IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL 20/2019
IND#14/17
SC#894/17

BETWEEN

RONNIE RODNEY EBANKS

Appellant

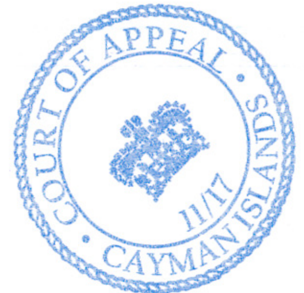
- AND -

HER MAJESTY THE QUEEN

Respondent

BEFORE **The Rt. Hon Sir John Goldring, President**
The Honourable Sir Richard Field, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: Mr. Laurence Aiolfi of Priestleys – for Appellant
Ms. Candia James-Malcolm (for DPP) – for Respondent



Date of Hearing 8 November 2019

Revised from transcript delivered 8 November 2019 and Approved

Released 19 May 2020

ALAN MOSES, JA:

1. This is an application for permission to appeal against what is said to be a sentence before the Grand Court following trial by judge alone in which this Appellant was convicted and

was sentenced to six years' imprisonment with a Sexual Harm Prevention Order. The appeal is about that order and not about the sentence. The issue is whether that court had power to impose a Sexual Harm Prevention Order where that power was only introduced after the Appellant had committed the sexual offence which led to its imposition. The dates are, therefore, of significance.

2. The offence took place on the 13th of February 2017, that is prior to the introduction of the power to make a Sexual Harm Prevention Order, which was introduced by an amendment to the Penal Codes.45A of the Law 32 of 2017. The power to make such an order came into effect on the 26th of May 2017.

3. This Appellant was convicted on the 29th of September 2017 and the sentence and the order were made by the trial judge, the Honourable Justice McDonald Bishop, on the 15th of December 2017.

4. The issue, as I have said, turns on the nature of a Sexual Harm Prevention Order, but, for reasons that will become apparent in our reasoning, it is worth dealing shortly with the facts.

5. The Appellant had been released from prison for an offence of rape in May or June 2009. Within a few weeks of being released, he committed a burglary with intent to rape on the 2nd of July 2009 and pleaded guilty and was sentenced to ten years' imprisonment. He was released from that offence on the 31st of May of 2016 and this offence was committed within nine months of that release. This offence bore a remarkable resemblance to the previous offence since it involved going into the apartment of a visitor to the island. In the previous offence, he had tried to rape the victim. This offence involved him masturbating and making gestures with his penis towards the victim. In the course of those serious

events, he had pulled the complainant's hand and put it on his penis, he had made requests of her to put his penis in her mouth and to show her breasts and genitals, and at one stage told her to lie down and it was going to be quick, that he was not going to hurt her and would not use his gun.

6. It is, we have to comment at this stage, surprising that the judge thought it appropriate to pass a sentence as low as six years, saying that had she not imposed the Sexual Harm Prevention Order she would have imposed a sentence of seven years. We shall explain the relevance of those facts when we come to consider our resolution of the issue of the unlawfulness of imposing an order which was not available to the court at the time the offence was committed.

7. The essential argument turns on whether a Sexual Harm Prevention Order is a penalty. In clear and cogent submissions, Mr. Aiolfi, on behalf of this Appellant, argues that it was unlawful to do so because it was to impose a heavier penalty than those penalties applicable at the time the offence was committed. No power existed at the time of the commission of the offence to make such an order. To do so was, so it is submitted, to impose a penalty retrospectively.

8. It is to be noted that subsequent to this order being made the law was again amended by the addition of s.45G by way of amendment introduced on the 26th of October 2018, which gave explicit retrospective effect to s. 45A.

9. It is not disputed by the Crown that, save in relation to procedural matters, it is not open to construe any procedure or penalties under the criminal law so as to take effect retrospectively. Penalties cannot be altered to the "detriment" of the transgressor after the transgression. (See *Bennion on Statutory Interpretation*, 5th edition, s.267, p.807.)

10. Quite apart from that general principle, s.8 of the *Bill of Rights* would prohibit any such retrospective penalty. By s.8(1), under the heading "No punishment without law":

> *"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed; nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."*

11. The Penal Code relevant at the time must be construed in a manner consistent with s.8 of the *Bill of Rights* (see s.25). The provisions in question are contained within the *Penal Code (Amendment) Law,* 2017, Law 32 of 2017, and are contained in part 2 headed, as Mr Aiolfi draws to our attention, under the rubric "*punishments*". By s.45A, under the heading "*Sexual Harm Prevention Order*":

> *(1) The Director of Public Prosecutions, after consultation with the Royal Cayman Islands Police Service or any other relevant agency, may apply to a court for a sexual harm intervention order.*
>
> *(2) Where a person, including a young person, of or over the age of seventeen is dealt with by the court for any offence of a sexual or indecent nature and the court is satisfied on the balance of probabilities that it is necessary for the purpose of -*
>
> *(a) protecting the public or a particular member of the public from sexual harm from that person;*
>
> *(b) protecting children or vulnerable persons or a particular child or vulnerable person from sexual harm from that person.*
>
> *The court, upon an application pursuant to subsection (1), may instead of or in addition to any sentence, make a sexual harm prevention order.*
>
> *(3) A sexual harm prevention order shall prohibit a person from doing anything described in the order and may include such conditions as the court considers necessary including a prohibition on travel both within and outside the Islands and shall be for a fixed period of at least five years.*
>
> *(4) Before making a sexual harm prevent order the court shall explain to the convicted person -*
>
> *(a) the purpose and effect of the order;*

> *(b) the consequences which may follow under section 45C if the person fails to comply with any of its requirements; and*
> *(c) that the court has the power to review or vary the order on the application either of the person or the Director of Public Prosecutions."*

12. Section 45C sets out the consequences at subsection (3) of a failure to comply with the order, which can lead to either a term of imprisonment not exceeding four years, or a fine not exceeding $3,000, or to both.

13. That, in the instant case, the making of an order under s.45A was unlawful if it was retrospective and contrary to s.8 is not disputed. For the short period until s.45G was brought into effect, therefore, if this order amounted to the retrospective imposition of a penalty, it cannot stand. S.45G now reads:

> *"For the purpose of sections 45A and 45B (which deals with interim Sexual Harm Prevention Orders), an order may be made in relation to an act, behaviour, conviction or finding which occurred before the commencement of the Penal Code (Amendment Law), 2017."*

14. The argument turns on whether the imposition of this order is to be regarded as a penalty at all. The Crown contends that it was not a penalty because its nature and purpose was to prevent the repetition of unlawful sexual conduct for the purpose of protecting the public and, to an extent, the defendant himself. Nor were the principles to be applied in determining whether this order was a penalty in dispute. It was their application to a Sexual Harm Prevention Order which was the matter of controversy.

15. We accept that the principles that we have to apply on the island are those identified by the Court of Appeal Criminal Division in the United Kingdom in a case called *R v Field* and *R v Young* [2002] EWCA Crim 2193, [2003] 3 All ER 769. That case concerned a

disqualification order made under the Criminal Justice and Court Services Act 2000. The offences had been committed before that Act was in force, but sentencing took place after. The disqualification order was mandatory and forbade the convicted persons from undertaking certain types of work which would have brought him into contact with children. The court concluded that this was a preventative measure and not a penal measure and did not have a punitive effect.

16. As we have said, the principles identified were set out in a lengthy judgment but they were fundamentally incorporated in a set of what were described as criteria set out at para.20. They derived from the leading case in the European Court of Human Rights which applies Article 7 of the European Convention on Human Rights which has the same effect, not the same terms, as that which is contained in s.8 of the Cayman Islands Bill of Rights.

17. The criteria identified in para.20 of *Field* were stated as follows:

> (i) The starting point is whether the measure is imposed following a criminal conviction.
>
> (ii) The nature and purpose of the measure are also relevant.
>
> (iii) Its characterisation under national law is relevant.
>
> (iv) The procedures involved in the making and implementation of the measure are relevant.
>
> (v) Its severity is relevant.
>
> (vi) The court will look at the substance, rather than the form, in determining whether the measure forms part of a 'regime of punishment'.

18. We should note at this stage that the criterion identified at (vi) is not so much a criterion, but a question of approach and of the way a conclusion should be reached. The court is

required to look at substance rather than form. Moreover, we should point out what must be obvious, that none of the factors which the court has to consider in considering retrospectivity of a penalty are determinative. Their weight will vary according to the nature of the order in question and, as the matter has to be looked at in substance, we must emphasize that it is not a question of merely ticking boxes. We have to look at what, in essence, the order that was made was designed to achieve.

19. In the case of *Field*, the court started with what Lord Justice Law had described as the gateway to an order. In *Field* the court pointed out that the disqualification order could be made not just following a conviction, but also where a person was not convicted but found not guilty by reason of insanity or suffered a disability. In neither of these cases would it be right to say that the imposition of an order followed a conviction. Rather, the court drew an analogy with football banning orders where there was no requirement that a conviction should precede the making of such an order. A conviction was only one of the specified criteria. (See paras. 23 following and para. 27 in *Field*).

20. In the instant case the Crown draw attention to another provision providing for what is described as an interim Sexual Prevention Harm Order [sic]. That order might be made under s.45B. It is only interim, but it may be made on the application of the DPP, irrespective of whether there is conviction, where a person is charged with an offence. That, the Crown suggests, demonstrates that the gateway is not only where the person has been convicted.

21. In our judgment, limited reliance can be placed on interim orders. An interim Sexual Harm Prevention Order, may, as Mr. Aiolfi put it, be regarded as an adjunct of bail. Clearly, in such a case, it is not a penalty, but rather is designed to enable someone to be on bail and not kept in custody, notwithstanding the need to protect the public from any indecent behaviour.

22. Under s.45A it is clear that the order made in this case can only be imposed following a criminal conviction. However, we draw attention, as the President did in the course of argument, to the wording of s.45A(2), which speaks of a person being 'dealt with by the court'. Moreover, the standard of proof is merely on the balance of probabilities and the order is described as one being made instead of or in addition to any sentence. That wording seemed to us to suggest an adjunct or an addition to a sentence, something different from the sentence that is passed. On the other hand, as Mr Aiolfi points out, the right of appeal under s.2 of the *Court of Appeal Law* includes an order within the definition of sentence.

23. By far the strongest factor pointing towards the non-penal nature of the order was, as it was in *Field*, the purpose of this order. As s.45A(2) makes clear, the purpose is to protect the public or to protect children. The decision to make it depends not on the gravity of the offence, but on the risk of reoffending. (See, by way of analogy, para.37 in *Field*).

24. Thus, the mischief against which such an order is directed is the risk of reoffending by sexual offenders who have offended in the past and have shown a continuing propensity to offend. (See the description of the mischief in a very different case, namely *B v Chief Constable of Avon & Somerset Constabulary* [2001] 1 All ER 562). The description, in our judgment, is apt, although we must point out that B was plainly not a penalty case. No offence was charged and, as Lord Bingham pointed out, no penalty may be imposed.

25. It is important, however, to point out that the making of this order does not depend in any way on the circumstances of this offence, the gravity of this offence. And the terms of the order to which this Appellant was subject make plain the protective and preventative nature of the order. The order required the Appellant:

> "... *not* [to] *attend at any residential property or premises, including hotels, resorts, stratas, apartment buildings, dwelling houses or any premises where persons normally reside ... during the hours of 7:00 pm to 6:00 am without express invitation ....*"

26. It forbade him from loitering around any such property. It required him to notify the Commissioner of Police of his place of residence and associated telephone numbers within 48 hours prior to his release. Notify the Commissioner of any change of residence or telephone number. Notify him in advance of any departure from the Cayman Islands, including travel itinerary, and any changes to any identity documents. Its purpose was plainly, therefore, preventative.

27. The characterisation under national law is also relevant. The provision under which the order was made is, as Mr Aiolfi points out, under part 2, heading "punishment", although it has to be pointed out that an interim Sexual Harm Prevention Order is also made under the same rubric. In favour of it being a penal provision, it has to be accepted that the order could have, even though it does not restrict his liberty, a considerable impact upon a person's life with penal consequences.

28. The final passages in *Field*, deals with what had earlier been described as the sixth criteria. They deal with the looking at the case in the round as a matter of substance and refers in particular to a case, at that time recently decided in the House of Lords. *R (on the application of McCann) v Crown Court at Manchester* [2002] UKHL 39, [2002] 3 WLR 1313. In that case, as applied in *R v Field*, the courts had looked at the technique whereby the law has employed civil injunctive remedies as a supplement to normal criminal sanctions where the criminal sanctions are regarded as providing inadequate protection for the public or, in that case, children. (see para.54 in *Field*).

29. In the instant appeal, particularly having regard to the facts to which we have drawn attention, and the history of this defendant, it is plain that the judge was right to regard the criminal sanction she was imposing as inadequate for the protection of the public. Something more had to be done to protect the public from this Appellant once he was released. Something, in short, had to be done to supplement the protection of the public in the light of the inadequacy of the sentence. That which had to be done, although its gateway was clearly a conviction, was the imposition of this order which was wholly protective in its purpose and, although it had a restrictive effect, wholly protective in what it was designed to achieve.

30. In such circumstances, we have come to the conclusion that the order was not a penalty at all and could be imposed, notwithstanding that this was not in force at the time of the commission of the offence of which this Appellant was convicted.

31. Mr Aiolfi rightly drew attention to the case of *R v Monument* [2005] EWCA Crim 30, [2005] 2 Cr.App.R.(S) 57. That was a case where a restrictive order had been passed in circumstances where the law no longer allowed the court to make such a sentence and the Court of Appeal had to consider whether it could substitute for it an order for the protection of children which could only be passed for a longer period than the previous restrictive order had been made - namely, a Sexual Offences Prevention Order pursuant to s.104 of the Sexual Offences Act 2003. The court decided it could not because to do so would be to deal with the Appellant more severely on appeal than he had been dealt with by the court below pursuant to s.11(3) of the Criminal Appeal Act 1968. In those circumstances, it did not make the order. In commentary on that case, in the *Journal of Criminal Law*, [JCL 69 (377) 1 October 2005) it is said that plainly the court could not do so because to impose an order under the 2003 Act would be to impose a more severe penalty, and the author of that

article says a Sexual Offences Prevention Order is, "*it is submitted, obviously a penalty and accordingly the court was bound to reject the submission*".

32. We note that the point was not argued as to whether such an order was a penalty or not in the case of Monument. We would also point out that it is perfectly appropriate to say that an order, even though it is not a penalty, is more severe than another, without it categorising the order as penal. For example, a type of football-banning order may be regarded as more severe because it is longer than another, but neither of which are penal and neither of which introduced by a penal provision. In those circumstances, we do not find that Monument is contrary to our conclusion.

33. In a totally separate ground, Mr. Aiolfi argues that it was not open to make the order which was, as we understand the argument, conditional on the date of release when no one could say how long he would remain in custody and when the order would start to have effect. Insofar as we understand the argument, we reject it. Such orders made under s.45A only make sense if they are to start once they are released. If anything, the argument demonstrates the force of our conclusion that the order is separate and for a separate purpose than any criminal sanction that had been passed.

34. For those reasons, whilst we grant the application for permission to appeal because it clearly raised questions of substance, even if only of limited duration, nonetheless we dismiss the appeal.