Neutral Citation Number: [2023] EWCA Crim 33

Case No: 202103959 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM INNER LONDON CROWN COURT
T20200555

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before :

LADY JUSTICE THIRLWALL
MRS JUSTICE YIP DBE
and
MR JUSTICE HENSHAW

- -

Between :

REX

- and -

ROBERT HANNA

- -
- -

Mark McDonald (instructed by **Carson Kaye Solicitors**) for the **Appellant**
Robert Evans (instructed by **Crown Prosecution Service**) for the **Crown**

Hearing date: 9 November 2022
Further written submissions received: 18, 20 and 21 November 2022
Draft judgment circulated to parties: 14 December 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Henshaw :

1. This is a case to which the provisions of the Sexual Offences (Amendment) Act 1992 apply. It follows that, during her lifetime, no matter may be included in any publication if it is likely to lead members of the public to identify the complainant as a victim of any of the offences involved in this case.

2. The Appellant was convicted on 19 October 2021 at the Crown Court at Inner London of one count of causing or inciting a child to engage in sexual activity by a person in a position of trust, contrary to s.17(1) of the Sexual Offences Act 2003 (Count 1) and five counts of sexual activity with a child by a person in a position of trust, contrary to s.16(1) of the Sexual Offences Act 2003 (Counts 2-6). Of the latter counts, Count 2 related to kissing, when the complainant was 16 years old; Counts 3-6 related to sexual intercourse, when the complainant was 16 years old.

3. On 23 November 2021 the Appellant was sentenced, by the trial judge, to 3 years' imprisonment on counts 3-6, and concurrent sentences, each of 1 year's imprisonment, on counts 1 and 2. A sexual harm prevention order (SHPO) was imposed until further order.

4. The Appellant appeals against the imposition of the SHPO, by leave granted by the single judge. He also renews his application for leave to appeal from the sentence of 3 years' imprisonment, following refusal by the single judge on the papers.

5. The facts, briefly, were that between 29th June 2018 and 1st April 2019 the appellant, then aged 40, engaged in a sexual relationship with the complainant, a 16 year old female pupil at the school where he taught physics. The relationship began over the summer after the complainant had completed her GCSEs, and continued for a time after the complainant returned to school to study for her A levels. The appellant had sexual intercourse with the complainant on multiple occasions including at his home and in a number of hotels. The complainant had a history of school absence due to mental health issues and a history of self-harm.

6. By January 2019 the complainant wanted to end the relationship. The appellant persuaded the complainant to meet him and during that meeting convinced her to continue the relationship, before then ending it himself. The complainant continued at the school, and the appellant was her form tutor during the time when the offences leading to Counts 4-6 took place. On 1st April 2019 the complainant disclosed to another teacher what had been happening and the police were called, leading to the Appellant's arrest.

7. The complainant in her victim personal statement said these events had had a hugely negative effect on her emotional wellbeing, worsening her depression and anxiety, and causing unwanted repeated memories and nightmares, disrupting her sleep. As a result of all this her attendance at sixth form suffered, and she ended up only achieving two A levels, with the result that she had to do an additional foundation year in order to get into university. The Applicant's behaviour also caused her to self-harm in an attempt to deal with the stress and depression. She was referred to CAMHS (Child and Adolescent Mental Health Services) and to a rape and sexual assault clinic. She remains

affected, struggling to forming healthy relationships and suffering anxiety around male figures of authority.

8. The judge applied the sentencing guidelines for offences under sections 16 and 17 of the Sexual Offences Act 2003. The Counts 3-6 offences fell within harm category 1 as they involved vaginal penetration. The judge considered that they fell in culpability category A because they involved a significant degree of planning, with the Appellant going to great lengths to book hotel rooms. In addition, the judge found that there was grooming behaviour from the start, the specific targeting of a particularly vulnerable child through her mental health issues, and threats to tell the complainant's parents about her sexual activities in an attempt to stop her reporting the matter. Each of those further features were indicative of category A culpability, so the presence of several such factors aggravated the seriousness of the offending.

9. Under the guidelines, the starting point for a single category 1A offence is 18 months' custody, with a category range of 1 to 2 years' custody. The judge considered the offending to be aggravated by the matters we have just mentioned, and by the fact that ejaculation took place on more than one occasion. It was mitigated by the Appellant's previous good character: he had no previous convictions, and a variety of people spoke well of him. On the other hand, the judge said, the Appellant had still not shown any genuine remorse or understanding of the complainant; the author of a pre-sentence report spoke of Appellant's inability to admit his culpability; and although the Appellant was considered a low risk of reoffending, the prospects of rehabilitation were not good given the Appellant's attitude.

10. Taking into account the mitigating factors and bearing in mind totality, the judge concluded that concurrent sentences each of three years' imprisonment were called for on Counts 3-6, involving full sexual intercourse, with concurrent sentences of 1 year for Count 2, the initial kissing, and for Count 1, the initial incitement.

11. The Appellant appeals against the imposition of the SHPO on the ground that it was disproportionate and unnecessary in the light of the offences, and renews his application to appeal from the custodial sentence on the ground that it was manifestly excessive.

12. We received written and oral submissions from Mr Mark McDonald on behalf of the Appellant and Mr Robert Evans on behalf of the Crown. We are grateful to them both.

13. We consider first the application in relation to the custodial sentence.

14. The Appellant does not dispute that Counts 3-6 fell within category 1A in the sentencing guidelines. However, he submits that none of the aggravating features took the case outside the normal category range of 1-2 years. This was a consensual relationship between a teacher and a pupil that lasted 6 months; the complainant was vulnerable but there was no evidence that the Appellant had either groomed or targeted her because of her vulnerabilities; there was evidence that the complainant had been in a previous sexual relationship with a much older man; there was a significant delay between arrest (April 2019) and trial (October 2021); and the pre-sentence report assessed the Appellant as having a low risk of reoffending. The report assessed the risk of serious harm as medium, in light of the harm to the complainant, but added that harm would be unlikely to occur again as the Appellant would not be teaching in the future, and had said he was hypervigilant and would not put himself in such a position again in any

event. The Appellant had an exemplary record as a teacher, liked by pupils and teachers, and had numerous character references.

15. The Appellant cites cases in which lesser sentence were imposed for similar offences, *R v Healy* [2009] EWCA Crim 2196 and *R v Daniel Wilson* [2007] EWCA Crim 2762. However, those are not guideline cases, and related to significantly different situations from the present case.

16. The Crown takes issue with some of the Appellant's points, noting among other things that the Appellant made express reference to the complainant's mental health, including her depression and self-harm, in messages he sent her on 1 April 2019 i.e. the day on which she reported these matters and on which the Appellant was arrested. At the end of a long series of WhatsApp exchanges on that day, the Appellant said he had done "*whatever I could to prevent you from missing more school and cutting yourself again*".

17. The Crown submits that given the several aggravating features mentioned by the judge, he was entitled to conclude that each of Counts 3-6 fell at the top end of the category 1A range (2 years' custody); further, since there were multiple such offences over a number of months, the judge was entitled to impose a sentence above the top of the range, namely 3 years' custody. The judge was also entitled to have regard to need to send a message as to what teachers who abuse their position should expect, in order to maintain confidence in the educational system.

18. In our judgment, whether or not the judge could be sure that the Appellant had targeted the complainant due to her vulnerability, the other aggravating features in relation to Counts 3-6 would have justified moving from the starting point to somewhere near the top of category 1A. However, the judge also had to reflect the fact that the Applicant had been convicted of four such offences. Count 3 related to sexual intercourse in a hotel in August 2018, Count 4 to intercourse in another hotel in September 2018, Count 5 to intercourse in a third hotel during the October 2018 half term break, and Count 6 to intercourse in the Appellant's flat on multiple occasions. Even after taking account of totality and the mitigation available to the Appellant, we do not consider that an overall custodial term of 3 years' was arguably manifestly excessive or wrong in principle.

19. We therefore refuse the renewed application for leave to appeal against the custodial sentence.

20. Turning to the SHPO, the Crown applied for an order in these terms:

> "1. The offender is prohibited from having any unsupervised contact or communication of any kind with any child under the age of 18 other than:
>
> a. Such as is inadvertent and not reasonably avoidable in the course of everyday life, or
>
> b. With the consent of the child's parents or guardian (who has knowledge of her convictions) and with the express approval of Social Services for the area.

2. The offender shall not enter or remain in any dwelling where any child under 18 resides nor shall the offender stay overnight in any private or residential premises where a child under the age of 18 is staying unless:

a. Accompanied by a person (other than the offender himself or any sexual partner of his) holding parental responsibility for the child and

b. That person has been made aware of the terms of this sexual harm prevention order and

c. The express, written permission of the offender's Police Public Protection Unit/JIGSAW Team has been obtained by the offender in advance of any such event.

3. The offender shall not cause, permit or allow any child under 18 to enter his home unless

a. Accompanied by a person holding parental responsibility for the child and

b. That person has been made aware of the terms of this SHPO and

c. The express, written permission of the offender's PPU/JIGSAW Team has been obtained by the offender in advance of any such event.

4. The offender shall not seek or undertake employment either paid, unpaid or voluntary which may involve direct/indirect contact with any child under the age of 18 years.

5. The offender is prohibited from having any unsupervised contact or communication 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 daily life, or

b. with the consent of the child's parent or guardian (who has knowledge of her convictions) and with the express approval of Social Services for the area."

21. The judge stated that he declined to make an order as elaborate as that which the prosecution had put forward, but was prepared to make an order prohibiting the Appellant from having any unsupervised contact or communication of any kind with any female under the age of 16 other than (a) such as is inadvertent and not reasonably avoidable in the course of everyday life or (b) with the consent of the child's parent or guardian with knowledge of his conviction.

22. However, the order as drawn and distributed reflected the prosecution's draft and not the order the judge stated in open court, and was thus significantly more restrictive. Counsel were not in a position to explain how this came about, and it is a matter of serious concern that the Crown Court issued a form of order that did not reflect the order that the judge had in fact made. It is regrettable that no-one noticed this error until the case was before this court. It means that the official court record contains the wrong order. It need hardly be said what the consequences of that may have been.

23. It is open to this court to reconstitute ourselves as a Divisional Court in order to rectify the record before considering the appeal. That strikes us as over elaborate in the light of our views on the merits of the order as pronounced by the judge, to which we now turn. We approach the appeal on the basis of the order that the judge actually made in court.

24. On behalf of the Appellant, Mr McDonald submits that, but for the complainant having been a pupil at the school where he taught, none of the matters of which he was convicted would have constituted an offence. Further, he is now on the Sexual Offences Register for life. His teaching career is over and his licence to teach has been revoked by the Teaching Regulation Agency. He submits that outside of the teaching environment he does not pose a real risk of harm to children under the age 18. Further, there is no evidence of any risk to children under the age of 16, since none of the offending alleged in this case related to such a child.

25. The Appellant cites this court's decision in *R v Smith* [2011] EWCA Crim 1772, which made clear that care must be taken when making such a SHPO. The facts of the case must be analysed and statutory test applied. There will be cases where a wide-ranging order should be made, for example where there is a real and identifiable risk to children particularly when the defendant is predatory paedophile. That is, the Appellant submits, not the case here. Further, any term prohibiting a defendant from activities likely to bring him into contact with children has to be justified as being necessary over and above the restrictions placed upon him by being on a Sexual Offences Register. There must be a "*real risk*" (albeit not necessarily a high risk) that the person might undertake some activity outside the prohibitions.

26. The Appellant also highlights this court's decision in *R. v Joseph Cornwall* [2012] EWCA Crim 1227, where the appellant pleaded guilty to three offences of causing or inciting a child to engage in sexual activity by a person in a position of trust, contrary to the Sexual Offences Act 2003 s.17(1). After citing *R v Smith*, the court said:

> "Applying the principles set out in that case, we remind ourselves that it was only the fact that he was in a position of trust that made what this appellant did in relation to communication with these young women unlawful. It is apparent that as a result of his convictions he will never again be in such a position of trust, working with children, because he has been disqualified under s.28 of the CGCS [Criminal Justice and Court Services] Act 2000 and will be placed on the list by the Independent Safeguarding Authority.
>
> In those circumstances the situation will not arise again. In those circumstances, any contact that he has with young women who

> are 16 or 17 years old will be lawful activity. Clearly the judge felt that the appellant had urges that he needed to restrain and deal with but they were not ones that were in themselves unlawful outside the relationship of trust. …
>
> In all those circumstances we must set aside and quash the sexual offences prevention order made in this case."

27. The appellant in that case had been disqualified from working with children under section 28 of the 2000 Act, since repealed. Because the regime has significantly changed since *Smith* was decided, particularly as a result of the Safeguarding Vulnerable Groups Act 2006, we directed the parties to file written submissions after the hearing as to the protections now in place to protect children from any risk from the Appellant undertaking private or informal teaching or other work that might bring him into contact with children. We are grateful for those further submissions.

28. The Appellant in the present case, having been convicted of an offence listed in Schedule 3 of the Sexual Offences Act 2003 and sentenced to more than 30 months' custody, has to comply with the notification requirements of Part 2 of the Act indefinitely. In simple terms, this means he is required to be on the Sexual Offences Register for life.

29. In addition, having been convicted of offences specified in paragraph 2 of the Schedule to the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009 (SI 2009 no. 37), the Appellant was liable to be included in the "*children's barred list*" by the Disclosure and Barring Service ("*DBS*"): see regulation 4(5), which makes Schedule 3 § 2(1) of the 2006 Act ("*Inclusion subject to consideration of representations*") applicable in these circumstances.

30. Under Schedule 3 § 2(1), the DBS has to decide whether the person in question *"is or has been, or might in future be, engaged in regulated activity relating to children".* "*Regulated activity*" includes *"any form of teaching, training or instruction of children, unless the teaching, training or instruction is merely incidental to teaching, training or instruction of persons who are not children"* (Schedule 4 § 2(1)(a)). The Appellant falls within Schedule 3 § 2(1) because he has in the past been a teacher. As a result, the DBS was required to give him an opportunity to make representations as to why he should not be included in the children's barred list. The DBS was then required to include the Applicant in the list if either (i) no representations were received within any prescribed period or (ii) having received such representations, the DBS was *"satisfied that it is appropriate to include the person in the children's barred list"*. Counsel for the Appellant has informed us, and it is not disputed, that the Appellant has in fact been included in the children's barred list.

31. As a result, under section 3 of the Act the Appellant is barred from regulated activity relating to children, and under section 7 of the Act it would be an offence for the Appellant to engage in, seek to engage in or offer to engage in any such activity. The definition of "*regulated activity*", quoted above, is broad enough to cover both formal and informal teaching or tutoring.

32. Further, as already noted, we are told that the Appellant's licence to teach has been revoked. That was done by a prohibition order made by the Teaching Regulation Agency, on behalf of the Secretary of State, under section 141B of the Education Act 2002 (inserted by section 8 of the Education Act 2011) by reason of the Appellant having committed a relevant offence (as defined). The prohibition order means that the Appellant is precluded, for life, from carrying on teaching work in any of the settings referred to in section 141A of the 2002 Act (schools, sixth form colleges, children's homes and relevant youth accommodation in England).

33. The Crown submits that the SHPO imposed here was necessary in addition to the statutory restrictions we have summarised. The judge had the opportunity of seeing the Appellant give evidence, and also his partner and character witnesses, who (it is submitted) were all in his sway and seemed to have accepted his version of events regardless of reality and the wider evidence. The judge in essence found the Appellant to have engaged in predatory behaviour targeted at a vulnerable girl by a remorseless offender lacking any insight into what he did or that it was wrong. The Crown proposes a 10-year SHPO, otherwise in the terms ordered by the judge as indicated in § 21 above, thus relating to unsupervised contact or communication with females under the age of 16.

34. The relevant statutory test under section 346 of the Sentencing Act 2020 is whether a SHPO is necessary to protect the public, or any particular members of the public, from the risk of sexual harm: which is defined in section 344 as physical or psychological harm caused by the commission of offences listed in Schedule 3 to the Sexual Offences Act 2003. The focus is thus necessarily on the risk, if any, of harm caused by unlawful behaviour within that Schedule. The order must be imposed for no longer than necessary, and in *R v McLellan, R v Bingley* [2017] EWCA Crim 1464 this court made clear that indefinite SHPOs should not be made without careful consideration, nor as a default option. The judge in the present case does not appear to have asked himself the questions necessary to address these matters. He imposed an order relating to contact with female children under 16 despite there being no evidence that the case involved or carried implications for children under 16. The judge also did not, at least expressly, address the considerations relevant to the length of any order. Instead he seems to have taken the view that it had to be the same length as the period of notification under Part 2. This was an error.

35. It was an essential element of the Appellant's convictions in this case that he had done the acts in question while holding a position of trust vis a vis a child under 18 (specifically, a girl of 16). In those circumstances, and given the absence of any previous convictions, there is no basis on which to infer a real risk of sexual offending against children in general, nor children under 16. On that basis, and having regard to the significant restrictions to which the Appellant is already subject under the statutory regimes we have described, we consider that the SHPO cannot be justified. In our judgment, the statutory test set out in section 346 was not met, either in relation to the order the judge envisaged or in relation to the order as drawn up.

36. For these reasons, we allow the appeal so far as the SHPO is concerned, and quash that order.