IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202100545/A3-202101684/A3

[2022] EWCA Crim 525

Royal Courts of Justice

Strand

London

WC2A 2LL

Wednesday 9 February 2022

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)

(SIR ADRIAN FULFORD)

MR JUSTICE DOVE

MRS JUSTICE HEATHER WILLIAMS DBE

REGINA

V

ROMAN WILKES (AKA MARTIN EASTON)

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MR T PARSONS-MUNN appeared on behalf of the Applicant.

MR G GORDON appeared on behalf of the Crown.

J U D G M E N T

1. MR JUSTICE DOVE: This case has been referred to the full court as a result of the issues that arise in relation to both the effect of the jurisdiction to make orders which form the basis of some of the appellant's convictions and also the procedures adopted in respect of the amendment of charges which have been committed by the Magistrates' Court to the Crown Court for sentence.
2. The questions before the Court emerged from an appeal which was originally lodged against the appellant's most recent sentence for sexual offences in 2021, but which we accept should now engage a consideration of earlier convictions and orders from 2018. We grant an extension of time to enable a consideration of all grounds of appeal which have been advanced including those pertaining to the 2018 convictions.
3. It is necessary to commence by setting out the history of the relevant matters for which the appellant has found himself before the courts starting in 2012. On 5 October 2012 at Newcastle Crown Court, having earlier pleaded guilty to offences of possession of an indecent image of a child, causing or inciting a child to engage in sexual activity, causing a child to watch a sexual act and attempting to arrange or facilitate the commission of a child sex offence, the appellant was sentenced to 12 months' imprisonment suspended for 2 years. The court also imposed a 7-year SOPO which included as a requirement that the appellant was prohibited from using social networking sites. As a result of his conviction for offences listed in schedule 3 of the Sexual Offences Act 2003, the appellant was also automatically subject to notification requirements for a period of 10 years.
4. Subsequent to this conviction the appellant was visited by the police on 28 December 2017. When his tablet computer was examined it was discovered that he had downloaded the Facebook application on to it. On 2 January 2018 officers returned to his home and seized electronic devices, which on examination showed that the appellant had access to dating websites and had created accounts on them. Later, on 18 March 2018, the police again visited the appellant's home and recovered another tablet computer on which the appellant had installed another social media application which he had used to strike up a relationship with a woman with a 4-month old daughter. Between 8 March and 18 March 2018, he had spent nights at the woman's home whilst the child was present and he had not notified the police.
5. On 28 March 2018 the appellant appeared before the South Northumbria Magistrates' Court and pleaded guilty to three charges arising out of these events which were drafted as follows. The first charge was an allegation that in breach of a SOPO the appellant had stayed for 12 hours or more in a house with a child between the 8 and 18 March 2018. The second charge was that between 8 and 18 March 2018 the appellant had failed without reasonable excuse to comply with notification requirements to which he was subject, in that he had accessed social network sites. The third charge was that between 28 December 2017 and 18 March 2018, he had accessed social media sites in breach of the SOPO. The appellant was committed to the Crown Court for sentence in relation to these charges.
6. On 23 May 2018 the appellant appeared at Newcastle Crown Court for sentence. It had been recognised that these charges were inappropriate after the case had arrived at the Crown Court and redrafted versions of the charges were prepared. The first charge was recast as between 28 December 2017 and 2 January 2018, accessing social media sites in breach of the SOPO without reasonable excuse. The second charge was redrafted to

read that between 8 March 2018 and 18 March 2018 the appellant had accessed social media sites in breach of the SOPO and without reasonable excuse. Finally, the third charge was reworded to allege that between 8 and 18 March 2018 the appellant had failed without reasonable excuse to comply with the notification requirements to which he was subject by staying for more than 12 hours in a house with a child. It was agreed that these amendments were necessary in order to properly reflect both the relevant legislation and the appellant's behaviour for reasons which are further specified below.

7. The prosecution and defence both concluded that these redrafted charges should replace those to which the appellant had pleaded guilty at the Magistrates' Court. The solution, which counsel and the judge identified to rectify the position, was that the judge would, pursuant to section 66 of the Courts Act 2003, sit as a District Judge Magistrates' Court but, by agreement, the existing pleas would be vacated and that thereafter the new charges would then be put to the appellant. This occurred in short order and without any election of venue being referred to and with the appellant entering guilty pleas when the revised charges were put to him. The appellant was then sentenced to a 2-year community order and the court imposed a SHPO for a period of 5 years, which included prohibitions on the appellant using social networking sites and deleting his Internet history.
8. On 6 August 2019, again following a committal for sentence from the Magistrates' Court to Newcastle Crown Court, the appellant was sentenced to 10 months' imprisonment in respect of two charges arising from breach of the SHPO imposed on 23 May 2018.
9. On 2 January 2021 police again visited the appellant's home and this time seized his mobile phone. Examination of the phone revealed that the appellant had downloaded 11 social media applications between February and October 2020 and this formed the first allegation of breach of the SHPO imposed on 23 May 2018. By the time the phone was examined he had deleted all of this activity which gave rise to the second allegation of a breach of that SHPO.
10. Further investigations disclosed that the appellant had set up accounts on dating websites using aliases. His failure to notify the police of this activity provided the basis of the third charge. Once again, the appellant pleaded guilty to the charges he faced in the Magistrates' Court and was committed to the Crown Court for sentence. On 5 February 2021 the appellant appeared at Durham Crown Court to be sentenced. Whilst the point was not raised at that hearing, it has subsequently become apparent that the drafting of the charges to which he pleaded guilty was defective, in that two of them referred to the SHPO as having been made in North Northumbria Magistrates' Court rather than Newcastle Crown Court, and the dates stated in the charge relating to the accessing of social media sites in breach of the order were incorrect. The case proceeded to sentence in the Crown Court without these errors being noted or corrected.
11. In passing sentence at Durham Crown Court on 5 February 2021 the judge noted that the appellant's offending on this occasion was persistent and very serious. He concluded that the offences, in particular, the offences relating to breach of the SHPO fell within category 2 harm, as there was a clear risk of harm and therefore the starting point for each of the offences was 2 years. The appellant's previous convictions were an aggravating feature. In totality the judge concluded that after trial the aggregate sentence for all of the offences would be a sentence of four-and-a-half years' imprisonment. He needed to give credit for the appellant's pleas and so he reduced that overall sentence to 3 years and

structured it by imposing a sentence of 3 years' imprisonment on the third charge related to notification requirements and 18 months concurrent on the other charges in relation to the breach of the SHPO all to be served concurrently. The judge then stated that he was discharging the existing SHPO and imposing a new one lasting for 10 years.

12. Following the exchanges between the parties and the Court of Appeal Office it appears that the grounds of appeal are, in brief, as follows. Firstly, the appellant contends that the 2018 SHPO was made without jurisdiction. Secondly, the appellant contends that the sentence imposed in 2021 was manifestly excessive, on the grounds that the judge failed to properly give the appellant credit for his plea, failed to take account of totality and failed to allow for the fact that the appellant would be serving his sentence during the Covid-19 pandemic. Thirdly, the appellant submits that the 2021 SHPO was made without jurisdiction and should be discharged.
13. In fact the issues to which the proceedings involving this appellant give rise are somewhat more complex and extensive than these grounds will suggest as will appear from the discussion below. It is necessary to address the issues in chronological order, starting with those which relate to the proceedings in 2018.
14. The first question which arises for consideration is whether the procedural steps taken in the Crown Court in 2018 to correct the errors in the charges which formed the committal of the matter were lawful. The potential perils of the Crown Court using section 66 of the 2003 Act were addressed by this Court in the recent case of R v Gould [2021] EWCA Crim 447. The Court concluded that section 66 of the 2003 Act enabled the judge of the Crown Court to sit as a Magistrates' Court and exercise any power that a Magistrates' Court could exercise. However, the power to sit as a Magistrates' Court, using section 66 of the 2003 Act, brings with it the responsibility of ensuring that any decisions which are taken when so sitting properly conform to the statutory constraints, requirements and rules governing procedure in the Magistrates' Court (see Gould at paragraphs 81-82 and 87-88).
15. When it emerges in the Crown Court that there are defects in the charges on the face of the committal, the first question to be considered is whether those defects are so fundamental that the committal is fatally flawed and therefore a nullity. If that is the case then the position will be that the matter has never, in truth, left the jurisdiction of the Magistrates' Court and the Crown Court has no jurisdiction. At that stage it is possible for the power under section 66 to be deployed and (sitting as a DJMC) for the Crown Court judge to take such steps as are open to a Magistrates' Court to rectify the matter (see Gould at paragraphs 80 and 87).
16. The question of whether the flaws in the charges are so fundamental as to render the committal of them a nullity will be determined applying the principles in R v Ashton, Draz and O'Reilly [2006] EWCA Crim 794 (paragraph 4) and R v Clarke & McDaid [2008] Cr App R 2 (paragraph 17) which are explained in the case of Gould at paragraphs 82-86.
17. It is important to observe that this is not the Crown Court exercising some proxy form of quashing of the committal which it has no power to perform (see Gould at paragraph 94 and following) but rather simply the recognition of an error which could have occurred to the Magistrates' Court and been corrected by them, and which is in this scenario being corrected by the Crown Court judge, sitting as a Magistrates' Court, pursuant to section 66 of the 2003 Act.

18. It is necessary to examine each of the charges which were the subject of 2018 committal separately against these principles. The flaws or errors in the first and second charge were fundamental to those charges and, in our view, rendered them bad on their face. In the first charge the facts averred in the charge, that the appellant remained 12 hours in the same house as a child, were not capable of amounting to the breach alleged, a breach of the SOPO. The same can be said of the second charge which alleged that the appellant was in breach of his notification requirements by accessing social networking sites. This was a factual allegation which could not put the appellant in breach of the notification requirements which were simply not engaged by what was alleged. We are in no doubt that the nature of the errors in these charges render their committal a nullity and that therefore they remained under the jurisdiction of the Magistrates' Court and never came within the Crown Court's jurisdiction.
19. So far as the third charge is concerned, it coherently charged a breach of the SOPO on the basis of alleged facts which were capable of amounting to such a breach. The only defect in the charge related to the dates on which the activity was alleged. In our view, this is a species of error which did not go to the root of the matter charged so as to render the committal of this charge a nullity. It was a minor, essentially typographical, error which was not so fundamental as to deprive the Crown Court of jurisdiction by rendering its committal unlawful. We are fortified in this conclusion by the parallels with the case of Mugenzi, one of the cases considered by this Court as part of the decision in Gould.
20. The next question is to examine the impact of these conclusions on the procedural decisions which were in fact taken in the present case at the sentencing hearing in 2018. In relation to the third charge the position is relatively straightforward. As a result of the conclusion we have reached the committal of the third charge to the Crown Court was valid and that charge was lawfully before the court for sentence. The process upon which the court embarked in relation to that charge involving sitting as DJMC and vacating the appellant's plea prior to inviting him to enter a further plea was entirely otiose and, in procedural terms, simply beating the air. The sentence imposed on that charge was as a consequence lawful.
21. Next it is necessary to examine the process which was adopted in respect of the first and second charge. This is more complex. Firstly, as a result of the consequence of the conclusion that the committal of these charges was a nullity, the jurisdiction in relation to them remained with the Magistrates' Court. The judge was entitled to sit as a DJMC using the power contained in section 66 of the 2003 Act and to rectify the flaws in the charges. However, as recorded above, the judge could only do so acting within the Magistrates' Court's established legal framework. In this case there are two potential difficulties with the approach which was taken by the judge whilst sitting as a DJMC. The first relates to the vacation of the pleas which had been entered earlier to the charges. As was noted in Gould at paragraph 110, the CPR provides for the vacating of a guilty plea but appears to assume that any such application will originate from a defendant and will require an application in writing. Ultimately at paragraph 112 the Court was prepared to accept that there was a common law power vested in the court to require a defendant to vacate a guilty plea if the interests of justice demanded it, albeit that the power should be exercised sparingly. We are satisfied that the judge in the present case was entitled, with the agreement of the parties, to elicit the vacation of the appellant's pleas to the first and second charges, to enable them to be corrected for the purposes of

enabling a lawful committal of them.

22. The second issue relates to the failure of the judge to adopt the procedure set out in relation to offences triable either way. Section 17A of the Magistrates' Courts Act 1980 affords important safeguards in relation to explaining to a defendant in ordinary language the process of election for trial and the potential for a committal for sentence in the event of a guilty plea. The process therefore concerns the consequences of the plea which is being entered. This procedure is mandatory and it is a requirement that it is undertaken in the presence of the defendant.
23. In the present case this requirement was not complied with. Does this failure affect the legality of the proceedings which were conducted by the judge sitting as a DJMC? The answer to this question is also to be found in Gould. At paragraph 106, Edis LJ noted that, if the charge was substantially the same as that upon which the defendant had been committed and the section 17A procedure had been properly followed when the defendant was first before the Magistrates' Court, that all the necessary safeguards would have been observed and will not have been undermined by the corrections required to the charges.
24. In the present case there is no suggestion that the section 17A procedure was not undertaken at the time when the appellant was first before the Magistrates' Court and albeit the charges were nullities in their form at that time the amended charges were in essence similar when properly reformulated. We do not consider that the omission to undertake the section 17A procedure was a flaw in the procedures adopted by the Crown Court in the particular circumstances of this case. In any event, even were we persuaded that it were necessary to reconstitute ourselves as a Divisional Court to address the failure to comply with the requirements of section 17A and to consider this point in the context of an application for judicial review, were we to have concluded that there had been an error of law in the proceedings, there is no doubt in this case that our view would have been that the outcome of the matter would have been substantially the same notwithstanding the error of law (see section 31(2)(a) of the Senior Courts Act 1981). In the result, we do not consider that there is any basis to interfere with the procedure before the Crown Court in 2018 and the sentences imposed must stand.
25. Different considerations apply to the judge's imposition of a SHPO on that occasion. It is common ground between the prosecution and the appellant that there was no jurisdiction to impose a SHPO in 2018. Pursuant to section 103A(2)(a)(i) of the Sexual Offences Act 2003, now contained in sections 343 to 347 of the Sentencing Act 2020, a SHPO can only be imposed when a person is convicted of an offence within schedule 3 or 5 of the 2003 Act. None of the offences of which the appellant was convicted are listed in those schedules and therefore there was no power to make the order. The impact of this conclusion on the convictions in 2021 is considered below.
26. The next question which arises is the impact of the errors noted above on the validity of the committal of the charges in 2021. As set out above, in one instance the error related to the dates in the charge which have been misrecorded. We are quite satisfied that this mistake was not such as to affect the validity of its committal or justify a conclusion that the charge was a nullity. It was properly committed and before the Crown Court. The error in the other two charges was the identification of the court which had made the SHPO which formed the basis of the allegations of breach. Again, we are quite unpersuaded that this misidentification was anything which calls into question the

validity of the charge. It was a matter which could have quite permissibly been ignored by agreement (see Gould at paragraph 160). In truth, that was what in fact happened.

27. This brings us to the next point which is the impact of any of those charges of the finding that there was no power to make the SHPO in 2018. Were the charges invalidated by the fact that they were based upon an unlawful order which there had been no power to make? This is not an altogether easy question but we have reached a clear conclusion. The consideration of issues of this kind has arisen previously, in particular in the recent decision of this Court in R v Kirby [2019] EWCA Crim 321. That case concerned a non-molestation order which had been erroneously granted by the High Court and which had then formed the basis of proceedings in the Crown Court. It was contended that the proceedings in the Crown Court were flawed on the basis that the order was made without jurisdiction. Giving the judgment of this Court, Singh LJ observed that:

    i. "... there is a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside."

28. In paragraphs 14-19 of his judgment Singh LJ rehearsed the long line of authority which endorses such an approach, including in particular the observations of Lord Diplock in his judgment in the Judicial Committee of the Privy Council in Isaac v Robertson [1985] AC 97, subsequently endorsed by the House of Lords in M v Home Office [1994] 1 AC 377.
29. In this case no application was made within time to the Crown Court to correct the error in relation to the imposition of the SHPO, nor was it appealed. The principle that the SHPO is to be obeyed unless and until set aside is *prima facie* engaged.
30. We have given consideration to the decision of this Court in the case of R v Beck [2003] EWCA Crim 2198; [2003] All ER D 471, in which this Court quashed the appellant's conviction for breach of a restraining order on the basis that it had not been within the powers of the Crown Court to make that order. It was submitted that the restraining should have been considered to be valid and of legal effect unless and until set aside. Mance LJ rejected that submission, observing that the principles in Isaacs v Robertson were of application to courts of unlimited jurisdiction and that the Crown Court was a court of limited jurisdiction and thus he considered the making of the order in the circumstances amounted to nothing. In the event there were additional reasons which the Court also relied upon to quash the conviction.
31. As Singh LJ pointed in his judgment in Kirby, there are many cases which do not appear to have been cited to the Court in Beck, in which the principle that a court order must be obeyed, unless and until it is set aside, has been applied to the orders of courts of limited jurisdiction. In the case of Johnson v Walton [1990] 1 FLR 350, the principle was applied to a non-molestation undertaking given in an order of the County Court. In particular, in the criminal jurisdiction the Divisional Court considered the principle in DPP v T [2006] EWCA 728, in the context of an Anti-social Behaviour Order and concluded that such an order was to be obeyed as enforceable unless and until it was set aside. The Court considered the effect of the decision of the House of Lords in the case of Boddington v British Transport Police [1999] 2 AC 143. That case concerned the question of whether the defendant to a charge brought under a byelaw was entitled to

raise as part of their defence that the byelaw, or an administrative decision made pursuant to it to was *ultra vires*. The House of Lords ruled that they could. The Divisional Court distinguished Boddington in reaching their decision for the following reasons:

i. "26. The validity or invalidity of a byelaw or an administrative decision falls to be determined in accordance with conventional public law principles by reference to the powers conferred by the enabling legislation. Their Lordships in *Boddington* affirmed the *ultra vires* doctrine as the essential basis of judicial review of such measures: see in particular per Lord Irvine of Lairg LC at 154-157; per Lord Browne-Wilkinson at 164A-C and per Lord Steyn at 171F-172A. The central point of dispute in Boddington was whether the issue of validity could be determined only by the Administrative Court in proceedings for judicial review or whether it was also within the jurisdiction of the magistrates' court to determine it when raised as a defence in criminal proceedings. In holding that the magistrates' court had such jurisdiction, their Lordships were strongly influenced by the fact that, if precluded from raising the issue as a defence in the magistrates' court, an individual might not otherwise have a fair opportunity to challenge the measure breach of which was alleged to constitute a criminal offence by him: see per Lord Irvine at 161D-162C and per Lord Steyn at 173C-F.

ii. 27. Very different considerations apply in the present context. First, the normal rule in relation to an order of the court is that it must be treated as valid and be obeyed unless and until it is set aside. Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside. Secondly, the person against whom an ASBO is made has a full opportunity to challenge that order on appeal or to apply to vary it: indeed, the respondent did appeal the order made against him in this case, though the matter was not pursued to a conclusion. Accordingly, in so far as any question does arise as to the validity of such an order, there is no obvious reason why the person against whom the order was made should be allowed to raise that issue as a defence in subsequent breach proceedings rather than by way of appeal against the original order. The policy consideration that influenced the finding in *[Boddington]* that the magistrates' court had jurisdiction to determine issues of validity of a byelaw or administrative decision is wholly absent when the issue is the validity of an order of the court."

32. Most recently the Supreme Court has considered these issues in the case of R (on the application) v Majera (formally SM Rwanda v Secretary of State for the Home Department) [2021] UKSC 46; [2021] 3 WLR 1075, a case which concerned a grant of bail which was determined to have been valid on its face but which was defective. The

kernel of the leading judgment of Lord Reed, with whom the other members of the Court agreed, was contained in the following paragraphs:

i. "44. It is a well established principle of our constitutional law that a court order must be obeyed unless and until it has been set aside or varied by the court (or, conceivably, overruled by legislation). The principle was authoritatively stated in *Chuck v Cremer* (1846) 1 Coop temp Cott 338; 47 ER 884, in terms which have been repeated time and again in later authorities. The case was one where the plaintiff's solicitor obtained an attachment against the defendant in default of a pleaded defence, disregarding a court order extending the period for filing the defence, which he considered to be a nullity. The order in question had been intended to give effect to an agreement between the parties, but had mistakenly allowed the defendant longer to file a defence than had been agreed. The Lord Chancellor, Lord Cottenham, set aside the attachment, and stated at pp 342-343:

ii. 'A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it … It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the Court that it might be discharged. As long as it existed it must not be disobeyed.'

iii. 45. Three important points can be taken from this passage. First, there is a legal duty to obey a court order which has not been set aside: 'it must not be disobeyed'. As the mandatory language makes clear, this is a rule of law, not merely a matter of good practice. Secondly, the rationale of according such authority to court orders, as explained in the second and third sentences, is what would now be described as the rule of law. As was said in *R (Evans) v Attorney General (Campaign for Freedom of Information intervening*) [2015] UKSC 21; [2015] AC 1787, para 52, 'subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive'. This principle was described (ibid) as 'fundamental to the rule of law'. Thirdly, as the Lord Chancellor made clear in *Chuck v Cremer*, the rule applies to orders which are

> 'null', as well as to orders which are merely irregular. Notwithstanding the paradox involved in this use of language, a court order which is 'null' must be obeyed unless and until it is set aside."

33. In the course of the review of the authorities the particular features of the case of Boddington related to its subject matter being a byelaw were noted by Lord Reed, along with the observations of the Divisional Court in T, leading to the Supreme Court also following their lead and distinguishing that case from the circumstances of the case before them. No distinction was drawn by the Supreme Court between orders from courts of limited and unlimited jurisdiction. An emphasis was placed on the wide range of jurisdictions in which it had been held that there was a need to obey orders unless and until they were set aside. The principle was related to the rule of law and of broad scope.
34. Drawing these threads together, the starting point is that in principle the SHPO which was made in the present case should be obeyed and is enforceable unless and until set aside. The issues that were raised in the case of Boddington do not arise in relation to the SHPO, the position is closer to that of the order considered in T. The SHPO was an order directed to the appellant and to which he was personally subject, and there were mechanisms available to him at the outset to question its validity which were not taken up. The case of Beck can be distinguished on the basis that it does not appear that the pertinent authorities dealing with the application of this principle to orders made by courts of limited jurisdiction were cited to the Court and it seems the argument in relation to the point was not the fulcrum of the Court's decision.
35. With the benefit of a full citation of authority and the opportunity to consider the point in depth, we are not persuaded that there is any distinction of principle to be drawn between the orders made by courts of unlimited or limited jurisdiction. The orders of both are to be obeyed unless and until set aside and they are capable of being enforced. The approach taken by this Court in Kirby is to be preferred. On this basis, the charges for breach of the 2018 SHPO laid in 2021 were not affected by the fact that the Crown Court did not have power to make the order at the time when it did so. The charges were valid and so were the convictions obtained in relation to them. The notification requirements placed on the appellant were based on the existence of the SHPO, and by the same reasoning they were valid and again capable of validly underpinning the charge laid for breach of them. As a result all of the appellant's 2021 convictions were valid.
36. The next question which arises is in relation to the sentences which were imposed in respect of the 2021 convictions. The appellant submits that the sentences were manifestly excessive on the basis that there was a failure to consider totality, a failure to reflect the appellant's plea of guilty at the earliest stage of the proceedings and no reflection of the difficulties which the appellant would experience in serving his sentence at the time of a worldwide pandemic.
37. We are unconvinced that there is any substance in any of these contentions. It is important to reflect upon the judge's sentencing remarks in passing sentence. It is clear that the judge had regard to the relevant Guidelines in addressing the starting point for, in particular, the more serious offences of the breach of the SHPO (see transcript page 2C).
38. This appellant has a history of persistently breaching the requirements of the court orders to which he has been made subject, and the risks of harm to children, given his earlier

convictions, is undeniable. Although the pre-sentence report recorded that the appellant had attended his appointments with the Probation Service regularly and participated in the courses which were required of him, in the light of the continued breaches of the restrictions to which he was subject, the author of the report noted that this was, in reality, a form of disguised compliance. It is notable that he was on licence at the time of these offences, following his release from prison for the earlier two breach offences related to the SHPO in 2019.

39. Whilst the judge did not specifically address the question of the prison conditions caused by the pandemic, bearing in mind the relatively lengthy sentence to be imposed, this was not a matter to which, in our view, any significant weight could be attached. The judge stepped back from an aggregation of the sentences under each of the charges and in so doing addressed the question of totality whilst at the same time recognising the obvious aggravating feature of the appellant's previous convictions. The sentence, after trial, of 4 years 6 months for these breaches was not one which, in our judgment, was inappropriate in the circumstances. The judge then applied a one-third discount to reflect the appellant's guilty plea, to arrive at an overall sentence of 3 years (see the transcript page 2G). This was not an outcome which was either manifestly excessive or wrong in principle and it was one which properly reflected all of the relevant considerations.
40. Finally, it is accepted on all sides that the judge did not have power to impose a SHPO in 2021 as the provisions of section 345 of the Sentencing Act 2020 were not engaged and so that order must be quashed. To that extent, and that extent only, this appeal succeeds.