IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 1972 (Admin)

No. CO/3422/2021

Royal Courts of Justice

Tuesday, 5 July 2022

Before:

LORD JUSTICE WILLIAM DAVIS
and
MRS JUSTICE MAY

B E T W E E N :

CHIEF CONSTABLE OF KENT POLICE — Applicant

- and -

PHILIP CARTER — Respondent

ANONYMISATON APPLIES

MS N. STRACHAN (instructed by Kent Police Legal Services Department) appeared on behalf of the Applicant.

MR N. HOON (instructed by Takk & Co. Solicitors) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

This is the judgment of the court.

1 On 5 February 2021, the Chief Constable of Kent Police made an application for a sexual risk order under s.122A of the Sexual Offences Act 2003. The respondent to the application was a Mr Philip Carter. The application was made on the basis that Mr Carter had done an act of a sexual nature as a result of which there was a reasonable cause to believe that it was necessary to make a sexual risk order.

2 On 6 July 2021, the application was heard by the Medway Magistrates' Court. At the conclusion of the hearing, the court declined to make any sexual risk order. The Chief Constable now appeals by way of case stated.

3 We should make brief reference, before turning to the substance of the case, to the procedural history of the proceedings before this court. The Chief Constable required the Magistrates to state a case, which they did. We shall deal with the detail of it in due course. Mr Carter made no representations in relation to it and took no part in the obtaining of the case stated. This court then made directions in terms of the provision of skeleton arguments. The Chief Constable, by counsel, provided a skeleton argument dated 20 June 2022. The same requirement was made of Mr Carter. There was no response from either him or his solicitors.

4 Today Mr Notu Hoon, instructed by the solicitors who have acted for Carter throughout, appeared before us. We heard his submissions. Having heard them, and having considered the case in the round, we have concluded that there is no need for these proceedings to be adjourned, or any other step taken in relation to them other than for us to give the judgment that we now do.

5 In 2020, a Police Sergeant Whitmill, an officer of the Kent Police, was involved in a MAPPA (multi-agency public protection arrangements) process for a vulnerable adult in his late twenties with mental health issues and a history of drug and alcohol abuse. We shall refer to him as M. At the time M was in custody. During the MAPPA process Mr Carter sought to put himself forward as an uncle of and carer for M. He is not, in fact, a relative of M. M's father is very much engaged with the care of the male. Mr Carter put himself forward as the person with whom M should reside whenever he was released from custody.

6 Because of the interest shown by Mr Carter in M, and due to M's vulnerability, Police Sergeant Whitmill undertook a review of the information available on police systems in relation to Mr Carter. This review revealed the following:

(1) In 2007 a man reported that between 1989 and 1993, when he was aged between ten and thirteen, Mr Carter had offered him money and had made him dress up in school uniform whilst being spanked. This report went no further because the man failed thereafter to cooperate with the police.

(2) In 2011 a man reported that between 1994 and 2000 he had been dressed up by Mr Carter and spanked by him. Mr Carter had paid the man for this. The man was aged between fourteen and nineteen at the time. The matter was forwarded to the Crown Prosecution Service. They declined to authorise any charge.

(3) In the same year, a young man complained that Mr Carter had offered him money to dress up in school uniform. The young man had agreed to do so, whereafter Mr

Carter had spanked the victim. Mr Carter then took his own trousers down and tried to put his penis into the young man's mouth. The young man fled the address where this happened. The Crown Prosecution Service did not authorise charge in this case.

(4) In 2016, a nineteen-year-old man with some learning difficulties reported that he had been paid to dress up in school uniform and to be filmed bending over. It was decided that the man, though he was vulnerable, had the capacity to consent and no further action was taken. In the course of the police investigation in 2020, a handwritten contract relating to the activity with this man was found at Mr Carter's home address.

(5) In July 2020, the police received information from a third party that a young man with mental health difficulties had been told by Mr Carter to dress up in school uniform and had been spanked by Mr Carter with sufficient force to cause injury. The young man, it was alleged, had been paid for this. The young man was spoken to by the police and refused to engage. When at a later date Mr Carter's address was searched, a copy of a typewritten contract, consistent with the information given to the police, was found on a computer at the address.

7 As a consequence of this material becoming known to PS Whitmill, the communication between M in prison and Mr Carter was reviewed. This revealed concerning issues, such as Mr Carter telling M he would collect him from prison when he was released with a crate of beer in the boot of the car, despite M being someone with significant alcohol addiction problems. As a consequence, the prison was requested to remove Mr Carter from M's authorised contact list. That was done. Mr Carter responded by trying to add himself to the contact list under a false name. Prison security challenged him and he confirmed that he was using a false name to try and re-establish himself on the contact list.

8 In October 2020, PS Whitmill visited a twenty-seven-year-old man who lived in Sheerness. This was because Mr Carter had made allegations against M's probation officer. The man in Sheerness was able to provide evidence to rebut those allegations. The man disclosed that some fifteen years before he had been abused by Mr Carter. Mr Carter had made him drop his trousers and had spanked him. This abuse had continued over the succeeding years. The man alleged that about a month prior to PS Whitmill's visit, Mr Carter had given him a cocktail of drink and drugs following which Mr Carter had raped him. PS Whitmill made a length note of the man's allegations in her day book. The man signed the note. Within a month the man was dead. He was found in his bedroom following an apparent drug overdose.

9 The search of Mr Carter's home address was carried out on 15 October 2020. An invoice for the supply of a schoolmaster's cane was recovered. It was dated February 2020 and addressed to Mr Carter at his home address. The cane came with instructions on its use on the bare bottom. An old school desk was at the address. It was identical to the desk shown in photographs held on Mr Carter's computer, the photographs showing a young man in school uniform by the desk. This young man was the twenty-seven-year-old from Sheerness. The computer also had photographs of unknown teenage boys showing their bare bottoms and images of school uniforms saved from an internet search.

10 All of this material was placed before the Magistrates by the evidence of PS Whitmill and one of her colleagues. In addition, the Chief Constable relied on the fact that in about 1998 Mr Carter had been cautioned after he had spanked a schoolboy. This was the basis of the Chief Constable's application for an order under s.122A of the 2003 Act.

11 The written application contained the following passage, which formed the core of the Chief Constable's case:

> "What has become apparent throughout the Defendant's offending history is his explicit interest in corporal punishment for his own sexual gratification. Over many years this has led to the investigation of numerous offences of serious sexual assaults on children and young men and their incitement to participate in sexual offences. The Defendant favours as his victims individuals who are vulnerable by virtue of drug or alcohol abuse or may have some form of learning disability. The Defendant will often present as a father figure in order to secure their trust before tempting his victims with a monetary reward to secure their participation. A common trait displayed by this defendant is an obsession with seeing his male victims dressed in schoolboy uniforms and then using a schoolmaster's cane to spank their exposed buttocks across a school desk before moving on to seriously sexually assaulting them."

12 Prior to the hearing on 6 July 2021, Mr Carter served a statement consisting of ten closely typed pages. He said that some of those who complained about his behaviour were lying and acting maliciously. He denied any sexual acts in relation to the man from Sheerness. He accused that man of having created the incriminating documents on his computer. He said that the order for the cane was placed by this man and it was this man who had purchased the school desk. Mr Carter said he had no idea how the pictures of young males with bare bottoms came to be on his computer. He gave evidence at the hearing, at which he adopted the contents of his statement. He said that the handwritten contract had been planted by the man from Sheerness. He admitted to being cautioned in 1998.

13 Section 122A of the 2003 Act, insofar as is relevant for our purposes, reads as follows:

> "(1) A chief officer of police … may by complaint to a magistrates' court apply for an order under this section (a "sexual risk order") in respect of a person ("the defendant") if it appears to the chief officer … that the following condition is met.
>
> (2) The condition is that the defendant has, whether before or after the commencement of this Part, done an act of a sexual nature as a result of which there is reasonable cause to believe that it is necessary for a sexual risk order to be made.
>
> …
>
> (4) An application under subsection (1) may be made to any magistrates' court acting for a local justice area that includes—
> (a) any part of a relevant police area, or
> (b) any place where it is alleged that the person acted in a way mentioned in subsection (2).
>
> …
>
> (6) On an application under subsection (1), the court may make a sexual risk order if it is satisfied that the defendant has, whether before or after the commencement of this Part, done an act of a sexual nature

as a result of which it is necessary to make such an order for the purpose of—
(a) protecting the public or any particular members of the public from harm from the defendant, or
(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the defendant outside the United Kingdom.

(7) Such an order—
(a) prohibits the defendant from doing anything described in the order;
(b) has effect for a fixed period (not less than 2 years) specified in the order or until further order.

…

(9) The only prohibitions that may be imposed are those necessary for the purpose of—
(a) protecting the public or any particular members of the public from harm from the defendant, or
(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from harm from the defendant outside the United Kingdom."

14 There is no definition of "an act of a sexual nature" in the 2003 Act. Statutory guidance has been issued which states as follows:

> "Acts of a sexual nature are not defined in legislation and therefore will depend to a significant degree on the individual circumstances of the behaviour and its context. The term intentionally covers a broad range of behaviour. Such behaviour may, in other circumstances and contexts, have innocent intentions. It also covers acts that may not in themselves be sexual but which have a sexual motive and/or are intended to allow the perpetrator to move on to sexual abuse."

Though the statutory guidance does not make it explicit, an act of a sexual nature does not necessarily involve the commission of a sexual offence, though committing a sexual offence inevitably will involve an act of a sexual nature.

15 Proceedings in which a Chief Constable applies for an order under s.122A are civil proceedings. They are equivalent to applications that were made for an antisocial behaviour order pursuant to the Crime and Disorder Act 1998. In relation to such applications, the standard of proof to be applied was the criminal standard (see *R (McCann & Ors) v Manchester Crown Court* [2002] UKHL 39). In the context of this case, the criminal standard of proof is to be applied to whether or not an act of a sexual nature has been committed by the defendant.

16 When the court moves on to consider the necessity to make a sexual risk order, having found that an act of a sexual nature has occurred, the process is by way of an evaluation. This involves application of the civil standard, namely the balance of probabilities. Because they are civil proceedings, hearsay is admissible pursuant to the Civil Evidence Act 1995. As was said at para.35 in *McCann*:

> "The weight of such evidence might be limited. On the other hand, in its cumulative effect it could be cogent."

17 A point was raised in the course of argument by Mr Hoon that in this case no notice had been served under the Civil Evidence Act 1995. It is clear to us that no notice was necessary. In any event, the entirety of the evidence was served on Mr Carter well in advance of the hearing. He had an opportunity to deal with it and consider it. He did deal with it in the written statement to which we have referred.

18 The case stated by the Magistrates' Court sets out the evidence called and the submissions made by the parties in the course of the hearing. It makes reference to the relevant legislation and to *McCann*, albeit that reference is cursory. It states that the court was not satisfied to the criminal standard that Carter had carried out an act of a sexual nature. We can reproduce the reasons in full:

> "We have heard from the two officers and the Defendant. Evidence was also referred to in a 150-page bundle submitted by the Applicant and a 15-page statement from the Defendant. We cannot be sure that a sexual act was carried out by the Defendant. We therefore refuse the application."

19 We remind ourselves of the opening paragraph of PD 52E, relating to appeals by way of case stated:

> "An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court for the superior court to make a decision on the application of the law to those facts."

We do not have a set of facts specified by the Magistrates' Court. We have the evidence heard by the court. We have the bare conclusion the court reached, having heard that evidence. It is quite impossible to tell from the material we have, and from the case stated, what evidence the court accepted and why.

20 The first question posed for the opinion of this court is: "Did we err in law by conflating the determination of whether the defendant had committed an act of a sexual nature with a finding that the defendant was guilty of a criminal offence?" We infer from the question that the Magistrates' Court did elide "an act of a sexual nature" and "a sexual offence". That was a clear error of law. Thus, the answer to the first question is "yes". In order to establish the condition in s.122A(2) of the 2003 Act, it is not necessary to prove that the respondent committed a criminal offence. Were that the case, the power to make a sexual risk order would have no point. Where there is sufficient evidence to convict somebody of a criminal offence, the presumption must be that prosecution would follow. On conviction, there are ample powers to make a protective order without resorting to s.122A. If it were intended that the sexual risk order could only be made upon proof of commission of a criminal offence, the legislation would make that clear. The reverse is the case. It must follow that the finding of the Magistrates' Court cannot stand.

21 The second question posed for our opinion is: "Were we reasonable in our decision, based on the evidence before us, that we could not be sure that the defendant had committed an act of a sexual nature?" We are sure that the answer to this question is in the negative. First, the decision was not reasonable because it did not provide any explanation to the Chief Constable as to why the application had failed. By definition, a reasonable decision is one which can be subjected to rational analysis. That is not possible given the absence of any

reasoning at all. Second, the evidence adduced by the Chief Constable was not open to sensible challenge.

22 That led to these consequences. First, Mr Carter admitted that he had been cautioned in the past for spanking a schoolboy, i.e., the very conduct to which all of the evidence of PS Whitmill related.

23 Second, although Mr Carter denied that he had ever behaved in the way alleged by the various complainants to which PS Whitmill referred, the court had evidence in respect of six different individuals with no apparent opportunity for collusion between them. The six individuals described a course of conduct which can only be described as having a striking similarity. The fact that the evidence was hearsay was not irrelevant to the court's assessment of it. However, this was a paradigm of a case where the cumulative effect was cogent. Mr Hoon argued before us that the evidence amounted to rumour and innuendo. With great respect to Mr Hoon, that is a misrepresentation of the evidence that the Magistrates heard. The evidence consisted of detailed accounts of complaints made. The complaints which may not have resulted in prosecution or further proceedings but they were very much more than rumour and innuendo.

24 Third, what Mr Carter did when he was prevented from making contact with M demonstrated deviousness in relation to a vulnerable young male. That was not explained in his evidence. It was probative of a sexual interest in M.

25 Fourth, the explanation given by Mr Carter for the incriminating material found at his home, and on his computer, was wholly inadequate. The only proper conclusion was that (a) Mr Carter had purchased a cane, had downloaded sexual material and had created contracts in relation to spanking and (b) he had lied about it. Even applying the appropriate caution about lies, this was cogent evidence.

26 We have no explanation from the court below as to how all of this evidence was put to one side in concluding that the Chief Constable had failed to discharge the burden of proving that Mr Carter had committed acts of a sexual nature. It must follow that the answer to the second question is "no".

27 The third question is: "Did we err in law by failing to have regard to the purpose of the legislation which is preventative rather than punitive?" The task of the Magistrates' Court was to determine whether the Chief Constable had proved to the criminal standard that Carter had committed an act of a sexual nature. The purpose of the legislation was not a matter for the court's consideration. We apprehend that this question is linked to the first question. The reference to "punitive" suggests that the Magistrates' Court considered that a criminal offence had to be established in order to make an order under s.122A. As we have already made clear, that is not the case. Insofar as it is necessary for our determination of this appeal, we answer the third question "yes".

28 In our view, the only possible view open to the Magistrates' Court was that Mr Carter had committed more than one act of a sexual nature. The Magistrates' Court did not consider the issue of necessity or whether the terms of the order sought by the Chief Constable were necessary to protect the public from harm from Mr Carter. We have considered whether it would be appropriate for us to make a decision on that issue. We have concluded that it would not. Mr Carter is entitled to have a decision from a first instance court on the question of necessity. More to the point, this court is not the proper forum for a discussion of the terms of an order when the court below has never considered them.

29 We answer the questions posed as follows:

Question 1: Yes.
Question 2: No.
Question 3: Yes.

30 We remit the Chief Constable's application to the Magistrates' Court to decide whether a sexual risk order is necessary in this case, that issue to be determined on a balance of probabilities on the basis of the evidence as we have rehearsed it. It will be for the Magistrates' Court to decide whether the terms of the order sought are necessary and whether the prohibitions in the order go beyond what is necessary to protect the public. These issues must be considered by a fresh bench.

CERTIFICATE

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