IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/01966/A3
[2022] EWCA Crim 1042

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 15th July 2022

B e f o r e:

LADY JUSTICE CARR DBE

MR JUSTICE FRASER

SIR NIGEL DAVIS

R E G I N A

- v -

JAMES MICHAEL TIERNEY

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Mr O Osman appeared on behalf of the Appellant

Mr K Talbot QC appeared on behalf of the Crown

J U D G M E N T

Friday 15th July 2022

LADY JUSTICE CARR: I shall ask Mr Justice Fraser to give the judgment of the court.

MR JUSTICE FRASER:

1. This is an appeal against sentence whereby the appellant, James Tierney, was committed to prison for seven months for contempt of court after four breaches of an order. The sentence was imposed by His Honour Judge Rochford in the Crown Court at Birmingham on 27th May 2022. An appeal against such a sentence can be brought by a contemnor as of right, with no need for prior permission from a single judge. This is, therefore, the full appeal against sentence. We are grateful to Mr Osman, who has appeared before us on behalf of the appellant, and to Mr Talbot QC for the respondent. We have also had the benefit of their written submissions, including a Respondent's Notice.

2. The order was imposed for four breaches of a Restraint and Disclosure Order (the "RD Order") which had been made against the appellant and four others on 21st June 2021, pursuant to section 41 of the Proceeds of Crime Act 2002. We are concerned with the order only in so far as it affects the appellant.

3. The nature of the underlying allegations that founded the RD Order do not need to be addressed in any great detail. They essentially concern fraud and the unlawful distribution of funds that were obtained from a particular individual called Mr Iannacio.

4. The underlying subject matter was that the sum of US$ 2 million had been advanced from Mr and Mrs Hassenfeld to Mr Iannacio (who is their nephew), and it is said that Mr Iannacio was defrauded of that sum by the appellant, together with others. The appellant was also said to have defrauded one Dr Wietzke of a sizeable sum of Euros, also measured in the millions. There is also a summary judgment in a civil claim relating to fraud of two Swiss companies of the total sum of 1.4 million Euros.

5. The trial in relation to the criminal matters in what is a private prosecution which is being brought by Mr and Mrs Hassenfeld will be held in 2024 in Birmingham.

6. An RD Order generally prevents a person who is subject to such an order from dissipating or otherwise using assets that are in their possession that may be proceeds of criminal activity. The purpose of them is to preserve those assets so that, should events transpire in that way and it is proved to the necessary standard, those assets can be recovered, and so that wrongdoers do not profit from criminal activity. Such orders are the equivalent in the criminal jurisdiction of what in civil litigation are now called "freezing orders" and what used to be called "Mareva injunctions". In the instant case the RD Order, as is usual, was endorsed with a penal notice in which, in the usual stark terms, it was made expressly clear to the appellant (and all who were subject to the order) that he would be subject to sanction, including imprisonment for breach of any of the terms of the order, and that any such breach would be a contempt of court. This was a worldwide RD Order which restrained the appellant's assets worldwide and required him to make disclosure of them, including bank accounts and for particular transactions he had undertaken to be explained in a witness statement. A statement of assets was also required. The order was served upon him personally and by email.

7. In January 2022 the prosecution filed an application for the appellant to be committed to prison for contempt on the basis that he had disobeyed the RD Order. It was alleged that there had been four breaches. Breaches 1 to 3 were that after the order had been made, he dealt with a Monzo bank account by making 53 different withdrawals, which he had failed to disclose, and the account itself was not identified in either his witness statement or list of assets. The

fourth breach was that he had failed to disclose the particulars of three transfers that had been made in July 2019. These were for the sums of £50,000, £50,000 and £31,750 – in aggregate £131,750.

8. The first three breaches were admitted by the appellant; and although the fourth was admitted, the basis upon which that activity had been carried out by the appellant was challenged by the prosecution. Ultimately, his account was explored at a hearing and not accepted by the court. A ruling was provided.

9. The appellant had filed witness statements dated 4th March and 18th March 2022 in respect of that hearing, and the application was heard initially on 22nd April. Evidence was heard from him. The matter was then adjourned. The appellant asked to file a further witness statement and exhibits in support of his case. He filed further witness statements dated both 5th and 6th May, and the hearing resumed on 17th May, when he gave further evidence. In total, therefore, there were four witness statements from him, and the appellant gave oral evidence on two different days.

10. In the detailed ruling, the judge found that the fourth breach was made out and that the appellant was an unreliable witness. He said that these were "flagrant breaches". He rejected the accounts given to him by the appellant for the fourth breach and explained that the account or explanation from the appellant for the breach had changed over time. He sentenced the appellant to concurrent terms of four months' imprisonment on each of the first three breaches, having reduced those sentences from six months down to four to reflect the discount available for the guilty pleas. For the fourth breach, which involved, as we have explained, transfers of over £130,000, the judge said that this was less serious in that it did not involve the appellant deliberately setting in train a sequence of events to enable continued disobedience, but that there would be no reduction for any admission, as he had contested the basis upon which he had been found to be in breach. This approach to a contested guilty plea is consistent with principle. The judge found that the breach was made out on the basis of his account to the court being a lie. The appropriate sentence was one of three months' imprisonment, which resulted in a total term of seven months' imprisonment, as the sentence would be served consecutively to the concurrent sentences for the first three breaches. The total sentence, therefore, was one of seven months' imprisonment.

11. We can deal with the facts very briefly. The first three breaches, as we have explained, related to secretly setting up and then not disclosing the Monzo account, all of which was in breach of the RD Order. The fourth breach related to the failure to reveal the truth behind the three payments totalling £131,000, which were initially said to have been made to assist somebody else in the purchase of a football academy. The appellant's story changed over the course of his evidence on this count. He gave evidence that he had now complied with the order in respect of the fourth breach, but the judge had ruled that he had not. His initial failure to give any explanation for this at all, which the appellant had originally claimed was on legal advice – an explanation which he later abandoned – was compounded by a failure to give a true explanation.

12. The purpose of sentencing in a case such as this, as recognised by the judge, is to uphold the authority of the court and to encourage others to comply with court orders. It does that by punishing those who act in contempt. Sentencing for such offences also provides an incentive for someone in contempt to remedy his contempt. We repeat the importance that those who are subject to orders such as these must comply with them in all respects. A penal notice on any court order is present in order to make it abundantly clear to those subject to such orders what the potential consequences of ignoring it, or flouting its terms, will be. That warning is set out in black and white on the face of the order, front and centre on page 1. There can be no

reason in a law-abiding society for those who are subject to such orders to disobey them. If they do, custodial sentences can be expected. Orders of the court are made to be complied with. They are not mere suggestions.

13. The maximum sentence for contempt of court is two years' imprisonment. The judge found that these offences were so serious that only a custodial sentence could be justified.

14. Although there are no guidelines for contempt of court, the judge was referred at the sentencing hearing, as we have been, to a number of cases. Some of these arise in the civil sphere in the sense that contempt often or sometimes arises in the context of breach of freezing orders, rather than Restraint and Disclosure Orders. However, the general approach of the court is the same. The cases make it clear that such instances are all fact specific and provide some general guidance on the nature of sentences imposed by other courts in other cases.

15. The judge had regard to the cases to which he had been referred, together with the relevant sentencing guidelines, including those giving credit for guilty pleas and those for community and custodial sentences. He also expressly considered whether he could properly suspend the sentence or sentences. He concluded that he could not, and that the breaches were such that immediate custody was called for. He considered that essentially there were two separate classes of breach: those relating to the Monzo account (breaches 1 to 3); and the non-disclosure. These were flagrant and deliberate breaches, rather than being the result of carelessness or oversight, but the judge accepted that they were not designed to get around the order in the sense of spiriting money away to avoid it being recovered later under the Proceeds of Crime Act. However, he found that there was every chance that the appellant would try to avoid court orders again if he thought he could get away with it.

16. The judge considered all of the relevant factors and expressly balanced those factors. As we have observed, he found that the appropriate punishment could only be achieved by a sentence of immediate custody. Given the fact that the substantive trial would not take place until 2024, the appellant would still have ample opportunity to prepare for that trial, notwithstanding a period in custody that would be, given the release at the halfway point, one of three and a half months. The judge therefore did not reduce the sentence to reflect the pending trial.

17. The judge took account of all of the assorted personal mitigation available to the appellant, and also bore in mind difficult prison conditions arising from the Covid pandemic. He also had regard to the principle of totality.

18. We should record that in terms of mitigation, this court has been provided with an updated position in an unsigned witness statement from Christina Tierney (the appellant's wife) explaining the impact on the family of his imprisonment. Although it is unsigned, Mr Osman has addressed us on it and we have taken its contents fully into account.

19. The grounds of appeal are, in summary, as follows. First, it is said to have been wrong to impose consecutive sentences, which we take to mean, as expressed in paragraph 7(i) of the Advice and Grounds of Appeal, that it was wrong in principle to do so. It is also said in paragraph 7(ii) of the Advice and Grounds that, given the judge's categorisation of the fourth breach as being less serious, to have ordered it to run consecutively breached the totality principle. It is said both that the sentences of four months' imprisonment were manifestly excessive in themselves in any event, and also that any total sentence ought not to have been longer than four months' imprisonment. In all the circumstances it is said that the sentences are too long, and that a shorter sentence could still have marked the gravity of the offending and been regarded as deterrent. It is also argued that the sentences could, and indeed should,

have been suspended.

20. It also appears in the written grounds to have been argued on behalf of the appellant that there ought to be, potentially, a different approach required because the underlying offences are proceeding by way of private prosecution. To be fair to Mr Osman, he has not advanced that in any appreciable respect in his oral submissions, and we do not in any event accept that there is any different principle.

21. There is an order from the court in all circumstances where applications for committal for contempt arise. The fact that the proceedings were private prosecutions which have led to the order is, in our judgment, not relevant.

22. We have also had the benefit of a Respondent's Notice, as we have observed.

23. We emphasise the advantage the sentencing judge had in this case, compared to this court, which is a court of review and not rehearing. The judge saw the appellant give evidence. He heard and saw him be cross-examined. He was ideally placed to take a view of the facts of the offending, the appellant's motivation and intentions, and the gravity of the offending.

24. Contempt of court and breaches of orders such as these are highly fact specific. There is no one size fits all approach to such sentences. It is correct to observe that in a number of the cases both before this court and the sentencing judge, it is possible to find different cases on their own different facts, with different sentences of different lengths, all of which relate to different breaches of different orders. In so far as there is a statement of principle, it is contained in *JSC Bank v Solodchenko* [2011] EWCA Civ 1241, where Jackson LJ observed that the starting point for breach of such orders is immediate imprisonment, which should be measured in months and not weeks.

25. All of the sentences for different breaches in other cases could either in combination or alone be said to lead to potentially different sentences for breaches of court orders and contempts of court. The grounds of appeal specifically identify these, and this morning Mr Osman has also drawn our attention to *FCA v McKendrick* [2019] EWHC 607 (Ch) per Marcus Smith J.

26. We are aware of all of these different cases, many of which are in respect of freezing orders. However, considering other sentences in other cases and deciding whether different sentences could or might have been passed on these four breaches is not the function of this court. The test for us is whether the resulting sentence was manifestly excessive or wrong in principle. One common thread running through all the cases which we have considered is that each case and each contempt is individual and highly fact specific.

27. Dealing with the personal mitigation for the appellant, we have taken fully into account what is described in the witness statement as the devastating impact upon his wife and children, and the fact that she in particular is caring for the family in undoubtedly difficult circumstances. We have carefully considered what is said, and the appellant's wife is doubtless also experiencing the detrimental impact of his sentence. It is often, regrettably, the fact that the impact of a prison sentence hits the family of the person imprisoned much more harshly than it does the person who has in this case breached the order, and who serves the sentence in prison. That is a consequence of their failure to comply with the order. The only person to blame for his wife and children finding themselves in what is a very challenging situation is him. This will continue until he is released and thereby able to resume the support he provided prior to his imprisonment.

28. Having made the factual findings the sentencing judge did, we cannot conclude that either the overall sentence structure was wrong, that it was wrong to make any of the sentences consecutive, or that any element of it was wrong in principle. Neither the individual sentences themselves, or any of them, individually, collectively or in the aggregate was or is manifestly excessive or wrong in principle. Nor, in our view, is it arguable that the resulting sentence should have been suspended. The decision of whether to suspend a sentence of below two years is a matter of discretion for the sentencing judge. Here that discretion was exercised by the court below which had the benefit of hearing the evidence and all of the background knowledge. This gave the sentencing judge a unique position to make the findings that he did regarding the appellant's motivation and intention generally. It cannot be said that the discretion available could not or should not have been exercised in the way that it was. There was no error of principle.

29. In all the circumstances, therefore, we are unpersuaded by Mr Osman for the appellant on any of the different grounds of appeal. Accordingly, this appeal fails and is dismissed.
