Neutral Citation Number: [2023] EWCA Crim 531

Case Nos: 202202967 B2/ 202200803 B2 / 202200163 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM GRIMSBY CROWN COURT(202200163 B2 and 202200803 B2)
His Honour Judge G Robinson
T20107052

IN THE COURT OF APPEAL (CRIMINAL DIVISON) ON APPEAL FROM SHEFFIELD CROWN COURT (202202967 B2)
His Honour Judge Goose QC
T20107052

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2023

Before :

LADY JUSTICE THIRWALL
MRS JUSTICE STACEY
and
MR JUSTICE BENNATHAN

- -

Between :

DEAN BARTON	**Applicant/ Appellant**
- and -	
REX	**Respondent**

REPORTING RESTRICITONS APPLY:
SEXUAL OFFENCES (AMENDMENT) ACT 1992
YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

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Mr William Goss appeared on behalf of the **Applicant/Appellant**
Miss Abigail Husbands appeared on behalf of the **Respondent**

Hearing date : 27.04.2023

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Approved Judgment

This judgment was handed down remotely at 11 am on Wednesday 17 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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WARNING: Reporting restrictions apply to this judgment as stated in paragraphs 1 and 2.

Mrs Justice Stacey :

1. The provisions of the Sexual Offences (Amendment) Act 1992 apply to this appeal. 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.

2. An order under s.45A of the Youth Justice and Criminal Evidence Act 1999 is in force that no matter relating to the individual subject to the order shall be published that would be likely to identify them to the public as being concerned in these proceedings. This order lasts for her lifetime.

3. We announced at the end of the hearing on 27th April that in appeal 202202967 B2 we grant leave to appeal the imposition of a Sexual Harm Prevention Order (SHPO) in 2015 ("the 2015 SHPO"), an extension of time in which to bring the appeal and we quash the 2015 SHPO and the subsequent amendments made to it. In appeals 202200163 B2 and 202200803 B2 leave to appeal both conviction and sentence is refused, together with all applications. These are our reasons for those decisions.

4. There are 3 matters before the court concerning 2 sets of proceedings. The applicant seeks leave to appeal his conviction on 23 August 2010 in the crown court at Grimsby for a number of sexual offences (appeal 202200163 B2) and seeks leave to appeal the sentence imposed on 20 September 2010 in respect of those offences (appeal 202200803 B2). He applies for an extension of time in which to appeal: 4,133 days (over 11 years) in respect of conviction and 4,165 days in respect of sentence. Permission to appeal both conviction and sentence was refused by the single judge. He also requires, and applies for, an extension of time in which to renew his application for leave to appeal both matters, seeking 15 days in respect of conviction and 12 days in respect of sentence.

5. The third matter concerns the lawfulness of a Sexual Harm Prevention Order ("SHPO") made on 4 December 2015 that was imposed for breach of a Sexual Offence Prevention Order ("SOPO") that had been made following the sexual offences conviction in 2010 (appeal 202202967 B2). The registrar has referred the application for leave to appeal and for an extension of time of 2,264 days to the full court.

Background facts

6. After pleading guilty on the first day of trial on 23 August 2010 the applicant (age 20) was convicted of 6 sexual offences (1 count of rape, 2 counts of indecent exposure, 2 counts of sexual assault and 1 count of assault by penetration) committed when he was a teenager between 2005-2008. The rape, assault by penetration and sexual assault were committed against a cousin who was some months younger than him and the offences of exposure were committed against two much younger cousins. He was automatically subject to the notification requirements under Part 2 Sexual Offences Act 2003 ("SOA 2003") having been convicted of a number of offences listed in Schedule 3 of the Act. He was sentenced on 20 September 2010 to a term of 5 ½ years imprisonment for the rape and to concurrent sentences of 18 months for the sexual assault by penetration, 6 months for the 2 counts of sexual assault and 2 months for each of the indecent exposure counts. He was also made subject to an indefinite Sexual Offences Prevention Order ('SOPO'). The terms of the SOPO were varied on 29 August 2012 and the amended order contains the following schedule of prohibitions:

> "The defendant is prohibited from:
>
> 1. Living or staying, being or remaining in any dwelling house or any semi-permanent residual structure (such as, for example, a tent, caravan, mobile home or boat) when any child who is, or reasonably appears to be, under the age of 16 years is also present in the same dwelling house or structure unless:
>
> i) The child is related to him and the child is at all times in the presence of one or more of its parents or legal guardians who is aware of this order; an[d]
>
> ii) He has written permission of any Social Services Department; or
>
> iii) He is permitted by the terms of an Order of a Court in England or Wales
>
> 2. Having any contact with any child who is, or reasonably appears to be, under the age of 16 years unless;
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> i) The child is related to him and the child is at all times in the presence of one or more of its parents or legal guardians who is aware of this order; an[d]
>
> ii) He has written permission of any Social Services Department; or
>
> iii) He is permitted by the terms of an Order of a Court in England or Wales
>
> 3. Inviting any child who is, or reasonably appears to be, under the age of 16 years to enter or to remain in any building where he is intended to be unless:

> i) The child is related to him and the child is at all times in the presence of one or more of its parents or legal guardians who is aware of this order; an[d]
>
> ii) He has written permission of any Social Services Department; or
>
> iii) He is permitted by the terms of an Order of a Court in England or Wales
>
> 4. Contacting or attempting to contact any child who is, or reasonably appears to be, under the age of 16 years directly or indirectly by voice, letter, text message, telephone, email or by any other means unless:
>
> i) The child is related to him and the child is at all times in the presence of one or more of its parents or legal guardians who is aware of this order; an[d]
>
> ii) He has written permission of any Social Services Department; or
>
> iii) He is permitted by the terms of an Order of a Court in England or Wales
>
> 5. Refusing entry to his home when police protection officers attend for the purposes of monitoring visits and enforcing this order under the Sexual Offences Act 2003.
>
> 6. Contacting or attempting to contact directly or indirectly [named individuals]."

7. On 5 March 2014 the applicant was convicted at North Lincolnshire Magistrates Court for breach of the Part 2 notification requirements by failing to notify the Police of a change of address and to provide bank details. He received a 28 day term of imprisonment and was recalled on licence. In September 2015 the applicant was prosecuted for breach of the SOPO contrary to section 113(1)(a) and (2) of the SOA 2003, for making contact via Facebook, with a younger half-sister. He pleaded guilty in the Magistrates Court and was committed for sentence pursuant to s.3 Powers of Criminal Courts (Sentencing) Act 2000. On 4 December 2015, before the Crown Court at Sheffield (His Honour Judge Goose QC as he then was), the Judge concluded that although the custody threshold had been crossed, the sentence could be suspended. The applicant was sentenced to a term of imprisonment of 4 months, suspended for a period of 12 months, with an Unpaid Work requirement of 100 hours and a Rehabilitation Activity Requirement of up to 50 days. It was accepted that the contact was non-sexual and that it was the applicant who had brought the fact of the contact to the attention of social services but the breach of the SOPO was aggravated by the applicant's earlier breach of the notification requirements.

8. At the sentencing hearing the prosecution sought more onerous terms to the civil order to prevent the risk of future sexual harm to the public from the applicant in relation to use of devices accessing the internet. The Judge was informed by prosecuting counsel that the only thing he could do was to impose a Sexual Harm Prevention Order, as since 8 March 2015, SOPOs had been replaced by SHPOs, the power to make a SOPO contained in ss.104 to 129 SOA 2003 had been repealed and there was no power to vary an existing SOPO or any of its provisions. There was no objection in principle from the applicant's then counsel to the making of a SHPO, although submissions were made on the precise terms. The Judge considered that the risk threshold identified in the statute had been met and imposed an SHPO with the following schedule of prohibitions:

> "1. Using any device capable of accessing the Internet unless;
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> a) It has the capacity to retain and display the history of the Internet use and
>
> b) He makes the device available on request for inspection by a Police Officer or Police Sex Offender manager.
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> 2. Permanently deleting any Internet history from a device capable of accessing the INTERNET.
>
> 3. Possessing or using any software which is designed or can be used for the permanent destruction of permanent deletion of any devices Internet use history or activity or which is designed to encrypt data held on such a device." ("the 2015 SHPO")

10. In imposing the 2015 SHPO the Judge stated:

> "You are the subject also of an additional order. You know that you are the subject of the sexual offences prevention order. That is the one that has been in place since 2010. I am imposing now a sexual harm prevention order. It is almost the same, a similar order, but it's in the terms of some additional paragraphs that you now know so that you can use devices but they must only be on condition they apply with this order." 5C – 5D

11. The applicant was thus subject to both the SOPO and the 2015 SHPO which ran in tandem and concurrently to each other.

12. Neither counsel drew the Judge's attention to the provisions of s.103A(2)(i) that the court may only make a SHPO where a defendant has been convicted of an offence listed in Schedule 3 or 5 of SOA 2003 and that the offence of breach of a SOPO is not contained within either of those schedules. The Crown Court therefore had no power to make a SHPO and the respondent now concedes that that the 2015 SHPO is unlawful and should be quashed.

13. In 2016 the Police sought a variation of the 2015 SHPO. From the statement in support of the application the police appeared to be under the impression that the 2015 SHPO had replaced the SOPO, with the consequence that there were no provisions limiting face to face contact with children and the Police now wished to remedy the supposed

lacuna. On the Police's unopposed application at a hearing before HHJ Dixon on 6 December 2016 the 2015 SHPO was amended to include a new paragraph in the schedule of prohibitions at 4 as follows:

> "4. Having any unsupervised contact of any kind with any child under the age of 16, other than;
>
> a) Such as is inadvertent and not reasonably avoidable in the course of lawful daily life; or
>
> b) With the consent of the Child's parent or guardian who has knowledge of his convictions and with the written permission of Social Services."

14. The Court duly granted the application and purported to amend the 2015 SHPO ("the 2016 Amended SHPO").

15. In 2021 the applicant and his partner became parents to their son. He applied to the court to vary the order to avoid his son being encompassed by the prohibition in the 2016 Amended SHPO so that he, his partner and their child could live a normal family life together. There was no objection from the Police to the variation proposed and at a hearing before HHJ Harrison on 7 December 2021 a further sub clause (c) was added to paragraph 4 of the schedule of prohibitions of the 2015 SHPO so that it now read:

> "4. Having any unsupervised contact of any kind with any child under the age of 16, other than;
>
> a) such as is inadvertent and not reasonably avoidable in the course of lawful daily life; or
>
> b) with the consent of the child's parent or guardian who has knowledge of his convictions and with the written permission of Social Services or
>
> c) contact with his child in accordance with an order made by the Family Court." ("the 2021 Amended SHPO")

16. On 11 February 2022 the matter came before the Crown Court at Sheffield once again, before HHJ Kelson QC (as he then was), on the applicant's application to discharge the 2021 Amended SHPO on the basis that it was no longer necessary and there was no longer a risk that required prohibitive preventative measures. At that stage everyone appears to have been under the impression that the SOPO had not been in force since 2015 and only the 2021 Amended SHPO restricted the applicant's lawful activities. The Judge considered that the application was premature and it was refused. The Judge offered hope that with good behaviour and continued co-operation with the Police there may come a time when an application would be successful.

Discussion and conclusions: 2010 conviction and sentence.

17. The applicant had leave to address the Court as a litigant in person and we thank him for his articulate, clear and succinct submissions. He explained that he had not lodged grounds of appeal sooner as he had not seen all the case papers from the 2010 criminal

proceedings until the Family Court proceedings following the birth of his son in 2021. Having now gone through them in detail he sees inconsistencies and errors which he was unaware of at the time that he submits were fatal to the prosecution case. He pleaded guilty on legal advice having been told that the evidence against him was overwhelming and that he risked an indeterminate sentence if he did not plead guilty. He now considers the advice to have been wrong and that he was foolish to accept it, but as a 20 year old with no previous convictions, he was reliant on his legal advice. He also states that no account was taken of his dyslexia and dyspraxia.

18. Following his waiver of privilege, detailed notes of the pre-hearing conference with counsel on the day of trial were kept by the applicant's solicitors and have been supplied to the court. His then counsel, Mr Butters, advised that the case against him was strong and gave him realistic advice as to likely sentence in the event of either guilty verdicts or guilty pleas. He was told that it was unlikely, but possible, that he could receive an indeterminate sentence if he was found guilty, but it was much less likely if he pleaded guilty. Mr Butters did not put his client under any pressure and explained it was entirely up to him how he chose to plead and he would represent him whichever course he chose. He emphasised that if he pleaded guilty it would mean that he was guilty and he would not be able to change his plea later. The applicant was given time to think about what he wanted to do and after 45 minutes he advised his legal team that whilst he maintained his innocence he had decided to plead guilty. He endorsed counsel's brief to that effect. The case was adjourned for sentence and the preparation of a pre-sentence report. In his interview for the pre-sentence report the applicant told the probation service that he was not guilty and wished to change his pleas. His solicitors were contacted and it was explained to him that it was now too late and the sentence hearing proceeded on 10 September 2010.

19. By his unambiguous plea of guilty to all counts on the indictment the applicant admitted the facts constituting the offences. The grounds of appeal do not identify shortcomings by his then representatives so as to lead to arguable grounds that the conviction was unsafe. The applicant's instructions were clear. The prosecution case was strong: there was cogent evidence from each of the applicant's cousins and a family friend who had witnessed inappropriate behaviour consistent with some of the allegations. There was supporting evidence from GP notes and the older cousin's disclosure to other family members. The applicant had also made an admission to his uncle.

20. It cannot be said that he was deprived of a good defence in law by his guilty pleas that were given after legal advice that does not appear to be tainted by legal error or to have been wrong or that the pleas were offered after duress. He had time to think about what he wanted to do and counsel told him that he would represent him both if it was to be an effective trial or a re-arraignment for guilty pleas and then sentence.

21. It is not apparent that dyslexia and dyspraxia would affect his ability to understand what he was being told and nor was it relevant to conviction.

22. As to the prosecution evidence relied on the single judge noted:

> "It is unrealistic to point to issues that could be taken with the prosecution evidence whilst failing to consider its likely overall effect. There is often no physical evidence in "historic" sexual offences cases; just the evidence of a number of witnesses who

> describe the offences. Inconsistencies occur and juries are warned how to approach them. Often witnesses may not have identical or wholly correct recollections; this is not unsurprising given the trauma and passage of time. Complaints although hearsay can be admissible to rebut recent fabrication. The question is whether the evidence (and it must be borne in mind that there were three complainants) is likely to be accepted as broadly true and correct. To now say that witnesses were lying is not enough to provide a valid basis for an appeal."

23. There is no realistic argument that the conviction was unsafe.

24. It is far too late now to seek to challenge the conviction. The receipt of the full set of case papers from the prosecution in 2021 is not sufficient explanation for the delay in bringing the appeal. He regretted his decision to plead guilty when he was still in time to have lodged an appeal but did not follow through after raising it with the probation service and his solicitors before he was sentenced in September 2010. But in any event, as the single judge noted: "As the appeal has no merit it would be pointless to extend time."

25. As to the appeal against sentence, the custodial sentence for the lead offence of rape, although on the high side, was within the guidelines applicable at the time, given the offences committed, the period of offending and the age and vulnerability of the 3 complainants. An appropriate discount for the day of trial guilty plea was also given. The court was entitled to conclude that the SOPO was necessary to protect the public or any members of the public from serious sexual harm and that the terms were proportionate. The notification requirements under SOA 2003 applied automatically as a consequence of some of the offences for which he was convicted.

26. The applicant focussed his argument on the onerous provisions of the SOPO and their indefinite term. He was a teenager with good character when the offences occurred and only 20 at the time of sentence. The consequence of the SOPO is that now that he and his partner have their own child it is preventing normal family life. Even though the police and the Family Court have agreed that the applicant's contact with his son is exempt from the restrictions in the prevention orders, he is unable to take his son swimming or to playgrounds because of the SOPO.

27. An order must be necessary and proportionate and is to be judged at the time that it was made. An order should not be made for an indeterminate period without careful consideration and only when the court is satisfied that there is a need to do so, and not as a mere default option (see *Ali (Shahan)* [2018] EWCA Crim 1941; [2018] 2 Cr. App R. (S.) 52 and *Sokolowski* [2017] EWCA Crim 1903). In light of the offences for which the applicant was convicted, looked at from the date of sentence in 2010, to impose an indefinite SOPO was harsh given the applicant's age, but was not arguably manifestly excessive. The applicant waited for a period of time and after his circumstances had changed with the birth of his son, he applied for the order to be discharged. However HHJ Kelson KC of 11 February 2022 refused the application to discharge the order and there has been no appeal under s.353 of the Act from the order, which would have been the proper course to challenge that decision. The time limit for such an appeal has now long expired.

28. Leave to appeal and all applications relating to the 2010 conviction and sentence are therefore refused.

Discussion and conclusion: 2015 SHPO and subsequent amendments

29. It is acknowledged that the appeal has been lodged many years outside the 28 day time limit. The delay is explained by the mistaken belief of both counsel and the Court that the court had power to impose a SHPO in 2015. The error did not come to light until after it was noticed by the Court of Appeal Office whom we commend for their diligence in bringing this matter to light and referring it to the full Court. The merits of the appeal are overwhelming. We extend time and grant leave to appeal.

30. Both sides agree that the 2015 SHPO is unlawful since the Court had no power to impose a SHPO for a breach of a SOPO for the reasons we have given. It is also common ground that all the subsequent purported amendments to the 2015 SHPO are invalid and unlawful and cannot stand. We therefore quash the 2015 SHPO, the 2016 Amended SHPO and the 2021 Amended SHPO.

31. It was made clear by HHJ Goose QC in his sentencing remarks in 2015 that the SOPO made in 2010 and amended in 2012 remained in force alongside the 2015 SHPO.

32. The SOPO that both parties had wrongly believed had been superseded by the 2015 SHPO, remains in place. It may present an urgent difficulty for the appellant since it is potentially wider than the 2021 Amended SHPO which expressly allowed his contact with his child in accordance with an order made by the Family Court.[1] The respondent acknowledges that it is neither necessary nor proportionate for the appellant's contact with his son to be restricted beyond the terms of the order made by the Family Court as per clause 4(c) of the schedule of prohibitions in the 2021 Amended SHPO.

33. The power to discharge or vary a SOPO is now contained in s.350 of the Sentencing Act 2020 (which although referring to SHPOs, is applicable to SOPOs by virtue of the transitional arrangements in s.114 of the Anti-social Behaviour Crime and Policing Act 2014 which was the Act which replaced SOPOs with SHPOs with effect from 8 March 2015). An application under s.350 can be made by an offender (such as the appellant) or a chief officer of police and the parties are urged to work together to seek a hearing at the earliest opportunity in the Crown Court at Sheffield to vary the SOPO to reflect clause 4(c) of the 2021 Amended SHPO. That hearing may be the time for other variations to be considered but such matters are not for this court.

[1] We say potentially since the scope of clause 4(iii) of the SOPO is unclear as to the extent that it restricts the appellant's contact with his son. The Family Court order was not before this court and on any application before the Crown Court must be included with the papers.