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Judgment: approved by the Court for handing down | *Delivered:* **23/9/2011**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

PBNI v. MICHAEL JONES

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivered ex tempore)

[1] The applicant was arraigned on 8 May 2007 at Belfast Crown Court before His Honour Judge Grant and pleaded guilty to a count of indecent assault on a female contrary to Section 52 of the Offences Against the Person Act. On 28 June 2007 before His Honour Judge Grant at Downpatrick Crown Court he was sentenced to a custody probation order of 2 years 6 months imprisonment followed by 3 years' probation. He was required to participate in the community sex offenders' group work programme, to present himself in accordance with instructions given by the probation officer to appropriate premises to actively participate in this programme for 240 hours and to comply with instructions given by the probation officer or the person in charge of the programme. He was also required to take part in an alcohol testing and treatment programme as directed by the officer supervising his probation order. It was ordered that registration as a sex offender would be required for an indefinite period. He was released from custody in September 2008.

[2] His first breach of the custody probation order was in 2009 when he left the jurisdiction without notifying the relevant authorities and went to Spain where he remained until September 2009. This breach was dealt with on 7 December 2009 before His Honour Judge Grant at Londonderry Crown Court when he was sentenced to 40 hours community service. The second breach of the custody probation order was in May 2010 when the applicant failed to return to his hostel accommodation. He was located in County Kildare. On 15 October 2010 at Londonderry Crown Court sitting at Magherafelt before His Honour Judge Grant the applicant was arraigned and pleaded guilty to breach of the custody probation order. On the same date and before the same judge it was ordered that the custody probation order originally imposed on 28 June 2007 be revoked and that the applicant be sentenced to 2 years custody and a sexual offences prevention order with a duration of 10 years was imposed with restrictions upon the applicant that he

was prohibited from travelling outside the jurisdiction without prior approval from his designated risk manager or residing at any address unless approved by his designated risk manager or entering into any relationship with a female unless verified disclosure of his previous sexual offending has taken place or taking up any form of employment unless approved by his designated risk manager.

[3] The applicant renews his application for leave to appeal against the imposition of the SOPO. The victim of the offence of indecent assault was a friend of the applicant's former partner and it was committed in the bedroom of the victim's home. The victim's statement reports that she woke up with the applicant on top of her and that he was having sex with her from behind. She stated that she screamed and then the applicant's former partner came into the room at which point the applicant ejaculated. The victim stated that she jumped out of bed and ran downstairs with the applicant's previous partner who then telephoned the police. The applicant continued to claim the victim was complicit in the offence. He claimed on the night in question he, his former partner and the victim were out drinking and by the time they arrived back at the victim's home he was heavily intoxicated. He stated that he went to bed in the spare room but as he was cold went to the victim's bedroom to ask for a blanket. He said the victim turned over, looked at him, he leaned down to kiss her and she then moved over on the bed to allow him beside her. He stated that she had her back to him. He admitted opening his trousers to guide his penis and put it between her legs. He claims he is unclear whether he had sexual intercourse with her but admitted he did ejaculate. He claimed he understood the sexual contact was with the victim's consent. It is of concern that the applicant has continued to take the view that he is not a sexual offender despite his conviction.

[4] Since his release from custody in 2008 the applicant was subject to probation supervision. The first breach occurred when he left the jurisdiction without notifying the relevant authorities. The present breach occurred because he left the hostel accommodation and was located in County Kildare. The pre sentence report indicates that he committed a number of offences there but we do not take those into account because there is no conviction in relation to them. The report also refers to a relationship which he commenced with a female.

[5] The submission on behalf of the applicant is that the 10 year SOPO was manifestly excessive and wrong in principle because –

(1) 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

(2) the conditions attached to the order were neither necessary nor proportionate.

It is submitted that the judge erred in principle in assessing the applicant's original offence of indecent assault as being at the top of the range of offences of that type and thereby drawing assistance from it in determining a SOPO necessary and proportionate. Various circumstances were then set out on behalf of the applicant including the fact that he had no history of sexual offending, that his breaches did not evidence any behaviour that would have required an order of this type to be made, that he had embarked on a relationship with an adult female, that by the time of the second breach he had made full disclosure of his position, that he had completed 50 hours of the community sex offenders programme and a further 180 hours within custody and that his non compliance of itself did not suggest the need for such an order. In addition it was submitted that when initially in breach of the custody probation order in May 2009 the breach was marked by way of a 40 hours community service order dated 7 December 2009 which the applicant discharged in full. At that point no concern was raised regarding his behaviour which gave rise to grounds for a SOPO. It is argued that until the date of his remand in custody of 7 July 2010 no concern about his behaviour has emerged to support a risk of serious sexual harm from him. He does not have any previous convictions relevant to the present offence of indecent assault.

[6] The pre sentence report indicates that the applicant appeared generally to have led a positive and productive lifestyle. The writer of the report states that the commission of indecent assault and the applicant's level of denial raises much concern. It was considered in order to fully assess the risk of further sexual offending posed by him that he should be required to participate in the PBNI sex offender programme. It was stated in the pre sentence report which was prepared in relation to his original offending that the imposition of a custody probation order would be considered appropriate.

[7] In relation to the latest breach the report dated 1 September 2010 says that throughout his period of supervision he has struggled to view himself as a sex offender and has consequently disregarded the constraints imposed on his lifestyle in an effort to manage his risk while in the community. Previous breach reports refer to his complete lack of internal risk management evidenced by his willingness to remain outside the jurisdiction for 4 months, his readiness to work in an area which gave him access to females and his entering into a personal relationship without disclosing his index offences. He was offered another opportunity by the court on 7 December 2009 to work with probation so that through further offence focused work he could gain greater insight into risk issues which would assist in the development of internal risk management controls. Unfortunately he chose not to avail of that opportunity. His willingness to remain outside the jurisdiction breaks the requirements of the custody probation order and his decision to enter a relationship without advising the designated risk manager evidences his lack of insight into the level of risk he poses. He has shown the absence of any internal risk management as well as a complete disregard for the external measures put in place in an effort to manage his risk. He was last reviewed by the local area public

protection panel in May 2010. He continued to be assessed as a category 2 offender under the Public Protection Arrangements (Northern Ireland), that is someone whose previous offending, current behaviour and current circumstances present clear and identifiable evidence that they could cause serious harm through carrying out a contact sexual or violent offence. Mr Mallon on behalf of the applicant takes no issue with the accuracy of that assessment.

[8] The pre sentence report stated that in light of the applicant's ongoing non compliance it is evident that the custody probation order was not sufficient to manage the risk posed by the applicant and the SOPO was recommended.

[9] A sexual offences prevention order is made pursuant to Section 104(1)(b) of the Sexual Offences Act 2003 which states that the court may make an order under this section in respect of a person where various conditions are fulfilled and 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 sexual harm from the defendant. Mr Mallon points to the fact that the test is one of necessity and we accept that he is correct in relation to that. Section 163 of the 2003 Act provides that protecting the public or any particular members of the public from serious sexual harm means protecting the public in the United Kingdom. Counsel also referred to Section 107(1) and (2) which states that a sexual offences prevention order prohibits the defendant from doing anything described in the order and has effect for a fixed period of not less than 5 years which the order must specify. The only prohibitions that may be included in the order are those necessary for the purpose of protecting the public or any particular members of the public from serious sexual harm from the defendant. We note the further reference to the test of necessity.

[10] There are two decisions in this jurisdiction which have looked at the appropriate test for the imposition of a SOPO. The leading case is that of R v. Samuel Shannon. The court noted the statutory tests set out in section 104 (1) (b). The test to be applied involves an assessment –

(1) of the level of risk of recurrence; and
(2) of the level of risk of harm if there be recurrence.

The latter involves assessing how much harm is likely to be done and whether it can properly be called serious or not. 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.

[11] Shannon also refers to the fact that the terms of such an order, if imposed, must be both necessary and proportionate and that is reinforced by the decision of the court in R v. CK.

[12] We accept that there was no note available of precisely what occurred before the learned trial judge. We are however informed that the hearing was fairly brisk. We remind judges of the principle set out at E21.13 of Blackstone referring to the case of Roberts [2010] EWCA Crim 907 where the Court of Appeal said that the statutory criteria must always be made out and such orders must not be made as a matter of course or on the hoof. Judges must be given the opportunity to consider a draft proposed order in advance. If counsel invite the judge to make such an order appropriate material should be placed before the judge to show that the statutory requirements have been met.

[13] We appreciate the burden of work falling upon Crown Court judges but Roberts reinforces the importance of ensuring that proper and adequate consideration is given to such orders and that they are carefully discussed with counsel before determining –

1. whether or not the necessity is established through the risk of recurrence; and

2. if necessity is established whether it is necessary and proportionate to make an order beyond the statutory minimum period of 5 years.

[14] Despite the absence of any note dealing with an assessment of the risk of recurrence or the necessity and proportionality of the period that was imposed we consider that there are features such as the fact that this applicant has breached his probation order on two occasions, the fact that he has not participated in the community sex offender treatment programme and perhaps most importantly of all the fact that he has persisted to demonstrate a complete failure to understand the fact that he is a risk by way of being a sex offender which go to the question of risk of recurrence. In our view the material before us demonstrates that the necessity for such an order was satisfied.

[15] We consider, however, that there is a complete absence of information to demonstrate why the minimum period of 5 years was not appropriate in this case. There is nothing in the note which discloses any consideration of the issue which unfortunately suggests that the Roberts guidance was not followed in this case. The Crown have not sought to adduce before us any material to support the maintenance of such an order for a period in excess of 5 years and in the circumstances we consider that we should interfere with the determination by reducing the period of the sex offenders prevention order to a period of 5 years. We therefore allow the appeal to that extent.