. The second submission made by defence counsel is a bold one. He suggests that such is the complexity of the defendant's condition and his reaction to be charged with making indecent images that he is a suicide risk and that to continue to prosecute in these circumstances amounts to an abuse as the prosecution as it is not in the public interest to prosecute an individual who may commit suicide during a trial.
>
> 7. I do not find an abuse here. It is not my job to determine the public interest, that is for the CPS, that being said there is a clear public interest In prosecuting individuals who make Cat A indecent images."

8 In his careful written ruling the judge summarised the evidence of the two separate doctors,

Dr Turner and Dr Stoddart, who he had heard giving evidence on this application. The judge then went on in his ruling to explain why, on a proper analysis, their evidence did not support a stay.

9 When the application for permission to appeal against conviction on this basis was considered by the single judge, she said:

> "... it is apparent that the judge had careful regard to the evidence from Dr Stoddart and Dr Turner but was not persuaded that a fair trial was impossible. Various measures were adopted to address the issues raised by the appellant's mental health issues, including acceding to his request to absent himself from further attendance at court, and the appropriate toolkit was applied. The jury was properly directed to disregard the appellant's absence and to draw no adverse conclusions from the fact that he did not give evidence. As for the broader question of public interest, as the judge observed, this was a matter for the prosecution but there was a clear public interest in prosecuting individuals who make Cat A indecent images. The judge had regard to the full evidence – and context – relating to the appellant's risk of suicide, permissibly noting that the appellant had himself chosen not to have his CPN at court and that Dr Stoddart had advised that there was 'a reduced risk by getting on with court proceedings' and that there was a greater risk if the appellant was remanded in custody. Again, the judge was prepared to make the various adaptations required to assist the appellant. In the circumstances, the decision not to grant the application for a stay disclosed no error of law and the appellant was not thereby deprived of his right to a fair trial."

10 Mr Fleming's oral submissions this morning essentially repeated both his original application for a stay and the original grounds for leave to appeal on the same basis. He properly accepted that a stay can only be imposed in exceptional circumstances. He acknowledged that the judge did what he could in the circumstances presented by this case, but he said that so exceptional were the circumstances that a fair trial was not possible and was not in the public interest.

11 We have considered those submissions but we are not able to accept them, principally for the reasons outlined first by the trial judge and then by the single judge. It was never suggested that the appellant was not fit to plead. There was no medical evidence which supported the suggestion that his mental health issues were unique or rendered a fair trial impossible, and there is of course no authority which supports the notion that a defendant who threatens suicide because of a forthcoming trial is entitled to have that trial stayed as an abuse of process.

12 There are two things that matter. The first is a fair trial. As everybody is agreed, the judge bent over backwards to ensure that the trial process could accommodate the appellant at every turn. Ultimately, it was the appellant's decision, doubtless on the basis of advice from his legal team, not to give evidence. That was not a matter for the judge, and it was not a decision that was caused by the refusal of the stay application. There was no question of the trial that took place not being fair. In any event, we are bound to note that, given the other evidence, the appellant's own evidence was unlikely to have made a significant difference, even if he had been minded to give evidence.

13 That leaves the question of public confidence. Mr Fleming suggested that public confidence is undermined in circumstances where a trial goes ahead with a defendant with mental health issues. In our view, looking at the facts and circumstances of this case, we would venture to suggest that public confidence in the justice system would have been strengthened by what happened here. The judge did all that he could, and everything was done, to ensure that there was a fair trial. For all those reasons therefore, we consider that the trial was fair and we consider that it was in the public interest that it went ahead. The first ground for the application in respect of conviction is therefore refused.

14 The second ground is that the evidence about the search terms used, like "teensexlolita" should properly have been regarded as bad character evidence, and that the Crown should have made an application to adduce it under section 101(d) of the Criminal Justice Act 2003. This issue originally appeared to arise somewhat tangentially to the stay application and the judge dealt with it in the same ruling at paragraph 16. The judge said:

> "As to the suggestion that the indicative evidence (the video titles, Ares keywords, Ares downloads titles, IE daily history and google analytics first visit cookies) are inadmissible, this is misconceived. They are clearly relevant to the defence, which appears to be that the images are on the hard drive GL2A but that they arrived by accident. That material demonstrates a clear proclivity. There is no necessity for a s.101(d) application, the recovery of the material emanates from the same hard drive recovered during the same operation and is directly linked to the facts of this offence. S.98 CJA 2003 applies."

The issue therefore is whether the judge was wrong to reach this conclusion.

15 In our view the judge was plainly right to reach that conclusion. In circumstances of this sort there is almost always evidence as to how the offending images were found and downloaded. That will usually arise from the offender keying in search titles. The use of those search titles is not bad character evidence as such; it has instead to do with the offence itself, and therefore admissible under section 98.

16 We acknowledge that Mr Fleming suggested that some of the search titles were of older vintage than the downloaded images and that it might be difficult to say that those particular search titles were ‘to do with’ the facts of the offending, but that is to approach the issue in too narrow a way. In our view, when considering indecent downloaded images, it is important for the jury to have the background material which explains how those images may have been accessed in the first place. That therefore means that key word searches are relevant even if it is not always possible to link a particular key word search with a particular image. Such linkage is unnecessary: what matters is that the key words were habitually used as part of an overall exercise to download indecent images. On that basis therefore, it is difficult to imagine anything more ‘to do with’ the offence of downloading an indecent image than the evidence of the search terms habitually used in order to obtain such images in the first place. Moreover, here that evidence undermined the principal plank of the appellant's defence, that the images had been downloaded inadvertently.

17 For those reasons, therefore, we consider that the second basis for the renewed application for permission to appeal against conviction is not made out and that renewed application is

therefore refused.

18 We turn then to the appeal against sentence for which, as we have said, permission has been granted. The appeal against sentence concerns the first prohibition in the SHPO. That is in these terms:

> "The defendant is prohibited from:
> 1. Having any unsupervised contact with any child under the age of 16 years without prior permission of the child's parent/guardian, children's services and police. This prohibition does not operate to prohibit contact with children which is inadvertent and unavoidable in the course of the defendant's lawful daily activities, e.g. whilst a passenger on public transport."

19 The complaint in essence is that since the appellant's offending did not involve contact with children, and was limited to viewing offences, it was disproportionate to prohibit such contact.

20 The appeal arises in an unfortunate way but Mr Fleming has properly accepted that this was due to inadvertence on his part. To be fair to Mr Walker, it is right therefore to note that this prohibition was included in the draft SHPO which was downloaded onto the digital case system on 6 April, so some two weeks before the sentencing hearing. It was not the subject of objection either at the hearing or thereafter, during the 56 days in which, had it been spotted, an application could have been made to the judge under the slip rule. This is not a case like *R v Inches* [2020] EWCA Crim. 373 where an application could be made to the judge as a result of a change of circumstances. There has been no change here: Mr Fleming objects to the prohibition for precisely the same reasons as he would have objected to it had he spotted the point in front of the judge at the sentencing hearing. In consequence therefore, we consider that this matter is properly before this court.

21 The proper approach to conditions which are contested in an SHPO was set out by this court in R v Mortimer [2010] EWCA Crim 1303. The court has to ask itself: (1) is the making of an SHPO necessary to protect others from serious sexual harm through the commission of scheduled offences? (2) If it is necessary are the terms nevertheless oppressive? And (3) Overall are the terms proportionate?

22 R v Smith [2011] EWCA Crim 1772 contains useful guidance as to the provisions in an SHPO that may limit contact with children. Particular paragraphs in the judgment of Hughes LJ (as he then was) are paragraphs 22 and 23:

> "22. Care must be taken in considering whether prohibitions on contact with children are really necessary. In Lea (supra) the defendant had been convicted of offences of viewing child pornography. The SOPO imposed contained provisions prohibiting him from having unsupervised contact with any child under the age of 16 except in the presence of a parent or appropriate adult, and from permitting any such person to be in any house where he lived or stayed. This court rejected the submission of the Crown that those provisions were justified in case the defendant graduated to contact offences. There was no indication whatever of any likelihood of such progression. The case is a good example of overuse of a SOPO. Preventive these orders are; it does not follow that anything is permissible. It is not legitimate to impose multiple prohibitions on a defendant just in case he commits a different kind

> of offence. There must be an identifiable risk of contact offences before this kind of prohibition can be justified.
>
> 23. Prohibitions on contact with children may however be necessary in some cases of predatory paedophiles who seek out children for sexual purposes. Even then, care must be taken with their terms. The defendant may have children of his own, or within his extended family. If his offences are within the family, or there is a risk that offences of that kind may be committed, then those children may need protection. But if they are not, and there is no sign of a risk that he may abuse his own family, it is both unnecessary and an infringement of the children's entitlement to family life to impose restrictions which extend to them. Even if there is a history of abuse within the family, any order ought ordinarily to be subject to any order made in family proceedings for the very good reason that part of the family court process may, if it is justified, involve carefully supervised rehabilitation of parent and child."

23 There have been recent authorities in this court to the same effect. As a result, Mr Fleming contended that it is only contact offences which justify a prohibition like the prohibition under review here. He pointed to the fact that this was manifestly not a case of contact offences. He referred to the evidence before the judge that there was a low risk of such offences. He also referred to the sentencing remarks where the judge said to the appellant: "You are reclusive and you present a very low risk of committing contact offences". On that basis Mr Fleming submitted that the prohibition was oppressive and certainly disproportionate.

24 In response, Mr Walker submitted that these were serious offences and that the judge was entitled to conclude that in the circumstances there may be escalation such that the appellant may be a risk of committing contact offences, which in turn justified the prohibition. However, when the point was put to him Mr Walker fairly accepted that the judge had indeed described the appellant as presenting a very low risk of committing contact offences and that, if the matter had been expressly raised with the judge at that hearing, it might very well be that the judge would have concluded that he should not make an order in the terms of prohibition 1. We are very grateful to Mr Walker for his assistance and we consider that those submissions were entirely realistic.

25 Accordingly, notwithstanding the unfortunate way in which the matter has ended up in the Court of Appeal, we are bound to conclude that prohibition 1 was disproportionate. These were not contact offences. Psychiatric evidence was that the appellant was not likely to commit such offences and the judge's own sentencing remarks confirmed that he presented a very low risk of committing such offences.

26 Accordingly, it does seem to us that if the matter had been the subject of debate at the time, the judge would not have made the order in the terms of prohibition 1. This is a viewing case and there is no other factor that anybody can point to which justified the sort of prohibition such as prohibition 1. So we consider that Mr Fleming's submission in relation to prohibition 1 is made out and we allow the appeal against sentence to that extent only, namely that prohibition 1 in the existing SHPO be deleted.

27 MR FLEMMING: My Lord, the application for leave was associated with an application for legal aid. It is a matter for the court as to whether or not a certificate could be granted

today for this hearing in respect of the sentence appeal.

LORD JUSTICE COULSON: This is not a matter that we have discussed, but my inclination is not, simply because, for the reasons we have given, we think this should have been sorted out at the time.

FLEMMING: My Lord, yes.

LORD JUSTICE COULSON: Thank you both very much.

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