IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101062/B5
[2023] EWCA Crim 643

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 24 May 2023

Before:

LORD JUSTICE COULSON

MRS JUSTICE FARBEY DBE

MR JUSTICE CONSTABLE

REX

V

IAN MICHAEL KERRY

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

NON-COUNSEL APPLICATION

J U D G M E N T

LORD JUSTICE COULSON:

1. The applicant is now 50. On 15 March 2021 in the Crown Court at Leeds (HHJ Belcher) and a jury, he was convicted of three counts arising out of breaches of a Sexual Harm Prevention Order ("SHPO") that had previously been imposed upon him. He was given a suspended sentence of 2 years' imprisonment. He renews his application for permission to appeal against conviction following refusal by the single judge.

2. On 15 November 2016 the applicant had been convicted of various sex offences. On 20 December 2016 he was made the subject of the SHPO.

3. The SHPO required him to notify the police of any address at which he resided within three days of commencing such residence. The subsequent breaches occurred in December 2019. They were identified as follows:
   (a) From 12 September 2019, he had resided at 16 Kingsley Drive in Castleford but had failed to notify that address to the police (count 1).
   (b) Instead he told the police that he resided at 14 Kingsley Drive, but when that address was checked the resident had never heard of him (count 2).
   (c) The police arranged to meet the applicant on 11 December 2019. When they did, they found him in possession of a mobile phone, capable of connecting with the Internet, and he refused to hand the phone to the police in breach of the SHPO (count 3).

4. The applicant contested the charges. He was represented at his trial by an experienced solicitor advocate. Every possible point was taken. There was evidence from a number of prosecution witnesses, and the applicant not only gave evidence himself but called evidence from his mother as to where he had lived at the relevant time. The judge summed up the case to the jury in some detail, and they returned guilty verdicts on all three counts.

5. Although the papers are voluminous, it appears that the applicant's own grounds of appeal can be categorised under three broad headings: i) A complaint that the police accessed legally privileged material on the mobile phone; ii) the wrongful admission of bad character evidence at the trial; and iii) the poor quality of his representation at the trial. Each of these points was addressed and rejected by the single judge.

6. However, the position has been complicated by the provision of a separate advice from new counsel, which took an entirely different point, regarding the jury's sight of the terms of the SHPO. It does not appear that that advice, and therefore that point, was considered by the single judge. Equally, it does not appear that new counsel thought there was

anything in the applicant's own three complaints. He certainly makes no mention of them in his advice. We propose therefore to give the applicant the benefit of any possible doubt, and deal with the three issues on which the single judge refused permission to appeal and then to move on consider the fourth point about the terms of the SHPO.

7. There is nothing in the point about the legally privileged material. The applicant was obliged to hand over the phone to the police and he refused to do so. Although he did not say so at the time, he subsequently said that he had refused because the phone contained privileged material. So at the trial, the only issue for the jury was whether the alleged presence of privileged material on the phone was a reasonable excuse for his refusal to hand it over to the police. By their verdict, the jury plainly considered that it was not. Beyond that, the material itself was irrelevant to the issues at trial. There is no suggestion that any legally privileged material was accessed by the police. There is therefore no arguable ground of appeal.

8. As to the bad character, the point arose in this way. On 23 April 2020 before the Magistrates, the applicant had previously been convicted of failing to comply with the notification requirements of the SHPO. That breach and that conviction were earlier in time so different from the breaches that were the subject of the trial. The Crown applied to the judge at the trial for that previous conviction to be admitted. That was contested but the judge gave a ruling in which she admitted that bad character evidence into the trial.

9. We consider that the argument that the judge should not have admitted the bad character evidence to be wrong in principle. This was a prior breach of the very same SHPO that the jury were considering. It was therefore entirely relevant bad character evidence. The real point for the judge was whether the admission of that evidence made the trial unfair. She gave a careful ruling in which she concluded that it would not make the trial unfair. That was a view to which the judge was plainly entitled to come. Her subsequent directions to the jury as to the limited use they could make of the bad character evidence were in standard terms and quite clear. Thus, the bad character does not give rise to any justification now for any complaint. For completeness, we should say finally on this point that the recent suggestion that the bad character was somehow admitted "by stealth" is untenable. The bad character evidence was only admitted into the evidence after a full-blown debate before the judge about whether or not it should be.

10. The majority of the papers in this case are concerned with the third area of the applicant's complaints, namely the quality of representation. In our view, that submission, although commonly made in applications for permission to appeal, needs to be properly analysed. This Court has made it plain in a number of cases, most recently in *R v Sutherland & Khan* [2022] EWCA Crim 72, that unless complaints concerning the competence of previously instructed lawyers can be demonstrated to have had a potential effect on the fairness of the trial, this Court will not countenance appeals based on this type of

complaint.

11. As we have said, it is clear from the judge's written directions and her summing-up that the applicant had every opportunity to present his case fully, and there was a good deal of evidence adduced, notwithstanding the fact that this was a case of a relatively narrow factual compass. As we have said, the applicant was represented by an experienced solicitor advocate. We do not consider that there is any justification for the complaints now and no sustainable suggestion that the trial was unfair as a result.

12. For those reasons therefore, we consider that the applicant's own three grounds of complaint have no prospect of success. As we have said, that appears to be new counsel's view too, because none of those matters appear in his advice and grounds of appeal against conviction, dated 28 May 2021.

13. The only point that is made in that advice is that, when the jury were considering the breaches, they were provided with copies of the SHPO of which it was said the applicant was in breach. On the face of it, that appears unsurprising. However, the complaint is that the SHPO revealed that the applicant's earlier offending involved children, and that it was therefore adversely prejudicial to him for the jury to be provided with a copy of the SHPO in its full terms.

14. We reject that final ground of appeal. The jury were considering breaches of the SHPO and the notification requirements set out there. They were entitled to see a full copy of the SHPO; indeed they could not have discharged their function properly without it. It would have been an affront to the principle of transparency if they had been provided with some sort of redacted document. It would only have encouraged speculation as to what the redactions covered up.

15. Furthermore, at no time before or during the trial was it ever suggested that the SHPO should be redacted; nor was there any sort of issue with the document being provided to the jury in the form that it was; nor was there a suggestion that any directions about it should be given by the judge. In our view, that is the best possible evidence that this was not a substantive issue at the time and cannot be now. It is, we fear, the product of hindsight.

16. Finally, we should say that, in any event, we cannot see that there was any prejudice in the provision of the SHPO to the jury. The jury were aware that the applicant was a sex offender; that is why he was the subject of the SHPO in the first place. Beyond that, the precise nature of his sex offences would not have been of any relevance to the jury, nor would it have had any significant prejudicial effect.
17. For those reasons therefore, this renewed application is refused. In our view, it has

proved a complete waste of both time and resources. Accordingly, pursuant to section 18(6) of the Prosecution of Offences Act 1985, we make an order requiring the applicant to pay the reasonable costs of the transcripts in this case, in the total sum of £282.58p.

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