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IN THE COURT OF APPEAL  
CRIMINAL DIVISION

Case No: 2021/02453/A3

[2021] EWCA Crim 2014



Royal Courts of Justice  
The Strand  
London  
WC2A 2LL

Tuesday 21<sup>st</sup> December 2021

LADY JUSTICE MACUR DBE

MRS JUSTICE FARBEY DBE

MR JUSTICE WALL

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**REGINA**

**- v -**

**WILLIAM LANDER**

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**Miss Z Chapman** on behalf of the Appellant

**Miss C Fern** appeared on behalf of the Crown

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**JUDGMENT**

Tuesday 21<sup>st</sup> December 2021

**LADY JUSTICE MACUR:** I shall ask Mrs Justice Farbey to give the judgment of the court.

**MRS JUSTICE FARBEY:**

**Background**

1. The appellant (now aged 51) appeals against sentence by leave of the single judge. On 26<sup>th</sup> July 2021, in the Crown Court at Snaresbrook, he was sentenced by Mr Recorder K King to eight months' imprisonment on one charge of intentionally causing harassment, alarm or distress which was racially aggravated, contrary to section 31(1)(b) of the Crime and Disorder Act 1998. He had pleaded guilty in the Magistrates' Court and had been committed to the Crown Court for sentence. We shall refer to this offence as "charge 1".
2. According to the Memorandum of Committal, the magistrates at the same time purported to commit the appellant for sentence on two charges of breach of a Criminal Behaviour Order ("CBO"), contrary to section 339 of the Sentencing Act 2020. Whether or not the appellant had pleaded guilty to the breaches is not clear from the muddled paperwork we have seen.
3. From the assistance we have been given by the Criminal Appeal Office, we understand that these two charges related to breach of an Anti-Social Behaviour Order ("ASBO") imposed by magistrates on 4<sup>th</sup> April 2011. Neither of these charges as drawn in the Memorandum referred to any breach of either a CBO or an ASBO. The charges in the form committed were drawn in such a way that they failed to describe offences known to law.
4. It appears that the original charge sheet signed by the appellant referred to one breach offence, which we shall call "charge 2". We have also seen an informal document purporting to charge a further breach of the ASBO, which we shall call "charge 3". The legal status of that informal document is at best dubious.
5. There is conflicting information as to whether the Recorder considered all three charges, or whether one of the charges for breach of the ASBO was somehow sent back to the magistrates. The Recorder's brief sentencing remarks show that he imposed a sentence of 16 months' imprisonment for breach of the ASBO but, regrettably, his remarks do not make clear whether the sentence related to charge 2 or charge 3 or both (in whatever way they may have been formulated before him).
6. Further, by committing the offence that was the subject of charge 1, the appellant was in breach of what counsel told us were suspended sentence orders imposed on 29<sup>th</sup> April 2021 in relation to seven different offences as follows:<sup>1</sup>
  - i. for the offence of intentional harassment, alarm or distress with racial aggravation, six weeks' imprisonment suspended for 18 months;
  - ii. for the offence of assault of an emergency worker, eight weeks' imprisonment

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<sup>1</sup> See however the Addendum below.

- suspended for 18 months;
  - iii. for the offence of battery, six weeks' imprisonment suspended for 18 months;
  - iv. for breach of the ASBO, four weeks' imprisonment suspended for 18 months;
  - v. for a further breach of the ASBO, four weeks' imprisonment suspended for 18 months;
  - vi. for a further offence of assault of an emergency worker, four weeks' imprisonment suspended for 18 months;
  - vii. for a further offence of battery, four weeks' imprisonment suspended for 18 months.
7. Those sentences had been imposed consecutively so that (on the basis of what the parties told us) the total sentence had been 36 weeks' imprisonment suspended for 18 months. For reasons which are not clear to us, the Recorder treated the various sentences as being a single sentence of 36 weeks. He purported to activate 29 weeks to reflect a reduction for totality and for 14 days spent on an electronically monitored curfew. The sentence on charge 1 was ordered to run concurrently with the sentence for charge 2. The activation of the suspended sentence was ordered to run consecutively so that the total sentence imposed by the Recorder was 16 months and 29 weeks' imprisonment.

### **Grounds of Appeal**

8. In her Grounds of Appeal Miss Zoe Chapman, who appears before us as she appeared below, submitted that the sentences imposed for breach of the ASBO and for the charge 1 offence were manifestly excessive both when viewed individually and when applying the principle of totality. The single judge could find nothing arguably wrong with the sentence of eight months' imprisonment on charge 1, and noted that the activation of the suspended sentence order was not challenged. He granted leave solely on the ground that it was arguable that the breach of the ASBO should not have been placed in category 1A of the relevant sentencing guideline.
9. Following the single judge's decision, the Registrar of Criminal Appeals sought the parties' comments on a number of legal issues. We are grateful to the Registrar and the court lawyer for directing our attention to questions of law that were not considered by either of the parties below or by the appellant's lawyers when making an application for leave to appeal to this court. It was the duty of both parties to assist the Recorder and to direct him to the relevant legal provisions. It was the duty of the appellant's lawyers to provide legally sound grounds of appeal. We are bound to express some surprise that the parties did not consider a number of significant matters before they were pointed out by the court lawyer. It is a notable feature of this appeal that the grounds of appeal have become redundant.
10. It is convenient to set out our views on all three aspects of the Recorder's sentence in turn.

### **Charge 1: Racial Harassment**

11. We start with the sentence of eight months' imprisonment imposed on charge 1. On 12<sup>th</sup> May 2021 the police came across the appellant drunk in the middle of the road. At the time, the appellant was subject to an indefinite ASBO which, among other things, prohibited him from using "in any public place threatening, abusive or racially abusive words or behaviour not directed to anyone in the same household". Initially the police tried to help him. They pulled him out of the road and took him to hospital.
12. Just before they arrived at the hospital the appellant started to be abusive, using the word

"cunt" and threatening and swearing at the officers. He threatened to headbutt one of the officers. When they got into the hospital, and in the presence of members of the public in the waiting area, the appellant threatened to spit and had to have a spit hood put on him. While handcuffed to a wheelchair he made a number of racially offensive remarks. We have watched and listened to the footage of part of the incident. It is plain to hear that he repeatedly called the officer looking after him a "Paki cunt". Members of the public appeared – unsurprisingly - shocked by his language. In addition, the appellant was also singing "Go home, go home" and then repeatedly used the "N" word.

13. We can express our view of the appellant's conduct no more clearly than to cite the judgment of the court in *R v Saunders* [2002] Cr App R(S) 71, 74-75:

"... [R]acism must not be allowed to flourish. The message must be received and understood in every corner of our society, in our streets and prisons, in the services, in the workplace, on public transport, in our hospitals, public houses and clubs, that racism is evil. It cannot co-exist with fairness and justice. It is incompatible with democratic civilisation. The courts must do all they can, in accordance with Parliament's ... intention, to convey that message clearly by the sentences which they pass in relation to racially aggravated offences."

14. In our judgment the single judge was correct to regard the challenge to the sentence of eight month's imprisonment as unarguable. We would go further and say that it would have been hopeless. This ground was not renewed before us today. Neither the principle of totality nor anything else would enable us to interfere.

### **Charges 2 and 3: Breach of the ASBO**

15. Both parties now agree that changes in the relevant statutory framework governing ASBOs meant that neither the magistrates nor the Recorder had jurisdiction to deal with the breaches of the ASBO that were before them. The ASBO was not imposed following a conviction for a criminal offence, but was freestanding in that it had been made by way of complaint to the Magistrates' Court.
16. By virtue of provisions of the Anti-Social Behaviour Crime and Policing Act 2014 and associated transitional provisions, the breach of a post-conviction ASBO fell to be treated as a breach of a CBO, punishable as a criminal offence. However, the breach of a free-standing ASBO, such as in the present case, fell to be treated as a breach of an injunction and not as an offence. Any breaches of the appellant's ASBO were outside the reach of the criminal law. The breaches of the ASBO set out in the paperwork before us could not amount to a criminal offence and should not have been charged. Irrespective of whether it was imposed for charge 2 or charge 3 or both, the sentence of 16 months' imprisonment was unlawful and cannot stand. We will return to the appropriate remedy below.

### **Breach of the Suspended Sentence Orders**

17. As we have mentioned, the 36 week period which formed the starting point for the Recorder's consecutive sentence related to the overall sentence imposed by magistrates on 29<sup>th</sup> April 2021. On that date magistrates had imposed a number of short consecutive sentences which we were told amounted in total to 36 weeks' imprisonment. Regrettably, as we have set out above, two of those sentences were unlawful because they concerned breaches of the ASBO.

18. Although the Grounds of Appeal do not challenge it, we have decided, in the interests of justice, to quash the Recorder's imposition of 29 weeks' imprisonment and to substitute 21 weeks to reflect (i) the fact that eight weeks of the total period considered by the Recorder was attributable to two breaches of the ASBO at a point in time when those breaches could not have been prosecuted as a criminal offence; (ii) a reduction of one week to reflect time spent on curfew under the suspended sentence orders; and (iii) the need to avoid dealing with the appellant more severely on appeal than he was dealt with by the court below.
19. We have concluded that 21 weeks reflects these various factors. The 21 weeks will be structured as follows: for the offence of intentional harassment, alarm or distress with racial aggravation, we activate the full six weeks; for the offence of the assault of an emergency worker, we activate the full eight weeks; for the offence of battery, we activate three weeks; for the offence of assault of an emergency worker, we activate three weeks. For the offence of battery, we activate one week. To this extent, the appeal is allowed.

### **Judicial Review of Other Matters**

20. In order to deal with legal errors made by the magistrates, over which the Court of Appeal has no jurisdiction, we reconstitute ourselves as a Divisional Court. We waive all procedural requirements of CPR Part 54 and grant permission to apply for judicial review.
21. We quash the following: (a) the appellant's guilty pleas to charges 2 and 3 (however they were worded and whether the appellant pleaded guilty in the Magistrates' Court or the Crown Court); (b) the committals for sentence of such charges by the magistrates; (c) any remittal of charge 2 and any amendment to charge 3 by the Crown Court; and (d) the sentence or sentences imposed on one or both of those charges in the Crown Court.

### **Conclusion**

22. In summary, the appellant will serve eight months' imprisonment for the charge 1 offence and 21 weeks' imprisonment consecutively for the breaches of the suspended sentence orders. His total sentence, therefore, becomes one of eight months' and 21 weeks' imprisonment. Should the appellant seek to have quashed any other unlawful convictions for breach of his ASBO, he should make an appropriate application to the Administrative Court.
23. We again express our gratitude to the Court of Appeal lawyer, whose assistance has been considerable.

### **ADDENDUM:**

24. After the court had delivered its judgment and turned to other matters in its list, both parties returned to court to inform us that, upon further consulting the court lawyer, the total of the suspended sentence orders lawfully imposed in the Magistrates' Court amounted to only 22 weeks: not only were the two ASBO-related sentences unlawful but also the two offences of battery to which we have referred should not have been recorded against the appellant. We considered this information but, as we announced in court, we see no reason to change our mind. The sentence we have now imposed is just and proportionate.

25. The 21 weeks which we have ordered will be restructured as follows: for the offence of intentional harassment, alarm or distress with racial aggravation, we activate the full six weeks; for the offence of the assault of an emergency worker, we activate the full eight weeks; for the further offence of assault of an emergency worker, the parties now agree that the sentence was eight weeks' imprisonment suspended for 18 months of which seven weeks will be activated.

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**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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