IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/01712/A3

[2023] EWCA Crim 1561
Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 21st November 2023

B e f o r e:

VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE BRYAN

MR JUSTICE FREEDMAN

R E X

- v -

OWEN HUW DAVID

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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)

Miss M Smith-Higgins appeared on behalf of the Appellant

Miss E Schutzer-Weissmann appeared on behalf of the Crown

APPROVED J U D G M E N T

Tuesday 21st November 2023

MR JUSTICE BRYAN:

1. Following guilty pleas in the magistrates' court, the appellant was committed for sentence, pursuant to section 14 of the Sentencing Act 2020 in respect of a breach of a Sexual Harm Prevention Order, contrary to section 354(1) and (4) of the Sentencing Act 2020 and an offence of making indecent photographs of a child, contrary to sections 1(1)(a) and 6 of the Protection of Children Act 1978.

2. On 25th April 2023, in the Crown Court at Cardiff, the appellant (then aged 30) was sentenced by His Honour Judge Daniel Williams to two years and eight months' imprisonment in respect of the former charge and a consecutive term of six months' imprisonment in respect of the latter charge. The total sentence was therefore three years and two months' imprisonment.

3. A Sexual Harm Prevention Order was imposed until further order. The appellant appeals against sentence by limited leave granted by the single judge in respect of one of the grounds sought to be advanced by him, namely that prohibition 13 of the Sexual Harm Prevention Order was unnecessary and disproportionate.

4. We turn to the background to the current offending and the terms of the Sexual Harm Prevention Order that were imposed. In 2021 the appellant was convicted of possessing indecent photographs or pseudo-photographs of a child, possessing prohibited images of children and breach of a Sexual Harm Prevention Order.

5. By June 2022 the appellant had been released on licence and was managed by a probation officer, Kerry Goddard. On 6th June 2022, Ms Goddard checked the appellant's Instagram

account in accordance with the terms of his Sexual Harm Prevention Order. She saw that the appellant was following approximately 60 different accounts that showed young boys in swimwear. Some of the tags on the accounts had an endorsement by the appellant stating: "DM [direct message] for pics".

6. The appellant was also managed by Detective Constable Huw Conquer, who worked in the Public Protection Unit with responsibility for the Management of Sex or Violent Offenders ("MOSOVO"). Detective Constable Conquer obtained the password for the appellant's Instagram account and saw that accounts followed by the appellant were being deleted from the account in real time. One account belonged to a 15 year old boy, whom we shall call "A". This put the appellant in breach of paragraph 2 of his Sexual Harm Prevention Order.

7. The appellant was arrested on 7th June 2022. His Alcatel mobile telephone was examined. On it were three images of boys aged between 8 and 10. Two of the images were considered borderline in terms of their illegality; the third was placed in category C. It was an image of a boy exposing his hip. The appellant was interviewed on 9th June 2022. He denied breaching the Sexual Harm Prevention Order and claimed that any deletion of his Instagram account had been done by someone else. Following the examination of his mobile telephone the appellant was interviewed again on 11th January 2023 and gave no comment to all questions asked of him.

8. The appellant had four convictions for 11 offences spanning from 9th March 2016 to 5th August 2021. His relevant convictions included offences of possessing an indecent photograph or pseudo-photograph of a child (three in 2016 and three in 2021), attempting to meet a boy under 16 following grooming (in 2020), possessing prohibited images of children (in 2021), and breach of a Sexual Harm Prevention Order (in 2021).

9. The sole ground of appeal for which leave was granted was that prohibition 13 in the Sexual Harm Prevention Order ("the Current SHPO") was disproportionate and that the learned judge was wrong in principle to impose such a term within the SHPO. The appellant has not renewed the other grounds on which he sought to obtain leave to appeal against sentence.

10. The Current SHPO provided in relation to prohibition 13 as follows:

> "Prohibitions
>
> The [appellant] is prohibited from –
>
> …
>
> 13. save where there is good reason not to do so to comply with instruction
>
> To comply with any instruction given by **your offender manager/police** requiring you to attend polygraph/ integrity screening.
>
> To participate in polygraph/integrity screening examinations as instructed and comply with any instruction given to you during a polygraph/integrity screening session by the person conducting the assessment." (emphasis added)

11. In Defence Submissions on the Crown's Draft Sexual Harm Prevention Order, dated 30th March 2023, Prohibition 13 had been opposed in its entirety. It was noted that any prohibitions included within an SHPO must be necessary, proportionate and sufficiently clear to be understood. Further, the terms must not be oppressive, and reference was made to *R v Parsons (Hayden Graeme); Morgan (Stuart James)* [2017] EWCA Crim 2163. It was noted that prohibition 13 places a positive obligation upon the appellant to participate in polygraph testing at any time upon request by the police. Refusal to participate, or failure to answer any questions would amount to a breach of the order. It was submitted that the imposition of this

prohibition/condition might constitute breaches of Articles 6 and 8 of the Human Rights Act, which afford the right to a private and family life and the right to a fair trial. It was submitted that the results of any polygraph test would be inadmissible as evidence against a defendant in a criminal case, but might be used in civil proceedings. It was, in any event, submitted that to compel the appellant to participate would be disproportionate.

12. In written submissions, dated 18th April 2023, the prosecution supported the imposition of Prohibition 13. They drew attention to the fact that since 29th November 2022 the court can impose a positive requirement on a defendant under an SHPO (section 175 of the Police, Crime, Sentencing and Courts Act 2022). It was said that the obligations would be supervised by a specified individual or organisation and can include a requirement to take a polygraph test. It was rightly noted that the court must receive evidence about the suitability and enforceability of such a requirement from the individual or an individual representing the organisation who is specified to supervise, except when in relation to electronic monitoring requirements. It was noted that an officer had been warned to attend at the sentencing hearing in order to give evidence about the requirement of this specific condition of the SHPO. Reference was also made to the comments of the Probation Service as to the appellant's escalating risk of serious harm to others. It was submitted that in light of the very high risk of serious harm posed by the appellant, Prohibition 13 was not disproportionate or oppressive. It was denied that the prohibition constituted a breach of the appellant's right to a private and family life and the right to a fair trial. It was stated that the polygraph screening was not designed to be used as an evidence tool, but was to be used as a safeguarding tool.

13. There was also before the court a statement from PC Michelle Jacob of the Public Protection Unit with responsibility for the Management of Sex and Violent Offenders ("MOSOVO"). She expressed her view that the appellant posed a very high risk of serious harm to children and that the threat was imminent. She identified that the appellant was a

very high risk sex offender who required additional prohibitions, monitoring and support from MOSOVO. It is said that the request to include polygraph screening was made in line with the appellant's very high level of risk. It was said that the request was not made lightly and that a carte blanche approach was not being considered for all registered sex offenders. Attention was drawn to the appellant's previous conduct in deliberately deleting Instagram data to cover up his actions and the officer expressed her belief that the use of the polygraph system that South Wales Police was trialling (Validated Automated Screening Technology "VAST") was proportionate in their efforts to protect the public and the most vulnerable members of the community.

14. Notwithstanding the written submissions he had received in relation to Prohibition 13 and the matters addressed by PC Jacob, the Learned Judge did not set out in his sentencing remarks how and why he considered Prohibition 13 to be justified, or satisfy himself as to whether the parameters of the order were sufficiently clearly delineated. In fact, all the Learned Judge said about the SHPO that he intended to make was:

> "I make a Sexual Harm Prevention Order in the amended terms sought until further order."

15. The new power to include a positive requirement in an SHPO, contained in section 175 of the Police, Crime, Sentencing and Courts Act 2022, came into force on 29th November 2022, and amended the Sentencing Act 2020. Section 343 (in its amended form) provides:

> "343. Sexual harm prevention order
>
> (1) In this Code a 'sexual harm prevention order' means an order made under this Chapter in respect of an offender.
>
> (1A) A sexual harm prevention order may—

(a) prohibit the offender from doing anything described in the order;

(b) require the offender to do anything described in the order.

(2) The only prohibitions or requirements that may be included in a sexual harm prevention order are those necessary for the purpose of—

(a) protecting the public or any particular members of the public from sexual harm from the offender, or

(b) protecting children or vulnerable adults generally, or any particular children or vulnerable adults, from sexual harm from the offender outside the United Kingdom.

(3) The prohibitions or requirements which are imposed on the offender by a sexual harm prevention order must, so far as practicable, be such as to avoid—

(a) any conflict with the offender's religious beliefs,

(b) any interference with the times, if any, at which the offender normally works or attends any educational establishment, and

(c) any conflict with any other court order …"

16. Miss Smith-Higgins, who appears on the appellant's behalf, submits that Prohibition 13 was not necessary and in any event was disproportionate. Whilst it is accepted that section 175 of the Police, Crime, Sentencing and Courts Act 2022 provides the court with sufficient powers to impose positive requirements within an SHPO, it is submitted that the court should still consider the principles outlined in *R v Smith* [2011] EWCA Crim 1772, [2012] 1 Cr App R(S) 82, in particular at [8]. Reference is also made to the case of *Parsons (Hayden Graeme); Stuart James Morgan* [2017] EWCA Crim 2163, in which the Court of Appeal provided guidance as to the applicable principles to be applied. In particular, the court stated as follows:

> "5. At the outset, we underline the following:
>
> i) First, as with SOPOs, no order should be made by way of SHPO unless *necessary* to protect the public from sexual harm as set out in the statutory language. If an order is necessary, then the prohibitions imposed must be *effective*; if not, the statutory purpose will not be achieved.
>
> ii) Secondly and equally, any SHPO prohibitions imposed must be *clear* and *realistic*. They must be readily capable of simple compliance and enforcement. It is to be remembered that breach of a prohibition constitutes a criminal offence punishable by imprisonment.
>
> iii) Thirdly, as re-stated by *NC* (*supra*), none of the SHPO terms must be oppressive and, overall, the terms must be proportionate.
>
> iv) Fourthly, any SHPO must be tailored to the facts. There is no one size that fits all factual circumstances."

17. It is pointed out by Miss Smith-Higgins that Prohibition 13 places a positive obligation upon the appellant to participate in "polygraph/integrity" screening at any time upon a request by the police. The remit of any topics to be covered during that testing is not defined. There is no test that must be met before the appellant could be asked to attend to participate, and his failure to participate, to "co-operate" or to answer questions will amount to a breach of that order. In particular, it is submitted that the broad reference to "your offender manager/ police" is too wide and imprecise to fulfil the requirements of section 347A of the Sentencing Act. Section 347A provides as follows:

> "Sexual Harm Prevention Orders: requirements included in order, etc:
>
> (1) A sexual harm prevention order that imposes a requirement to do something on an offender must specify a person who is to be responsible for supervising compliance with the requirement.
>
> The person may be an individual or an organisation.
>
> (2) Before including such a requirement in a sexual harm prevention order, the court must receive evidence about its

suitability and enforceability from —

(a) the individual to be specified under subsection (1), if an individual is to be specified;

(b) an individual representing the organisation to be specified under subsection (1), if an organisation is to be specified.

…"

18. In an overarching submission, Miss Smith-Higgins emphasises, as we have already noted, that the Learned Judge did not set out in his sentencing remarks how and why he considers such a requirement to be justified, or satisfy himself as to whether the parameters of the order were sufficiently clearly delineated.

19. In the Crown's Respondent's Notice and in her oral submissions Miss Schutzer-Weissmann submits that Prohibition 13 is necessary. As to its terms, it was accepted that the term could have been drafted better and also so that it made sense, and with changes to its ambit. It was also conceded that the Learned Judge did not expressly state that he was covering the conditions to be found in sections 343 and 347A of the Sentencing Act. It is submitted that the requirements of section 343 and 347A were met on the evidence before the court. It was also submitted that the inclusion of the words "save where there is good reason not to do so, to comply with the instruction" (characterised as the "good reason defence") prevented the requirement operating in a disproportionate or oppressive manner. It was further submitted that it could not possibly be said that the imposition of Prohibition 13 could represent a violation of the appellant's Article 6 and/or Article 8 rights.

20. We can deal with this last point first, as we do not consider the points made by the appellant in relation to Articles 6 and 8 to be of any merit, certainly in the context of a properly drawn order where a positive requirement including polygraph testing, is necessary

and proportionate. Article 6 is not engaged until either the criminal or civil rights of an individual is being determined, and that is not the consequence of such a positive requirement, which is being used as a safeguarding tool. Equally, in the context of any prohibition imposed in accordance with the provisions of the Sentencing Act 2020, any interference will be in accordance with law and justified as permitted by Article 8.

21. We consider, however, that there is substance in the grounds of appeal so far as they relate to the imposition of Prohibition 13 and the terms thereof. As a preliminary point, we consider that it is incumbent upon a sentencing judge to address expressly the requirements of section 343 of the Sentencing Act 2020, and also to give reasons as to why such an order is necessary for the specified purposes and why it is proportionate and sufficiently clear; a fortiori, where the order sought is contested and the judge has received competing submissions.

22. Such reasons need not be long, but they should address such matters. This is not simply to show that the court has considered the statutory requirement and put its mind to the competing submissions made and to allow the parties (and if necessary an appellate court) to understand the decision that has been made; but also the discipline of doing so is likely to assist the judge when considering whether the prohibition was not only necessary but also proportionate and sufficiently clear, rather than disproportionate and oppressive.

23. We are in no doubt that had he performed such an exercise, the judge would have recognised that Prohibition 13, as sought and ordered, even if he were to conclude that it was necessary (and that would itself require the learned judge to address the evidence before him and the existing protections offered by other paragraphs of the SHPO, which already amounted to a comprehensive package of prohibitions designed to protect the public from sexual harm, and at least one of which (prohibition 3) was new and more extensive in relation

to monitoring software), did not comply with the requirements of section 347A and was drafted in terms which were far too wide and vague, with the result that it was both disproportionate and oppressive.

24. Contrary to section 347A, Prohibition 13 failed to specify a person who was to be responsible for supervising compliance with the requirement, referring instead to "your offender manager/police". This is far too vague and on its face would apply to any offender manager or any police officer anywhere in England and Wales and whether or not they had any responsibility in relation to the appellant. As such it fails to identify a specified person, or indeed a specified organisation (for example, the MOSOVO of the Public Protection Unit of South Wales Police).

25. Even more fundamentally, however, it purports to require the appellant for the rest of his life to comply with a requirement of any police officer or any offender manager to take a polygraph test for any reason whatsoever, or indeed for no reason at all. The remit of any topics to be considered during that testing are not defined, as we consider they should have been.

26. We would only add that we do not consider the inclusion of the "good reasons defence" saves Prohibition 13. It would be difficult to apply in any given set of circumstances. It imposes a burden on the appellant to assess whether there is or is not a "good reason". In some circumstances it would be difficult for him or his advisers to predict whether there was a good reason. The burden for the appellant would then be that if he gets it wrong (because a court finds that there was no good reason), he might be in breach of Prohibition 13.

27. Far from saving Prohibition 13, we consider that the "good reasons" provision in fact creates more problems than it attempted to avoid, however well intentioned it was.

28. In the above circumstances, we have concluded that Prohibition 13 is disproportionate and should not have been made. Accordingly, we order that Prohibition 13 be deleted from the current SHPO.

29. To that extent the appeal against sentence is allowed.
