Neutral Citation Number: [2019] EWCA Crim 1650
No: 201803928 A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 6 June 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE LAVENDER

HIS HONOUR JUDGE EDMUNDS QC

R E G I N A
v
YOUNG SUK CHOUNG

Computer Aided Transcript of the Stenograph Notes 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)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Ms S A Queffurus appeared on behalf of the **Applicant**

J U D G M E N T

MR JUSTICE LAVENDER:

The appellant's application for permission to appeal against a sexual harm prevention order was referred to the full court by the Registrar. We grant permission to appeal and go on to consider the appeal itself.

In May 2018, the appellant pleaded guilty in the Berkshire Magistrates' Court to two charges concerning images found on two computers belonging to him, namely: (1) possessing an extreme pornographic image, contrary to sections 63(1)(7)(b) and 67(2) of the Criminal Justice and Immigration Act 2008; and (2) possessing a prohibited image of a child, contrary to sections 62(1) and 66(2) of the Coroners and Justice Act 2009.

The first charge concerned one photograph of a woman having sexual intercourse with a dog. The second charge concerned 2,335 images of a kind known as Hentai, which are computer generated animated images of children being subjected to various acts of sexual abuse. Unlike photographs or videos, these Hentai images did not depict real children.

The appellant was committed for sentence to the Crown Court at Reading, where he was sentenced on 17 August 2018 to a 2-year community order on each charge. There has been no appeal against that sentence. The judge also made the sexual harm prevention order which is the subject of this appeal.

The appellant, who has no other criminal convictions, was born in July 1994. It appears that he was sexually abused as a child. According to the pre-sentence report, he began watching pornography when he was 9 years old. He developed an interest in Hentai images. The charges covered the period from December 2009, when the appellant was 15, to December 2015, the date of his arrest, when he was 21.

The pre-sentence report states inter alia as follows:

> "The defendant stated that after accessing the 'Hentai' images, he became more and more curious and he believes this led him to explore and search for more

extreme pornography that included bestiality."

Following his arrest the appellant contacted the Lucy Faithfull Foundation and worked with them and made other efforts to manage his behaviour. However, the author of the pre-sentence report stated that:

> "It is my view that it is likely that this type of behaviour will re-occur unless there is a change in his sexual thinking, emotional management and coping skills."

We note that this report was dated 25 July 2018, shortly before the sentencing hearing, but over two and a half years after the appellant's arrest.

Ms Queffurus relied on the passage of time, on the efforts made by the appellant during this period and on his increased maturity by August 2017, by which time he was 24, as factors indicating that he did not present a risk of sexual harm. But the pre-sentence report indicated that as at July 2018 reoffending was still likely unless changes were made.

It also appears that the appellant told the report's author that he was already subject to a sexual harm prevention order, which was an external control to manage his behaviour. There must have been some confusion here, but it appears that the prospective sexual harm prevention order was regarded as a significant feature in managing the appellant's future behaviour.

As to future risk, the pre-sentence report states as follows:

> "It is my assessment that the defendant currently poses a medium risk of serious harm to children. The nature of the harm is emotional and there is no evidence of any physical harm. At the present time there are no indications that the defendant's behaviour has escalated from accessing images depicting abuse online. The material the defendant has accessed and viewed remains a concern. He says he has put in place a number of external controls to manage his behaviour such as accessing the Lucy Faithfull Foundation and complying with a sexual harm prevention order (not verified)."

It is not entirely clear what was meant by this. The report does not indicate that there was any appreciable risk that the appellant would himself commit any acts of sexual abuse of children. The draft sexual harm prevention order proposed by the prosecution did not

include any prohibition on contact with children. The report did not engage with the issue raised by that fact that none of the Hentai images involved any real children.

Ms Queffurus opposed the making of a sexual harm prevention order. The judge took time to read the proposed order and consider its terms. He decided to make an order in the terms sought, but restricting its length to 5 years. The order prohibited the appellant from:

> "1. Accessing, or attempting to access, the internet by any computer or device capable of accessing the internet without Risk Management software installed by police or designated police staff with the exception of a business environment which must have appropriate security measures in place, whether human or electronic, as deemed suitable by police or designated police staff.
>
> 2. Tampering with, interfering with, removing, bypassing, disabling, or altering any components or settings related to the installed Risk management software, or attempting to do so.
>
> 3. Using any computer or device capable of accessing the internet (including smart phone, smart watch, tablet, games console or any other device) unless that device has the capacity to retain and display the history of internet use; and he is prohibited from deleting or attempting to delete such history from any device and from refusing to show such history to a police officer or other designated police staff if so requested.
>
> 4. Purchasing, leasing, renting, borrowing, or otherwise using or being in possession of any computer or other device capable of accessing the internet as listed above without notifying his public protection officer within three days of coming into possession of or using the device.
>
> 5. Possessing any device or computer capable of storing digital images unless he makes it available on request for inspection by a police officer or designated police staff.
>
> 6. Using any remote electronic storage (commonly known as cloud storage) unless access (including password) is provided to this upon request by police officer, public protection officer or other designated member of police staff.
>
> 7. Using any false Internet Protocol (IP) address, name, alias, or persona, or in any other way, hiding your true identity, while using the internet.
>
> 8. Intentionally using software or methods which disguise your internet browsing or disguise your location such as Virtual Private Networks, incognito modes, TOR network.

> 9. Purchasing, using, or downloading any evidence elimination or encryption software or other file or drive cleaning software."

There are two grounds of appeal. The first is that the order was unnecessary in its entirety. The second is that the provisions of paragraph 1 of the order went beyond what was necessary.

As provided in section 103A(2)(b) of the Sexual Offences Act 2003, it is a necessary condition of making a sexual harm prevention order in a case such as the present that:

> "the court is satisfied that it is necessary to make a sexual harm prevention order, for the purpose of—
>
> (i)protecting the public or any particular members of the public from sexual harm from the defendant, or
>
> (ii)protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the defendant outside the United Kingdom."

As this court has repeatedly emphasised, the test is one of necessity and each case must be considered on its own facts. The type of sexual harm to which the section refers includes the harm caused to children who are the subject of pornographic photographs or videos: see R v Beaney [2004] 2 Cr App R (S) 441, R v Collard [2005] 1 Cr App R (S) 34, and R v Terrell [2008] 2 Cr App R (S) 49, all of which are cases on the predecessors to section 103A.

If the thousands of images in the present case had been photographs of real children being subjected to sexual abuse, then there would be no doubt that a sexual harm prevention order was necessary to prevent sexual harm to such children. But the images to which the second charge related were all Hentai images. They did not involve any actual sexual harm of any actual children. It follows that if Hentai images had been the only images which the appellant had possessed or was likely to possess in the future, then there would have been no risk of sexual harm to anyone and therefore no need for a sexual harm prevention order. But the appellant also had in his possession a photograph of a woman engaged in bestiality.

Women who are photographed engaging in such acts for the purposes of pornography are likely to be vulnerable and the harm to which they are subjected is sexual harm of a similar kind to that suffered by children who are the subjects of pornographic photographs or videos.

Moreover, as we have already noted:

(1) the defendant had stated that his possession of this image was the result of his becoming more curious and exploring and searching for more extreme pornography than just Hentai images;

(2) the opinion expressed in the pre-sentence report was that it was likely that the appellant's offending behaviour would reoccur unless there was a change in his sexual thinking, emotional management and copping skills;

(3) the proposed sexual harm prevention order was presented in the pre-sentence report, seemingly by the appellant himself, as part of the means by which he intended to prevent a recurrence of his offending behaviour.

As we have said, each case has to be considered on its own particular facts. We consider that the facts of the present case to which we have just referred were such that the judge was entitled to be satisfied that a sexual harm prevention order was necessary for the purpose of protecting children or vulnerable adults from sexual harm.

It follows that we dismiss the first ground of appeal.

Turning to the second ground of appeal, we note that paragraph 1 of the order in the present case was in substantially the same terms as paragraph 3(3) of the order in R v Parsons [2017] EWCA Crim 2163, quoted in paragraph 62 of the judgment of Gross LJ. That paragraph was quashed and replaced with an order in the terms set out in paragraph 76 of Gross LJ's judgment, having regard to what was said about blanket bans on internet use in R v Smith [2011] EWCA Crim 1772 and in paragraphs 8 to 10 of Gross LJ's judgment in Parsons and to

what Gross LJ said about risk management monitoring software in paragraphs 14 to 19 of his judgment in Parsons.

For substantially the same reasons, we agree that paragraph 1 of the order in the present case went beyond what was necessary and we quash it. It was accepted that there should be a prohibition inserted in its place along the lines of what had been approved in Parsons. There were issues about the drafting proposed by the prosecution in this case. We propose to substitute for paragraph 1 of the order the following prohibition, which is taken from a standard form used by the CPS in London. It appears that doing so will render paragraphs 3 and 6 of the existing order unnecessary, in which case they too will be deleted.

The paragraph for insertion is as follows:

Using any computer or device capable of accessing the internet unless:

(a) he has notified the police ViSOR team within three days of the acquisition of any such device;

(b) it has the capacity to retain and display the history of internet use and any automatic deletion is set to not less than 12 months and he does not delete such history;

(c) he makes the device immediately available on request for inspection by a police officer or police staff employee and he allows such person to install risk management monitoring software if they so choose;

(d) this prohibition shall not apply to a computer at his place of work, Job Centre Plus, public library, educational establishment, or such other place provided that in relation to his place of work within three days of him commencing use of such a computer he notifies the police ViSOR team of this use.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk