IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 286

No. 202103072 A2

Royal Courts of Justice

Friday, 18 February 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE HILLIARD
HIS HONOUR JUDGE CONRAD QC

REGINA
V
JULIAN CARR

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MS L. TAYLOR appeared on behalf of the Appellant.

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J U D G M E N T

HIS HONOUR JUDGE CONRAD:

1 On 13 August 2021, having pleaded guilty before the magistrates, the appellant was committed for sentence pursuant to s.14 of the Sentencing Act 2020 in respect of two offences of breach of a sexual harm prevention order.

2 On 14 September 2021 in the Crown Court at Bristol the appellant, who was then aged 60, was sentenced to 16 months' imprisonment on each offence concurrent. The statutory surcharge was imposed and an order for forfeiture and destruction of the items seized was made: those items being a mobile telephone and a tablet computer. It is in respect of that order only that limited leave to appeal against sentence was granted by the single judge.

3 The appellant is represented today, as he was in the court below, by Ms Taylor.

4 The facts can be taken shortly. The appellant was a registered sex offender and was subject to conditions imposed by a sexual harm prevention order issued by the magistrates on 31 October 2016 and in force for 10 years. Part of the order stipulated that the appellant was prohibited from using any device capable of accessing the internet unless (i) it had the capacity to retain and display the history of the internet use; (ii) he made the device available for inspection by a police officer or monitoring officer, and (iii) the device was registered with the police.

5 The appellant was released from prison on 29 June 2021 having previously been convicted of several breaches of a sexual harm prevention order and registration requirements. He was released with enhanced licence conditions between 1 July 2021 and 29 June 2022. He was also subjected to probation and supervision. His offender manager, Constable Head, was due to make a visit to the appellant's home. To Constable Head's knowledge the appellant was in possession of a basic telephone given to him by the Probation Service which had no access to the internet.

6 However, prior to Constable Head's visit another officer carried out an open source check and found a Twitter account in the name of Jules Hynam. Hynam was the appellant's mother's maiden name and an alias that the appellant used. The profile picture was a photograph of the appellant. Tweets and photographs had been uploaded to the account between 3 July 2021 and 11 August 2021.

7 On 12 August 2021 officers attended the appellant's address. The appellant opened the door and was arrested. Upon being cautioned, he said, "I have three days to register any new devices." He said that he had a telephone and a laptop and pointed to a Huawei E30 smart-phone and a Dynabook laptop in his flat. Both items were seized.

8 In sentencing, the judge took into account that the appellant had a history of offences for the most part involving access to indecent images, but which included distribution and possession of them to show to others. There were also two convictions, albeit old, of indecent assault. In 2017 the appellant failed to comply with notification requirements. In 2011 he was convicted of possession of indecent images. In 2011 and 2017 there were a total of three convictions for failing to comply with the notification requirements. In 2017 there was a breach of a sexual harm prevention order and on 29 June 2021 two breaches of the sexual harm prevention order and three breaches of notification requirements. The appellant was on licence for that when he committed these matters. Looking at the guidelines, it was not suggested that this was not a case of a persistent breach. It was also a deliberate breach and the appellant knew it to be a breach. His use of the two items had

nothing to do with offences of indecency, but nor did they have a sole purpose, as the appellant had suggested, of finding accommodation.

9 The question of harm was considered. It was clear that the appellant fitted into the very serious harm category. Within that category, there was a downward reduction because the appellant had not in fact, despite having possessed the devices since July, apparently downloaded any incident material on those two devices, which was of significance.

10 The aggravating features were that he had convictions, that he breached those obligations within a short period after his release and that he was on licence at the time. The appellant had pleaded guilty at the first opportunity and would receive full credit for that. The pre sentence report concluded that the appellant had full awareness of the consequences of his actions, but continued to behave in a way that was likely to get him into trouble. Having taken all factors into consideration, the sentence would have been two years' imprisonment after trial. With the reduction by virtue of the guilty plea, the sentence was 16 months immediate imprisonment. It is not now argued that the sentence of imprisonment was excessive.

11 Dealing with the order for forfeiture, at the conclusion of the prosecution opening the judge had asked, "Is there an application for forfeiture and destruction of the items seized?" Prosecution counsel replied, "Yes, of course there is. Thank you, your Honour." The judge, "Two items?" "Yes. Thank you." The judge went on to order that the telephone and tablet would be destroyed, the judge stating that "the phone and the tablet will be destroyed by virtue of the order of this court."

12 In the grounds of appeal counsel stated:

> "As we are appealing, we should also appeal the forfeiture and destruction of the devices. As there was nothing illegal on them, I do not see why Mr Carr should not be permitted to have them back."

13 That contention is repeated today. The record sheet generated by the Crown Court incorrectly stated that the order for forfeiture and destruction had been made pursuant to s.1(2) of the Prevention of Crime Act1953. In fact, as the single judge observed, neither this legislation, nor any other, conferred power for the tablet and the phone to be forfeited and destroyed. This is accepted by the appellant and by the respondent, both agreeing that the correct disposal would have been a deprivation order pursuant to s.152 and s.153 of the Sentencing Act 2020. Such an order is now sought by the respondent. Under s.153:

> "(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—
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> (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 ...

[...]

(5) This subsection applies if—

(a) the offence mentioned in subsection (1), or

(b) an offence which is taken into consideration by the court in determining the offender's sentence, consists of unlawful possession of the property."

14 On behalf of the appellant it is accepted that the court had power to make a deprivation order and that the appellant's offending satisfied both s.153(3) and s.153(5).

15 Where the court is considering making a deprivation order, the court must have regard to s.155 of the Sentencing Act, which states:

"(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).

(2) Where a deprivation order is available for an offence, the court may make such an order whether or not it deals with the offender in any other way for the offence."

16 In this case, while there may have been nothing illegal on the items seized, nevertheless, it is right that the appellant should be deprived of them. It was having these items that gave rise to the offences charged. No objection was taken on the merits to the order made at the time and if there had been an order for deprivation, there could have been no objection. The forfeiture and destruction order should be quashed as it was an order there was no power to impose. However, in this case, there is no unfairness in substituting what would have been the correct order; namely, a deprivation order.

17 We would observe that applications of the kind made in this case are frequently made and granted. It is important that if such orders are made, they are made in accordance with the law and under the correct provision. Some statutes confer particular power , whether for forfeiture or for forfeiture and destruction - for example, under s.27 of the Misuse of Drugs Act 1971 or under s.1(2) of the Prevention of Crime Act 1953. In cases such as the present, the only power is to grant a deprivation order under s.152 and s.153. It is the responsibility of the advocates on both sides to ensure that any such application is lawful and properly made.

18 We therefore quash the order for forfeiture and destruction under s.1(2) of the Prevention of Crime Act 1953 and substitute an order for deprivation under s.152 and s.153 of the Sentencing Act 2020. To that limited extent only this appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.