NCN: [2022] EWCA Crim 446
IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202101979/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 17 March 2022

Before:

LADY JUSTICE MACUR DBE

LADY JUSTICE CARR DBE

MRS JUSTICE MAY DBE

REGINA
V
STEPHEN WRIGHT-HADLEY

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MR R HALLOWES appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE CARR: The provisions of the Sexual Offences (Amendment) Act 1992 apply. 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 identity that person as the victim of that offence. This prohibition applies unless waived or lifted in accordance with section 3 of the Act.

Introduction

1. This appeal is limited to a challenge to (part of) a deprivation order made under section 152 of the Sentencing Act 2020 ("the Deprivation Order") ("the Sentencing Code"). The Deprivation Order followed the appellant's conviction upon his guilty plea for an offence of voyeurism contrary to section 67(3) and (5) of the Sexual Offences Act 2003. The appellant was also convicted of affray contrary to section 3(1) and (7) of the Public Order Act 1986, to which he also pleaded guilty.

2. On 17 May 2021 in the Crown Court at Lewes, HHJ Mooney ("the judge"), imposed a two-year Community Order in respect of each offence with a rehabilitation activity requirement of 30 days, such sentences to run concurrently. A Sexual Harm Prevention Order for a period of nine years was made ("the Sexual Harm Prevention Order") and the appellant was placed on the Sex Offender Register for a period of five years.

3. A year earlier the appellant had been sentenced for an offence of causing a public nuisance. On that occasion the judge had imposed a custodial sentence of two years suspended for two years alongside numerous community requirements, a 6 month electronically monitored curfew and a 10-year criminal behaviour order ("the Criminal Behaviour Order"). The fact that the subsequent affray offence had been committed during the operational period of that suspended sentence was marked by an increase in the community requirements.

The Facts

4. The chronology of events is as follows. The public nuisance offending took place between January 2013 and December 2019. It encompassed over 100 incidents of repeated telephone contact of a sexual nature with unknown females.

5. During the course of a search in December 2019 of the premises where the appellant lived with his parents, a very large number of digital devices, cameras and other items belonging to the appellant were identified and seized. Their contents were downloaded and viewed. A number of images taken between 2016 and 2019 were found of a female in various stages of undress. It was clear that the female was unaware that she was being photographed. The

appellant had taken the images from his home which overlooked the female's bedroom window. The images included pictures of the female changing and naked with her breasts exposed. The female had confirmed her identity and the fact she had not consented in any way to those images being taken.

6. The appellant was arrested in January 2021 and made full admissions. He said that he had discovered by chance that the female did not always close her curtains. He had taken the photographs over roughly a two-year period. He in fact had taken thousands of images of her but had only kept the ones that he wanted to. He would be aroused by the images and would enlarge certain images where the female could be seen exposing her breasts. When asked why there were no images found on a newer and more recently acquired camera, the appellant told officers that he had by then realised that what he had been doing was wrong and so had stopped. He expressed remorse. He was released under investigation.

7. Whilst awaiting the charging decision on these matters on 23 March 2021, he committed the affray offence. It involved threats to kill himself and giving members of public who came to offer help the impression that he was in possession of a firearm.

8. The appellant had mental health issues which contributed to the public nuisance and affray offences in particular. Indeed, he was sectioned for a short time after the affray. He was then charged with both the voyeurism and affray offences to which he pleaded guilty immediately in the Magistrates' Court.

The Deprivation Order Hearing

9. At the conclusion of the first sentencing hearing on 17 May 2021 the judge ordered the prosecution to make a list of all the items in police possession in respect of which destruction or forfeiture was sought, with reasons. If a hearing was required, it would proceed separately.

10. A police list was produced in due course, and the matter was listed for hearing on 8 June 2021. At the hearing Mr Hallowes, who appeared for the appellant below as he has appeared before us, indicated to the judge that it was accepted on behalf of the appellant that the bulk of the items would be forfeited. The only and most important items that the appellant wanted returned were the external hard drives (save for two small Seagate hard drives which (so the applicant had volunteered) contained illegal imagery). The hard drives sought by the appellant contained landscape photography, family pictures and copies of old family portraits of which the originals had been lost.

11. In respect of these hard drives counsel for the prosecution explained to the judge that it would not have been cost effective to examine all of the 20 devices in question. Only one

of those devices had been examined forensically; it had been found to contain voyeurism photographs and also other photographs of borderline indecent images of children. The judge then commented immediately:

> "No, that would be time consuming and expensive, and I'm afraid the simple answer is, in those circumstances, they will be forfeit because I cannot satisfy myself that they are hard drives which contain no imagery. So I'm afraid it's unfortunate but that's the way it is. So none of the hard drives or the SD cards, if they have not been analysed, will be returned to him..."

12. When challenged on this by Mr Hallowes, including on the basis that the appellant should not be penalised for a lack of resource and emphasising the personal nature of the contents of these devices, the judge commented:

> "One has to husband. This defendant has been prosecuted and convicted of serious offences. The police have used and husbanded resources in an appropriate way. Sad though it is, I cannot simply accept the defendant's word...The only way in which I could accede to the request would be if it were possible independently to verify that none of these hard drives have any images on. I'm not running the risk that some of them do and he gets them back. I'm sorry – just not doing it."

13. When the judge addressed the appellant directly to explain his decision, the appellant asked whether it would be permissible for him personally to fund the cost of the necessary forensic analysis. The judge rejected the offer, saying that it would become overly complicated and involve a lot of money.

Grounds of Appeal

14. Mr Hallowes restricts his challenge to that part of the Deprivation Order made in respect of the hard drives and security digital ("SD") cards which had not been the subject of any forensic examination by the police. He submits that the judge acted contrary to the statutory test at section 153(3) of the Sentencing Code in depriving the appellant of these items (with the exception of the two Seagate hard drives that had been volunteered by the appellant for forfeiture). The judge proceeded purely on the basis of his suspicions that these devices might have been used to facilitate the commission of an offence. Mr Hallowes points to the fact that the judge stated that he could not take the risk of the items that might contain offending material being returned to the applicant. But the statutory test requires the court to be satisfied either that the property had been used or that it was intended to be used to commit or facilitate the commission of any offence. In the absence of any forensic examination of the other hard drives and the SD cards the court simply could not be so satisfied. Nor, submits Mr Hallowes, did the judge have any due regard to the considerations identified in section 155 of the Sentencing Code.

Discussion

15. A deprivation order under section 152 of the Sentencing Code is an order made in respect of an offender for an offence and deprives the offender of any rights in the property to which it relates. Section 153 provides materially:

> "Deprivation order: availability
>
> (1)A deprivation order relating to any property to which subsection (2) applies is available to the court by or before which an offender is convicted of an offence.
>
> (2)This subsection applies to property which—
>
> (a)has been lawfully seized from the offender, or
>
> (b)was in the offender's possession or under the offender's control when—
>
> (i)the offender was apprehended for the offence, or
>
> (ii)a summons in respect of it was issued,
>
> if subsection (3) or (5) applies.
>
> (3)This subsection applies if the court is satisfied that the property—
>
> (a)has been used for the purpose of committing, or facilitating the commission of, any offence, or
>
> (b)was intended by the offender to be used for that purpose."

16. Section 155 provides materially:

> "Exercise of power to make deprivation order
>
> (1)In considering whether to make a deprivation order in respect of any property, a court must have regard to—
>
> (a)the value of the property, and
>
> (b)the likely financial and other effects on the offender of making the order (taken together with any other order that the court contemplates making)."

17. A deprivation order is but one of a large number of forfeiture orders. The following requirements and general principles are apparent from the legislation and the authorities.

18. As to substance:

i) A deprivation order will only be available if the requirements in section 153(3) are met, namely that the property has been used for the purpose of committing, or facilitating the commission of, any offence, or was intended by the offender to be used for that purpose;

ii) If available, when considering whether or not to make a deprivation order, a court must have regard to the factors identified in section 155(1), namely the value of the property and the likely financial and other effects of making the Order;

iii) Proportionality is a relevant and important factor. The effect of a deprivation order should be considered as part of the total penalty imposed;

iv) Deprivation orders should not be made unless they are simple and there are no complicating factors such as the existence of innocent co-owners.

19. As to procedure:

i) It is for the prosecution to justify an application for a deprivation order. The burden lies on the prosecution to satisfy the court to the criminal standard of proof that such an Order is available;

ii) There needs to be a sufficient evidential basis for a deprivation order to be sought and made, so that full and proper investigation of the basis for the Order can take place;

iii) The court must make a proper enquiry into the circumstances of the property which is the subject of the application for deprivation and, where necessary, make a formal finding. Where appropriate this may take the form of a Newton hearing;

iv) The prosecution and defence should be invited to make submissions as to the appropriateness of the proposed order.

(See generally *R v Pemberton* (1982) 4 Cr App R(S) 328; *R v Jones* [2017] EWCA Crim 2192; *R v Thomas* [2012] EWCA Crim 1159 and *R v De Jesus* [2015] EWCA Crim 1118.)

20. There is force in the appellant's criticisms of the judge's approach. Amongst other things, the judge appears to have turned the test under section 155(3) on its head. He commented that he could not satisfy himself that the hard drives contained no offending imagery. He should instead have asked himself whether he was sure that the hard drives had been used or were intended by the appellant to be used for the purpose of committing an offence. He did not appear to recognise that the burden of proof lay on the prosecution. No one, including counsel, appears to have addressed the question of future intention at all. Nor is there any indication that the judge considered (or was asked to consider) the requirements of section 155(1) or the question of proportionality more generally. Thus he did not address in this context the submissions for the appellant that the disks contained wildlife photography and family photographs about which the appellant was particularly anxious. Indeed the material was said to contain the appellant's lifetime's work.

21. In these circumstances, the question for us is whether there was nevertheless sufficient justification for a finding to the relevant standard that the materials either had been used for the purpose of committing an offence or were intended to be used in the future by the appellant for that purpose and, that a deprivation order was justified having regard to, amongst other things, the effect that such an order would have on the appellant.

22. According to the police evidence there were nearly 20 devices capable of mass storage. Only one had been forensically examined. The appellant had volunteered two further hard drives containing images and accepted that they were to be forfeited. The remaining hard drives he wanted to retain. As already indicated, his position was and remains that they contain innocent material of considerable sentimental value to him.

23. There were undoubtedly troubling features of the appellant's behaviour and offending. This was someone who in the past had collected a vast number of discarded mobile phones in order to obtain female contact details. He had taken unauthorised photographs of a neighbour over a long period of time and photographs of children had been found on the SD card which had been examined.

24. However, we have come to the clear conclusion that it would be wrong to uphold the Deprivation Order. There had been insufficient investigation into the actual content of the drives such as to justify a finding that the drives in question had been used in the past to commit offences. We do not suggest that it was necessary for the prosecution to examine each and every drive but a wider probe than simply the examination of one device was warranted. The appellant had been open in relation to two further hard drives and offered to pay for wider examination himself. There is no basis upon which we could be sure, without more, that the devices in question did contain further historic imagery.

25. As for future intention, in the right circumstances it may well be possible for a judge to be able to infer the existence of a future intention on the part of a defendant to use relevant property to commit offences. But here the prosecution did not advance any positive case

to this effect, and there is no assistance to be derived from the judge's remarks on the question. There may have been compelling arguments in the appellant's favour to the effect that he did not in any way intend to use these devices for the purpose of committing offences in the future. Such submission may have included the fact that the appellant had ceased to use his newer and more recent camera for the purposes of imagery offending.

26. Further, it is difficult for us to begin to gauge proportionately at this distance. It could be argued that the likely effect on the appellant in terms of deprivation of his landscape photography and irreplaceable family imagery would be extreme (and disproportionate).

27. In this context it is relevant to note the restraints already imposed on the appellant. The Sexual Harm Prevention Order, amongst other things, prohibited the appellant from using any device capable of capturing an image, moving or still, unless he notified the Sex Offender Management Team or other responsible monitoring authority of the full details of the device within 3 days of obtaining it, and unless he made the device available for inspection and permitted the installation of risk management monitoring software. In the recent decision of *R v Julian Carr* [2022] EWCA Crim 286, a mobile telephone and tablet computer were made the subject of a deprivation order in respect of breaches of a sexual harm prevention order even though those devices contained no illegal material. It was possession of those unregistered items that had given rise to the breach offences. The appellant was also the subject of the Criminal Behaviour Order as a result of the earlier public nuisance offence; again that restricted, amongst other things, the appellant's use of mobile telephones and SIM cards.

Conclusion

28. For these reasons we allow the appeal. The Deprivation Order will be quashed. The experience of this case serves to emphasise the need for judges and counsel alike to pay close attention to the statutory requirements of section 153 of the Sentencing Code and, if relevant, section 155 of the Sentencing Code, when considering whether to make a deprivation order. Such orders, whilst ancillary, are nevertheless subject to a specific statutory regime. They are not to be made as a matter of routine. They should only be made when the court is satisfied, after due investigation and process, that they are both available in principle and justified as a matter of proportionality.

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