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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

-v-

SAMUEL SHANNON

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Before: Campbell and Higgins LJJ

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CAMPBELL LJ

[1] This is an application for leave to appeal against a sexual offences prevention order with a five year duration imposed on the applicant under section 104 of the Sexual Offences Act 2003 by His Honour Judge Smyth QC, sitting in the Crown Court in Antrim on 4 September 2007. The single judge granted leave to appeal in relation to one of the conditions namely that the appellant should not own or drive a vehicle. This application extends to the entire order.

[2] The grounds upon which leave to appeal is sought in the notice of appeal are that the sexual offences prevention order was misconceived and not supported by the evidence as the applicant does not pose a risk of causing serious sexual harm and the conditions attached to the order were neither necessary nor proportionate.

The offences

[3] On 26 April 2005, at the Crown Court sitting in Antrim the applicant was convicted in respect of an indecent assault committed on 15 March 2001. He was sentenced to a custody probation order comprising 2½ years' imprisonment and 2 years 4 months' probation.

[4] At the time that the sentence was imposed the applicant was serving a sentence of 42 months' imprisonment imposed by Antrim Crown Court on 11 June 2004 for an offence of indecent assault on a female committed on 30 September 2003. He was released from prison on 23 June 2006 to commence the probation element of the custody probation order. Two days

later, on 25 June 2006, he was arrested and charged with two offences of indecent exposure. He appeared at the Magistrates' Court on 18 September 2006 and pleaded guilty and received a sentence of four months' imprisonment and the court certified that he was in breach of his custody probation order.

[5] He was charged with breach of the custody probation order and the case was sent back to the Crown Court in Antrim where on 3 November 2006 the custody probation order that was imposed on 26 April 2005, was revoked; he was ordered to serve 12 months' imprisonment and on release to be subject to an Article 26 licence. An application was also made for a sexual offences prevention order. The application was adjourned for reports and was determined by His Honour Judge Smyth QC on 4 September 2007 when he imposed the sexual offences prevention order that is the subject of this application. The order which was for a period of five years contained the following conditions:

(i) He is not to own or drive a motor vehicle.
(ii) He is not to be alone or solicit to be alone in a motor vehicle with a female.
(iii) He is not to frequent beaches.
(iv) He is not to take up any employment or activity without the prior approval of a designated risk manager.
(v) He is not to develop a relationship with a female unless verified disclosure has been made to her as to his previous criminal antecedents.

[6] The offence of indecent assault on 15 March 2001 which resulted in his conviction at Antrim Crown Court on 26 April 2005, involved the applicant entering, in the early hours of the morning, the home of a woman in Antrim who had fallen asleep in front of the television in her living room. The light was on in the room and the blinds were open. She woke up as she felt a cold sensation on her thigh through the pyjamas that she was wearing. As she awakened she saw an unknown man walking quickly towards the door. The woman's clothing was taken for examination and it was established that there was semen on the pyjamas she had been wearing and also on her polo shirt. As a result of a DNA examination it was established that the semen stain had the same characteristics as two buccal swabs taken from the applicant.

[7] The incidents that led to the breach of the custody probation order occurred on 25 June 2006, two days after the applicant was released from prison on 23 June 2006. These involved the applicant approaching a young couple in the sand dunes at Portrush and exposing himself and then beginning to masturbate. Shortly after this he approached another young couple in the Portrush area and exposed himself and masturbated in front of them.

The applicant's history

[8] The trial judge had before him a number of reports from the Probation Service in which it is recorded that the applicant, who is the youngest in a family of four, never knew his father and was brought up by his mother who died when he was 15. He left school at 16 without any qualifications and has poor literacy and numeracy. He married in 1990 and has two daughters but the marriage broke up after two years and his children live with their mother but he keeps in contact with them. His employment history is that of an unskilled labourer in farm work, the building trade and scrap metal collecting.

[9] The applicant has 18 convictions for indecency, 10 convictions for indecent assault and 3 convictions for sending obscene messages by public telecommunications. He began committing indecent offences in 1986 and on average they have occurred every two years. In addition to the usual copy of his criminal record the trial judge was provided by the probation service with information about some of these offences. It appears that two of the indecent assaults occurred when the applicant stopped his car to give female hitchhikers a lift and another when he offered a lift to a woman who was waiting at a bus stop. On another occasion on the pretext that he was carrying out repair work for the Housing Executive he gained entry to the home of a pregnant woman and squeezed her breasts and bottom. He was sentenced to 3 years' imprisonment in 1992 following an indecent assault on a female in her bedroom in a hotel in Portrush. She is reported to have been hysterical and frightened and to have been physically sick as a result. The offences committed by the applicant in cars occurred in vehicles that he or his brother owned and some of these were not registered with the Vehicle Licensing Authority. One of the offences occurred when he was a passenger in a taxi, driven by a woman. The victims have ranged in age from 19 to 56 years.

[10] The applicant has been the subject of five probation orders and the last of these ended in March 2003. Prior to the offence of March 2001 he took part in sex offender programmes on two occasions and he has been assessed by the Multi-agency Risk Management Committee (MASRAM) as someone whose behaviour, given his history, presents clear cause for concern regarding sexual offences.

[11] The MASRAM Area Committee requested the court to impose conditions designed to manage the applicant's risk by restricting his movements. These were based on the fact that previous convictions involved him driving from his home near Ballymoney to other areas and committing offences against women in cars. The restriction against frequenting beaches relates to the two most recent convictions for exposing himself on beaches.

The restriction proposed on his employment was designed to ensure that he would not be in a position to take up unsuitable types of employment or activities through which he could gain access to women in general.

[12] A report from Dr Tim Green, a chartered clinical psychologist with experience in the assessment and treatment of mentally disordered offenders, was provided for the judge. Dr Green administered a personality test and this shows a profile of an individual with difficulty in relating to other people in a mature and confident way which may indicate the presence of a personality disorder. The Risk Matrix 2000, an actuarial measure of risk, scored the applicant at three and this places him in the high risk category. Dr Green was of the opinion that the applicant's risk of indecent exposure remains high and he noted that the applicant has a clear attitude that whilst the indecent assaults that he has committed were wrong and would be damaging to others he does not think this way about indecent exposure. Dr Green suggested that through his behaviour the applicant attempts to triumph over his feelings of humiliation and victim hood by becoming a powerful perpetrator who makes others feel shame rather than having to tolerate feelings of humiliation and victim hood himself. While Dr Green could see the logic behind the restrictions that were proposed he felt that they could create a great deal of stress and frustration in the applicant which may cause him to attempt to cope with them through future offending.

The judge's sentencing remarks

[13] The judge stated that before a sexual offences prevention order is made it must have been shown that the measures sought are necessary for the purpose of protecting the public from the risk of serious sexual harm. He went on to consider the following questions–

(i) Is the applicant at risk of committing further offences? The judge concluded that he did not believe that there was any doubt that there was a high risk of commission of further offences.

(ii) Has it been shown that there is a reason to believe that a sexual offences prevention order is necessary to protect the public from the risk of serious sexual harm? Having referred to the definition of harm in the Sexual Offences Act 2003 the judge noted that the legislation directs the court to look at the risk of consequences occurring and that the consequences must be serious and can be either physical or psychological. He concluded that on the appropriate tests the applicant presented a sufficient risk of serious harm to women and that the measures proposed were necessary to protect them in the future.

The Sexual Offences Act 2003

[14] A court may make an order in respect of a person under section 104(1)(b) of the Act where;

> "it is satisfied that it is necessary to make such an order, for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant".

In section 106(3) of the Act the phrase "protecting the public or any particular members of the public from serious sexual harm from the defendant" is defined as meaning protecting the public in the United Kingdom or any particular members of that public from serious physical or psychological harm caused by the defendant committing one or more offences listed in Schedule 3 to the Act.

[15] In *R v Rampley* [2006] EWCA Crim 2203, Gray J distinguished between the concept of "serious harm" in the Criminal Justice Act 2003 (which does not apply in this jurisdiction) and "serious sexual harm" under the Sexual Offences Act 2003. He said:

> "Section 229 of the Criminal Justice Act, 2003 defines serious harm to mean death or serious personal injury, whether physical or psychological, whereas the serious sexual harm required under section 104 of the Sexual Offences Act 2003, is defined simply as including serious physical or psychological harm. As we say, we consider that there is a difference of degree. Moreover, we note that section 229 is expressed in terms of injury, whereas section 104 talks of physical or psychological harm. We consider that there is a qualitative difference between the concept of injury and the concept of harm."

[16] In *R v Richards* [2006] EWCA Crim 2519, the Court of Appeal came to the same conclusion by a slightly different route. Sir Igor Judge, P described a sexual offences prevention order at para 24 as:

> "a non-custodial order, available to be imposed by the court as a matter of discretion where satisfied that it is "necessary" for the order to be made. As we have already noted, it may be used for a qualifying offender who has not been convicted, but only cautioned in respect of a relevant offence, or for an offender who has already been punished for it. No

> question of a custodial sentence could arise in either of these cases."

[17] The offender in *R v Terrell* [2007] EWCA Crim 3709 was convicted of four counts of making indecent photographs of a child (by downloading them from the internet). Thirty six similar offences were taken into consideration. He had one previous conviction for downloading a large amount of similar material. Ouseley J considered the authorities on whether the downloading of indecent photographs could have caused "serious harm" sufficient to warrant the imposition of a sentence for public protection. He held that a sexual offences prevention order could be imposed in relation to relatively minor offences, and said:

> "The indirect and uncertain harm arising from the contribution to the harm which any downloading of indecent images may have does not necessarily fall outside the scope of the sexual offences prevention order provisions."

[18] As noted earlier the provisions of s 229 of the Criminal Justice Act 2003 do not apply in this jurisdiction however, these authorities assist in identifying the breadth of behaviour which can attract such an order and tend to suggest that the scope of the provision is relatively wide.

[19] The test to be applied, as identified by Hughes LJ in *The Queen on the Application of the Commissioner for the Metropolis v Croydon Crown Court* [2007] EWHC 1792, involves an assessment of the level of risk of recurrence, first, and of the level of risk of harm if recurrence there be, second. The second exercise involves assessing how much harm is likely to be done and whether it can properly be called serious or not, and if it were the case that only a small number of people would be likely to suffer such harm that would be a relevant factor in assessing the risk.

[20] Mr Macdonald QC (who appeared with Mr Devine for the applicant) accepted that there was a high risk of the applicant re-offending however, he submitted that nature of applicant's offending was not such that an order is necessary "for the purpose of protecting the public or any particular members of the public from serious sexual harm" from him. We were referred to a probation report, dated 22 April 2005, in which the author said;

> "His offences tend not to involve violence or force or even much persistence once a victim objects, so the risk of physical harm from the defendant may not be high. He would readily be seen however as posing a high risk of causing fear and upset in females with whom he creates an opportunity to be alone."

The history of his offending to date indicates the absence of a risk of the applicant causing physical harm to his victims. While some victims may have regarded his behaviour as grossly offensive others, especially those whose homes he has entered to commit an indecent act, are likely to have suffered fear and apprehension which could cause serious psychological harm. It is on this account that we are satisfied that it was necessary to make an order to protect women from serious sexual harm from the applicant.

Were the conditions necessary and proportionate?

[21] At a preliminary hearing of the application for leave to appeal the court altered the terms of the order to permit the applicant to drive a motor vehicle when accompanied by certain named individuals and to travel in a motor vehicle when accompanied by certain named females (who are members of his family). Mr McClean (who appeared for the Crown) did not seek to argue against the original order being amended in these respects. Mr Macdonald suggested that in order to avoid the need for an application to the trial judge to amend or add to the list of those who are approved the designated risk manager should be given discretion to authorise such changes. This is acceptable to the Crown and we will amend the order accordingly.

[22] Mr Macdonald, correctly in our view, confined his argument to the first condition which prevents the applicant from owning a car or driving a car unless accompanied by certain named individuals. He suggested that this condition prevents the applicant from obtaining employment and, as he lives some four miles from the nearest town, limits his daily life.

[23] In *The Commissioner for the Metropolis v Croydon Crown Court*, where the Divisional Court refused leave to review the decision of the Crown Court to overturn a sexual offences prevention order made in relation to a schizophrenic man with a history of touching women on the buttocks, hip or groin in public places, four out of his five convictions were for offences committed on trains or at railway stations. The order stopped him from travelling by train except in emergencies. Noting the similarity to *R v Rampley*, it was held that the Crown Court acted within the margins of its discretion. Hughes LJ emphasised the need both to show serious sexual harm and that the restriction was necessary and proportionate and said at para 19:

> "That simply underlines the proposition which is crucial to these cases: the assessment of whether a particular case calls for a sexual offences prevention order (in this case preventing the defendant using trains without permission) is a question which has to

> be addressed by the court on the ground in each case. It is a question to which there are likely to be, and were in this case, two legitimate answers: yes or no. Some courts might in this case have concluded that there was a sufficient risk of serious sexual harm. Others on the other hand could perfectly properly come to the conclusion that this judge did, that the risk here is of sexual harm certainly, but sexual harm which is less than serious. In the same way, some might conclude that an order keeping the defendant off all trains unless he makes a prior application for permission to travel is disproportionate, given that a train is only one type of public place in which he is certain to encounter women. Others might take the view that it is proportionate."

[24] In *R v Lewis* [2007] EWCA 3393, the appellant was serving a prison sentence for a number of offences related to child pornography. He was the subject of a sexual offences prevention order preventing him from using computers in various ways. Before his release from prison an application was made to vary it by adding a further condition prohibiting him from denying police officers access to his home. Counsel for the appellant referred the Court of Appeal, inter alia, to *R v Yates* [2004] 1 Cr App R(S) 269, where that Court held, albeit in a different context, that as a general rule a court should not make orders restraining people from doing things which they are neither threatening nor likely to do. The Court of Appeal struck down the further condition. Cox J said at para 20:

> "Section 108(5) of the Act provides that additional prohibitions may be imposed "only if it is necessary to do so to protect the public or particular members of public from serious sexual harm from the defendant". It is also important, in our view, that these orders are drafted with clarity, so that their scope and effect is clearly understood."

[25] The order in the present case is for a period of five years (the minimum period for which such an order may be made) and if being unable to drive to work limits the applicant's opportunity to obtain employment it will go beyond the purpose of the order. We will allow the appeal, for which leave has already been given, against this condition to the extent that the applicant will be permitted to travel, unaccompanied, by car directly to and from a specified place of work or activity which has been approved by the designated risk manager. He must travel by a route and at times approved by the designated risk manager and provide him, in advance, with details of the

make and registration number of any vehicle that he owns and/ or uses for this purpose. To this extent the appeal is allowed.