



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 18
HCA/2024/000154/XC

Lord Pentland
Lord Matthews
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND

in

Bill of Advocation

by

MACKENZIE FRED ANDREW HORNER

Complainer

against

HIS MAJESTY'S ADVOCATE

Respondent

Complainer: Ogg, sol ad; Pollock Ross & Co (Stirling)
Respondent: Prentice, K.C., AD; Crown Agent

2 May 2024

Introduction

[1] This case provides an opportunity for the court to provide guidance on the procedure which should be followed where a person, who has been convicted of taking and distributing indecent images of children, wishes to invite the court to determine that it is inappropriate for him or her to become subject to the notification requirements which would otherwise be imposed by section 80 of the Sexual Offences Act 2003.

The offence and the conviction

[2] On 7 November 2023 the complainer pled guilty to a section 76 indictment at Falkirk Sheriff Court. The single charge was one of taking or permitting to be taken indecent photographs of children contrary to section 52(1)(a) of the Civic Government (Scotland) Act 1982, as amended. The period of the libel was averred to have been between 9 February 2018 and 24 June 2022. During that period the complainer was between the ages of 12 and 16. By the date of his conviction he was 18. The child referred to in the charge was under 16 years of age at the time of the offence.

The Bill of Advocation and the complainer's submissions

[3] The basis of the challenge brought by the complainer in the Bill is that the Sheriff ordered on 7 November 2023 that he be made subject *ad interim* to the notification requirements under Part 2 of the Sexual Offences Act 2003. It is said that an *interim* order of this nature was not a competent one and that it should accordingly be quashed.

[4] In the Bill and in his written and oral submissions to this court the complainer set out his understanding of what happened at the hearing on 7 November 2023. Having heard a narrative of the circumstances giving rise to the offence, the Sheriff deferred sentence to 5 December 2023 for the preparation of a criminal justice social work report and a restriction of liberty order assessment. According to the complainer, the Sheriff ordered that he be made subject *ad interim* to the notification requirements provided for by the Sexual Offences Act 2003. The matter of whether the complainer was to be "placed on the register" was to be readdressed at the hearing on 5 December 2023.

[5] The Bill set out that at the deferred sentence hearing on 5 December 2023, having heard the plea in mitigation, the Sheriff imposed a community payback order with a supervision requirement for 3 years and 200 hours of unpaid work. It was submitted at that hearing that, having regard to the terms of paragraph 45 of Schedule 3 to the 2003 Act, as the child was under 16 at the time of the offence; the complainer was under 18 at that time; and the sentence was not 12 months imprisonment or more, paragraph 45(a) did not apply but paragraph 45(b) required to be considered by the Sheriff. The latter provision permits the court to determine that it is appropriate (and by necessary implication that it is not appropriate) that the offender be regarded as a person who has, for the purposes of Part 2 of the 2003 Act, committed an offence under section 52 of the 1982. Having considered the submissions made, the Sheriff was satisfied that it was not appropriate for the complainer to be regarded as such a person and accordingly she determined that the complainer would not be subject to the notification requirements under the 2003 Act. A review of the community payback order was fixed for 30 January 2024.

[6] The review report prepared for the hearing on 30 January 2024 disclosed that the complainer was co-operating with the community payback order. On that date a further review was fixed for 16 July 2024. The Bill explained that prior to the first review the police advised the social work department that as far as they were concerned the notification requirements under the 2003 Act were still in place despite the decision of the Sheriff on 5 December 2023. The police were not prepared to remove the notification requirement until the court minute of 7 November 2023 making the complainer subject to the notification requirements *ad interim* was amended. On 8 February 2024 the Sheriff Clerk at Falkirk contacted the Procurator Fiscal and the complainer's solicitor and advised them of the

position and queried with parties if the minute of 7 November 2023 could be amended in terms of section 300A of the Criminal Procedure (Scotland) Act 1995.

[7] The complainer observed in his submissions that the Sheriff states in her report to this court that the complainer ceased to be subject to the notification requirements on 5 December 2023 by virtue of her order on that date. Logically, according to the complainer, that ought to be the case, but unfortunately the police had taken a different view on the matter. It was submitted that, in any event, the Sheriff had no statutory power under the 2003 Act to make an order *ad interim*.

[8] With regard to the mechanism to remedy the problem it was submitted that the decision of the Sheriff on 7 November 2023 to make the complainer subject to the notification requirements *ad interim* did not fall within the definition of “procedural irregularity” in terms of section 300A; so that section could not be invoked. The only method for challenging an incompetent order under the 2003 Act made *ad interim* was by an appeal (*Moneagle v PF Elgin* 2018 SLT (Sh Ct) 13). No other method of rectifying the Sheriff’s decision was available under solemn procedure other than a Bill of Advocation.

The Crown’s submissions

[9] In a brief written submission the Crown took the view that the complainer had been made subject to an incompetent *interim* order and invited the court to pass the Bill. In the course of oral argument the Advocate Depute confirmed that there had been no mention made at the hearing on 7 November 2023 of paragraph 45 of Schedule 3 to the 2003 Act.

The Sheriff's report

[10] The Sheriff explained in her report to this court that at the hearing on 7 November 2023 the complainer pled guilty to the section 76 indictment. The Procurator Fiscal Depute moved for sentence and provided a narrative of the facts giving rise to the offence. The Sheriff deferred sentence. No submission was made in respect of paragraph 45 of Schedule 3 to the 2003 Act. The recording had been checked on the point. The complainer had, according to the Sheriff, been made subject to the notification requirements *ad interim* on 7 November 2023.

[11] The Sheriff went on to explain that when the complainer appeared for sentencing on 5 December 2023 she was satisfied that it was not in the public interest for him to be subject to the notification requirements. She therefore:

“declared in terms of section (*sic*) 45(b) of Schedule 3 of the Sexual Offences (Scotland) Act that the complainer was not subject to notification requirements.”

According to the Sheriff, the complainer ceased to be subject to the notification requirements on 5 December 2023 by virtue of her order.

Analysis and decision

[12] Having had the opportunity to consider the minutes (and other documents) recording events at the hearings in the Sheriff Court, we are satisfied that the Bill, the Crown's submissions and the Sheriff's report each proceeds on a misunderstanding of the applicable legal framework and of what in fact happened in this case.

[13] The minute of the hearing on 7 November 2023 states that the court certified in open court in terms of section 92(2) of the Sexual Offences Act 2003 “that the accused convicted of the offence (*sic*); that the offence is a sexual offence to which Part 2 of that Act applies.” On

the same date a certificate was issued and signed by the clerk of court certifying that the complainer had been convicted of the offence under section 52(1)(a) of the 1982 Act; that the offence was a sexual offence to which Part 2 of the 2003 Act applied; and that the court so stated in open court on that date. A police officer signed the certificate confirming that the principal was given to the complainer, who in turn signed to acknowledge that he had received the principal document. The complainer was also issued with a notice explaining what he must do in order to comply with the notification requirements.

[14] Section 80 of the 2003 Act provides *inter alia* as follows:

“A person is subject to the notification requirements of ... Part (2) for the period set out in section 82 (“the notification period”) if –
 (a) he is convicted of an offence listed in Schedule 3
 ...”

[15] Section 82 sets out the applicable notification periods for various categories of offender. For example, a person who has been sentenced to imprisonment for a term of 30 months or more is to be subject to a notification period for an indefinite period from the “relevant date”, which will normally be the date of the conviction.

[16] Section 92 of the 2003 Act provides *inter alia* as follows:

“Certificates for purposes of Part 2

- (1) Subsection (2) applies where on any date a person is—
 - (a) convicted of an offence listed in Schedule 3;
 - ...
- (2) If the court by or before which the person is so convicted or found—
 - (a) states in open court—
 - (i) that on that date he has been convicted ... and
 - (ii) that the offence in question is an offence listed in Schedule 3, and

- (b) certifies those facts, whether at the time or subsequently, the certificate is, for the purposes of this Part, evidence (or, in Scotland, sufficient evidence) of those facts.”

[17] Schedule 3 to the 2003 Act specifies the sexual offences which are relevant for the purposes of Part 2 of the Act. Paragraph 45 of Schedule 3 to the 2003 Act is in the following terms:

“An offence under section 52 of the Civic Government (Scotland) Act 1982 (c. 45) (taking and distribution of indecent images of children) if—

- (a) the child was under 16 and the offender—
 - (i) was 18 or over, or
 - (ii) is or has been sentenced in respect of the offence to imprisonment for a term of at least 12 months, or
- (b) in imposing sentence or otherwise disposing of the case, the court determines that it is appropriate that the offender be regarded, for the purposes of Part 2 of this Act, as a person who has committed an offence under this paragraph.”

[18] The court minute of the hearing on 5 December 2023 states that the court, having heard parties, “did not make the offender subject to the sexual offences notification requirements”.

[19] A number of points are clear. First, contrary to the understanding of parties and, it would appear, of the Sheriff there was no *interim* order made. While we acknowledge that the Sheriff states in her report that on 7 November 2023 the complainer was “made subject to notification requirements *ad interim*”, this is not consistent with any of the court minutes, the certificate or the notice issued to the complainer on that date. Such an *interim* order would have been incompetent and we see no reason to suppose that the court made an incompetent order in circumstances where the official court records are clearly to the contrary effect. We would observe also that while the Bill proceeds on the basis that the

Sheriff “ordered” that the complainer be subject *ad interim* to the notification requirements, this formulation betrays a misunderstanding of the effect of the 2003 Act. The statutory scheme contained in the 2003 Act does not provide that the court should “order” that an offender be subject to the notification provisions. Becoming subject to the notification requirements is a consequence which follows automatically by the operation of section 80 of the 2003 Act.

[20] Secondly, section 92 empowers the court to certify that an offender has been convicted of a sexual offence listed in schedule 3, but there is no obligation on the court to issue such a certificate at the time of conviction. It would make no sense to do so where the court was made aware that the offender intended to argue (or wished to reserve the right to argue) in the light of the sentence ultimately imposed that it was inappropriate to determine that he be regarded as a person who has committed an offence under section 52 of the 2003 Act. The purpose of certification is to provide an authoritative and self-proving record of the fact that the offender has been convicted of a sexual offence listed in Schedule 3. In the event that it is disputed that he has been convicted of such an offence then clearly it would be inappropriate to certify that he had been until the issue had been resolved.

[21] Thirdly, there is nothing in the 2003 Act permitting or authorising the making of an *interim* certification or *interim* notification order (*Moneagle v PF Elgin* 2018 SLT (Sh Ct) 13, para [12]). The minute of 7 November 2023, the certificate of the same date and the notice issued to the complainer put it beyond doubt that he was in fact as of that date subject to the notification requirements provided for by the 2003 Act. There was nothing *interim* or provisional about the effect of the certification made by the Sheriff on that date. It was a final certificate and could not subsequently be recalled or somehow set aside by the Sheriff, as she purported to do on 5 December 2023.

[22] Fourthly, the procedure adopted by the Sheriff at the hearing on 5 December 2023 was incompetent. Having previously made a notification certification, it was not open to her to issue a new order stating that the court “did not make the offender subject to the ... notification requirements.” What had previously been done by way of issuing a certification could not simply be undone by means of an *ad hoc* rewriting of history.

[23] Finally, the correct procedure for the Sheriff to have followed had the point been raised with her on 7 November 2023 (which it was not, but clearly should have been) would have been to refrain from making a certification. She would then have been in a position to hear submissions at the diet of deferred sentence on whether to make a determination under paragraph 45(b) of Schedule 3 to the 2003 Act unencumbered by a previously issued certificate.

[24] Despite the procedural irregularities which have given rise to unnecessary confusion and difficulties for the complainer, the police and no doubt others, it seems clear that the Sheriff’s underlying intention was that the complainer should not be subject to the notification requirements allowed for by the 2003 Act. The effect of the certificate she made on 7 November 2023 is that the complainer is currently deemed to be subject to those requirements, as Police Scotland was correct to recognise. To put matters right and to give effect to the substance of the Sheriff’s decision we shall pass the Bill to the extent of setting aside the certification made by the Sheriff on 7 November 2023 that the complainer had been convicted of an offence listed in Schedule 3 to the Sexual Offences Act 2003.