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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday 6 March 2020

B e f o r e:

LORD JUSTICE IRWIN

MR JUSTICE FRASER

SIR PETER OPENSHAW

R E G I N A
v
ROBERT GAVIN INCHES

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Miss J Cecil appeared on behalf of the **Applicant**

J U D G M E N T

MR JUSTICE FRASER:

1. This is the judgment of the Court. This is a renewed application for permission to appeal against sentence and for a substantial extension of time, after refusal by the single judge. The applicant appears before us this morning represented by Miss Cecil, who has lodged very helpful grounds of appeal. She has also addressed us this morning in detail on the particular legal points that she relies upon to justify both applications. She has relied on some in addition to those found in the grounds, all of which we have found most helpful.

2. The applicant pleaded guilty on 24 February 2009 before the magistrates to six separate counts. He was committed to the Crown Court at Birmingham where he was sentenced on 24 March 2009 by His Honour Judge Fisher on those different counts. All of the counts were for the same offence, namely possessing indecent photographs of children, contrary to section 160(1) of the Criminal Justice Act 1988. On each he was sentenced to 12 months' imprisonment, each sentence to run concurrently to one another. His overall sentence was therefore one of 12 months' imprisonment. There were a number of images of all different types, namely between Levels 1 to Level 5. There were a few images at Level 5 (which is the most severe level) and there were almost 700 different images at Level 1, with different numbers of images between Levels 2, 3 and 4.

3. Other orders were also made. The laptop and images were forfeit; the applicant was required to comply with the provisions of Part 2 of the Sexual Offences Act 2003 for 10 years and, most germane to this application, a Sexual Offences Prevention Order (or what is called for shorthand purposes a "SOPO") was also imposed and it is this that lies at the heart of this application. SOPOs were the predecessor to the current form of such orders, which are called Sexual Harm Prevention Orders or SHPOs. There is a difference between the two statutory regimes that permitted the imposition of SOPOs, and those in respect of SHPOs. These differences are that whereas a SOPO could only be imposed where necessary to guard against a risk of "*serious*" sexual harm, a SHPO can be imposed where necessary to protect "….the public or any particular members of the public" from

sexual harm, *simpliciter*: s.103A(2)(b)(i) Sexual Offences Act 2003. As pointed out by this Court in ***R v Parsons and Morgan*** [2017] EWCA Crim 2163 per Gross LJ at [3], this change has already been reflected in ***R v NC*** [2016] EWCA Crim 1448, amending the questions posed in ***R v Smith*** [2011] EWCA Crim 1772 (at [8]) to be considered by a Court when considering the imposition of a SHPO. As formulated in ***NC***, at [9], those questions are now as follows:

> " (i) is the making of an order necessary to protect the public from sexual harm through the commission of scheduled offences?; (ii) if some order is necessary, are the terms imposed nevertheless oppressive?; (iii) overall, are the terms proportionate? "

4. We recite that for completeness, but this case concerns a SOPO, and not a SHPO. It is said by Miss Cecil on behalf of the applicant that the terms of the SOPO imposed on the applicant in 2009 were manifestly excessive, wrong in principle and oppressive. However, upon examination that argument is based upon the effect of those terms now, rather than their effect upon the applicant when the SOPO was imposed in 2009. Essentially, the applicant is now 70 years old and the terms of the SOPO, which was imposed over ten yers ago, are said on his behalf, both in the papers that have been lodged with the Court and by Miss Cecil today, to have been overtaken by the features of a vastly developing society. Two examples will suffice. He is forbidden by the terms of the SOPO from having any kind of mobile phone that can also function as a camera. This feature is said to be present in almost all mobile phones currently available in the UK. He is also forbidden by the terms of the SOPO from having any access to a WAP internet-enabled or multi-media device and any computer equipment capable of, or capable of being adapted for, internet use. There is now sophisticated software available that makes a more focused approach available in terms of similar orders that are made in the Crown Court today. A blanket ban on using the internet is no longer required, it is said, in many such cases today, or in similar orders made in more recent times in the Crown Court.

5. The applicant requires an extension of time of 3,775 days for this application, which put another way is a period well in excess of 10 years. We are most strongly of the view that the correct route for the applicant to adopt, if he seeks upon advice to have the terms of the

SOPO varied, is to apply to the Crown Court under the procedure that permits the Crown Court to do that. It is no function of this court, which has an appellate function, to react to the arguments or submissions mounted by the applicant in respect of the specific wording of the SOPO, some 11 years after it was imposed. This is, in our judgment, properly an issue of variation of the terms of the existing SOPO. That SOPO was entirely properly imposed in 2009 and it has functioned perfectly workably since 2009 when the applicant would have been released from prison, given his short prison sentence.

6. Miss Cecil has explained to us that there is, to put it neutrally, something of a difference of view amongst some in the Crown Court about the correct way to deal with matters of this nature. We do not understand why that should be the case. In the case of ***R v Smith*** [2011] EWCA Crim 1772, guidance was given in respect of the correct approach to seeking to deal with the terms of SOPOs when circumstances have changed. That case has been considered in a number of other cases since, including ***R v Instone and others*** [2012] EWCA Crim 1792 which considered the imposition of SOPOs in the context of indeterminate, rather than determinate, sentences.

7. ***R v Smith,*** a widely circulated and cited authority of the Court of Appeal, was further considered in the case of ***R v Spencer*** [2014] 2 Cr.App.R (S) 18. In ***Spencer,*** the Court of Appeal considered an appeal from a refusal by the Crown Court to vary the terms of a SOPO. The judge at first instance in that case had said that that was a matter for the Court of Appeal, and not for the first instance Crown Court, and had refused to vary a SOPO. In ***Spencer*** the Court of Appeal gave detailed guidance as to the approach that ought to be adopted where variation was sought to the terms of an existing SOPO. It was made clear at [14] and [15] of that judgment that the correct approach is to make a structured application to the Crown Court for variation. The judgment emphasised the importance of providing evidence to the court on such an application, and in that case the refusal of the application to vary was substantially explained by the fact that *no* evidence had been submitted of any change of circumstances. The refusal of the Crown Court to vary the SOPO was upheld by the Court of Appeal, but not because an application ought to have been made to the Court of Appeal instead. Indeed, quite to the contrary.

8. We recite two sentences from the judgment at [14]:

> "There was no evidence [before the Crown Court] of any change of circumstances. There was no evidence that the order had created difficulties which were unanticipated at the time the SOPO was imposed (without, it will be recalled, any dispute as to its terms). There was no evidence at all. In these circumstances we cannot say that Judge Davis's decision was wrong."

9. It is undoubtedly the case, in our judgment, that were a structured application to vary to be made by the applicant to the Crown Court in the instant case, that would have to be supported by proper evidence. That evidence would (or ought to) include what has been said to this Court about the change of circumstances. The original SOPO was imposed prior to the decision of ***Smith*** itself in 2011, which post-dated the imposition of the SOPO in this case.

10. But the test this court applies to appeals against sentence is whether the sentence is manifestly excessive or wrong in principle. Extensions of time are only given where justifiable explanations are given for delay and extensions of time of the duration sought in this case, need very powerful grounds to justify them being granted. We consider that this is precisely the type of case envisaged by the Court in ***R v Hoath and Standage*** [2011] EWCA Crim 274 when Simon J (as he then was) stated at [11] in terms of varying a SOPO:

> "Usually the defendant will need to rely on a change of circumstances. In such a case, the Crown Court will need to be satisfied that the order in its original form is no longer necessary for the statutory purpose of protecting the public (or particular members of the public) from serious sexual harm from the defendant, or that those objectives can properly and sufficiently be secured by the proposed variation."

11. In those circumstances we refuse both applications, but we do emphasize that the variation sought and the terms of the SOPO must be pursued by means of a proper and structured application to vary its terms, supported by cogent evidence, and that must be made in the Crown Court. Notwithstanding the imposition of the SOPO, developments in computer technology alone mean more sophisticated means are available to prevent access to the

internet. The Respondent's Notice submitted by the Crown demonstrates the constructive approach that is likely to be adopted by the Crown if such an application were to be made to the Crown Court. Nothing in this judgment on this application today should be taken as this court expressing a view on what the result of an application to vary the SOPO would be, were one to be made. We do however repeat, that a matter in a case such as this, namely seeking to vary the terms of an existing SOPO, is a matter for the Crown Court and not a matter for the Court of Appeal. Both applications are therefore refused.

LORD JUSTICE IRWIN: Miss Cecil, normally judgments in refusing applications for leave are not reportable but it seems to us that there is an advantage in this instance in ordering that the decision in this case can be reported.

MISS CECIL: I would agree. I think it would assist in some level of clarification in terms of the correct venue.

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