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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 10 October 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

MRS JUSTICE CUTTS DBE

R E G I N A
v

JAKE ANTHONY WHITHAM

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Mr F Edusei appeared on behalf of the **Appellant**

Mr T Savage appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: The appellant pleaded guilty, on the day fixed for his trial, to a number of offences against his former partner, Ms Goodwin, and her mother, Ms Carnall. He was sentenced to terms of imprisonment which, together with the activation of a suspended sentence, amounted in total to 43 months. He appeals against his total sentence by leave of the single judge.

2. The appellant began a relationship with Ms Goodwin in January 2018. For a short time, all was well between them. In April 2018 he committed an offence of driving whilst disqualified. Around that time, he began to behave abusively towards Ms Goodwin. In August 2018 he committed an offence contrary to sections 2 and 4 of the Criminal Damage Act 1971, by making a threat to Ms Carnall that he would burn down her home. In September 2018 he committed an offence of common assault against Ms Goodwin. On 23 October 2018 he was dealt with by a magistrates' court for those three offences. A suspended sentence order was made comprising a total of 18 weeks' imprisonment suspended for 12 months with rehabilitation activity and unpaid work requirements. The total of 18 weeks comprised 6 weeks for the offence against Ms Carnall, 12 weeks consecutive for the offence against Ms Goodwin and 8 weeks concurrent for the disqualified driving. The magistrates' court also made a restraining order prohibiting the appellant from contacting Ms Goodwin directly or indirectly and from entering the property.

3. Despite that order, the appellant in November 2018 persuaded Ms Goodwin that he had changed for the better, and she allowed him to move back in with her. Once again, within a short time the appellant's behaviour towards her became abusive.

4. On 13 December 2018 Ms Goodwin went to her mother's house and asked to stay for a few days. Ms Carnall received a series of text messages from the appellant which were threatening and abusive towards both her and her daughter.

5. On the morning of 22 December 2018 the appellant and Ms Goodwin argued. He ordered her not to leave the bedroom. She was frightened, and texted her mother, asking her to visit. Ms Carnall contacted the police, who in turn contacted Ms Goodwin. However, with the appellant sitting beside her, and in fear of the consequences if she told the truth, she told the police that she did not need any help. After the call had ended, the appellant smashed her expensive mobile phone. He punched a hole into the bedroom door, threw a stool at Ms Goodwin causing bruising, and hit her across the face with the back of his hand causing a swollen lip. He told her to lie down and when she refused he seized her by the throat and pinned her to the floor. She managed to placate him, but for the rest of the day he continued to intimidate her by shouting at her. When she asked later in the day why he had wanted to lie down, he said it was because he had wanted to kill her. Unsurprisingly, Ms Goodwin was very frightened and did not feel able to report the matter to the police.

6. On 31 December, a day when Ms Goodwin's 7-year-old niece was staying in the flat (albeit she was not a witness to the events), the appellant told Ms Goodwin that she was not to leave the flat. When Ms Goodwin objected, he grabbed her and pushed her into a wall. He eventually permitted her to leave the flat but required her to surrender her keys before she did so. He gave her a mobile phone which had no credit on it, so that she could not make any calls, and rang her repeatedly throughout the day to ask where she was and who she was with. She was in fact with her mother.

7. This course of conduct was charged in count 1 of indictment T20190042 (to which we shall refer for convenience as "count 1") as an offence of controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 of the Serious Crime Act 2015.

8. As we have said, Ms Goodwin went on 31 December to join her mother. Having learned what had happened earlier that day, Ms Carnall set off to see the appellant. Before she got there, she received a call from him in which he threatened to batter her. She reported this to the police, who told her not to go to the appellant's address. Ms Carnall and Ms Goodwin then attended a police station to report matters. Whilst they were doing so, the appellant - using a mobile phone which he had confiscated from Ms Goodwin - sent to Ms Carnall a photograph of a burning flat. He followed that up with a series of over 60 messages to the effect that he had done nothing wrong. He used abusive language towards Ms Carnall, said that he was on his way to her house and would see her soon, and referred to both women as "dirty grasses", saying that Ms Goodwin had been warned what would happen next time. Ms Goodwin resorted to leaving the area for a time.

9. The appellant's conduct towards Ms Carnall was charged in count 4 of indictment T20190042 ("count 4") as an offence of putting a person in fear of violence by harassment, contrary to section 4 of the Protection from Harassment Act 1997.

10. The appellant was arrested on 3 January 2019. He became argumentative and aggressive with the two female officers who were dealing with him. His behaviour was such that other officers had to intervene. In the course of a struggle, one officer sustained an injury to his forehead. In relation to this incident, which was charged in count 2 of indictment T20190046 ("count 2"), the appellant ultimately pleaded guilty to an offence of using threatening behaviour with intent to cause fear of violence, contrary to section 4 of the Public Order Act 1986.

11. When interviewed under caution, the appellant denied all the offences, saying that he had not left the hostel at which he was living and had neither contacted nor visited either Ms Goodwin or Ms Carnall.

12. Counts 1 and 4 were listed for trial, together with other charges, on 20 June 2019. The appellant pleaded guilty to them, and entered an acceptable plea to an alternative offence in relation to count 2.

13. He was sentenced on 27 June 2019 by His Honour Judge Dixon. No pre-sentence report was thought to be necessary, it being conceded that immediate imprisonment was inevitable, and we are satisfied that no report is necessary at this stage.

14. The appellant was 24 at the time of these offences. He is now 25. He had been sentenced on 13 previous occasions for a total of 19 offences including offences of robbery, violence and damage.

15. Ms Goodwin had made a victim personal statement on 20 June 2019 indicating that since these offences she had suffered with anxiety and depression. She had felt suicidal, and in February 2019 had self-harmed. She had lost her self-confidence, did not trust anyone, suffered from nightmares about the appellant and had isolated herself within her home because she feared being hurt again. She had recently been signed off work sick. She had received counselling for her depression, and was prescribed medication for that depression. She did not feel safe at her present home, was constantly in fear of what might happen, felt she must move home and was worried that the offending would impact on her life forever.

16. The judge in his sentencing remarks observed that the appellant's behaviour showed that he had "a real problem with women" and resorted to the threat or use of violence if his wishes were not obeyed by a woman. The judge further observed that the appellant had taken no notice of the warning given to him by the suspended sentence order. He urged the appellant to use his time in custody to seek help with his problem, commenting that if he did not do so, the appellant was on course to become a dangerous offender. We respectfully agree with each of those observations.

17. Having considered submissions as to the appropriate categorisation of the offences, under the relevant Definitive Sentencing Guidelines, and having indicated that the guideline starting points must be increased to reflect the appellant's previous convictions, the judge concluded that the appropriate sentence on count 1, after trial, would have been 30 months' imprisonment. He reduced that to 27 months to give credit for the late guilty plea. The appropriate sentence after trial on count 4 would have been 15 months' imprisonment. The judge reduced that to 12 months because of the guilty plea, and ordered it to run consecutively to the sentence on count 1. He imposed a further consecutive sentence of 1 month's imprisonment on count 2, indicating that he had reduced that sentence in the interests of totality. He said, in relation to the suspended sentence, "that 3 months will be activated in full". Thus the total sentence was 43 months' imprisonment.

18. With respect to the judge, it appears that he fell into error in relation to the suspended sentence. It is not clear whether, in saying that he was activating in full "that 3 months", he was purporting to activate only the suspended sentence of 12 weeks' imprisonment in relation to the common assault on Ms Goodwin, or whether he had overlooked or misunderstood the fact that the suspended sentence order related to three separate offences, with a total term of 18 weeks' imprisonment. Be that as it may, the legal position is clear. When the magistrates' court dealt with those three offences on 23 October 2018, it imposed what was in law a single custodial term of 18 weeks' imprisonment, suspended for 12 months. It is not permissible for a subsequent court, dealing with offending in breach of the suspended sentence order, to activate only one of the individual sentences which collectively constitute the single term of imprisonment which is suspended. This is clear from the decision of this court in R v Bostan [2018] EWCA Crim 494; [2018] 2 Cr App R(S) 15. The factual situation in that case was different from the present, but we agree with prosecuting counsel Mr Savage that the principle applies in the present case. The consequence is that the order made by the judge in relation to the suspended sentence must, in law, be treated as the activation of the total term, but with its length reduced from 18 weeks to 12 weeks. It further follows that the record must be corrected to show the correct position.

19. We are, as always, grateful for the vigilance of the lawyers in the Criminal Appeals Office, who identified this error and arranged for submissions to be made about it by counsel on both sides. We are also grateful both to Mr Savage and to Mr Edusei, who represents the appellant today as he did below, for their submissions on the point.

20. The grounds of appeal advanced by Mr Edusei in helpfully focused submissions are that the total sentence was manifestly excessive. In particular, it is submitted that the judge was wrong to impose consecutive sentences in respect of counts 1 and 4, because the relevant events occurred "more or less concurrently" and there was at no stage any physical confrontation between the appellant and Ms Carnall. It is further submitted that the judge took starting points which were too high in all the circumstances of the case and that he failed to make an appropriate reduction for the guilty plea. Finally, it is submitted that insufficient consideration was given to the principle of totality.

21. In developing these submissions Mr Edusei particularly focused upon the consecutive term of 12 months' imprisonment imposed on count 4. He acknowledges that the offence might have been categorised as 2B rather than 2C under the relevant guideline but says that in all the circumstances the judge took too high a notional sentence after trial. Moreover, submits Mr Edusei, count 4 might properly have been dealt with by a concurrent rather than a consecutive sentence. If that submission be incorrect, Mr Edusei submits that nonetheless the total sentence became manifestly excessive.

22. In his response to the oral submissions Mr Savage draws attention to the fact that the category 2B category range for the offence charged in count 4 carries a range which goes up to 18 months' custody. Thus, submits Mr Savage, the judge passed a sentence which was within the category range and was entitled to go above the guideline starting point, both because of the appellant's previous convictions and because of the serious aggravating feature of sending Ms Carnall a picture of a burning flat.

23. We have reflected upon these submissions. Notwithstanding the care with which Mr Edusei has presented the appellant's case, we are quite unable to accept his submissions. This was serious offending by the appellant, who took no notice of either the suspended sentence order, imposed in large part for offences against the same victims, or the restraining order, specifically designed to protect the victims. It is apparent from Ms Goodwin's personal statement that the harm caused to her has been serious. A substantial total sentence was, in our view, inevitable. The guidelines applicable to the offences charged in counts 1 and 4 both make clear that where the offence is committed in a domestic context (as it was here) the court should also refer to the guidelines setting out Overarching Principles in cases of domestic abuse. One of those overarching principles, set out in paragraph 7 of the guideline, is that:

    i. "The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship."

24. Of course, a judge dealing with matters of this nature must be careful to avoid unfair double counting. But the domestic context in which the offences against Ms Goodwin were committed is a relevant aggravating factor.

25. In our judgment, the offence in count 1 fell within category 1B of the relevant guideline, for which there is a starting point of 1 year's custody and a range from 26 weeks to 2 years 6 months. The judge was plainly entitled to move to the top of that range having regard to the circumstances of the offending, the harm caused, the appellant's relevant previous convictions and the commission of the offence in breach both of the suspended sentence order and the restraining order. Count 4 was an offence which, in our judgment, fell within category 2B of the applicable guideline, with a starting point of 36 weeks' imprisonment and a range from 12 weeks to 18 months. Again, the judge was entitled in the circumstances of this case to move to a point high in the range. There was no error of principle in ordering that sentence to run consecutively to the sentence in count 1, but in any event the court's focus at this stage must be on the total sentence rather than its structure. Even if concurrent sentences had been imposed, the overall length would still have had to reflect the overall seriousness of the offending. The judge plainly had totality well in mind when he imposed a consecutive sentence of only 1 month's imprisonment for the offence charged in count 2. The judge was correct to activate the suspended sentence, and for the reason which we have given he made an error in the appellant's favour when he made an order which had the effect of ordering the suspended sentence to take effect with the total term reduced in length.

26. We are therefore satisfied that the total sentence was neither wrong in principle nor manifestly excessive in length. The appeal against sentence accordingly fails and is dismissed. We direct that the record of proceedings in the Crown Court be corrected to make clear that the suspended sentence of 18 weeks' imprisonment was activated consecutively to the other sentences but reduced in length to 12 weeks.