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Neutral Citation No. [2023] EWCA Crim 1631

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202302311/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 19 December 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE HILLIARD

HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX

V
GINO MARI

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MS N LAKE appeared on behalf of the Appellant.
MR J CARMICHAEL appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an appeal against the imposition on 22 March 2023 of a restraining order in the Crown Court at Harrow, after the acquittal of the appellant.
2. The appellant, Gino Mari, is a 39-year-old man. He was prosecuted in the Crown Court for an offence of strangulation, contrary to section 75A of the Serious Crime Act 2015, and the strangulation was alleged to have occurred on 14 October 2022. The complainant had been the appellant's former partner. The complainant alleged that the appellant had strangled her when he was drunk. There was a photograph showing marking around the complainant's neck.
3. The defence was that the complaint was malicious because the appellant had been working late and hard and he and the complainant had gone to bed after drinking and it was the complainant who had attacked the appellant.
4. The appellant and complainant had a 10-year-old son together and the complainant also had a 14-year-old daughter (who we will refer to collectively as "the children"). The children were present in the house at the time, but it appears they were asleep at the material time.
5. The complainant had attended for an earlier trial of the offence of strangulation on 9 March 2023 to give her evidence, but the case had to be adjourned because there was no court available. The complainant did not attend on the re-listed date, on 22 March 2023. There were communications in which the complainant made clear that she was not going to attend and, in those circumstances, the prosecution offered no evidence and the judge directed an acquittal of the appellant.

The restraining order

6. It appears that the prosecution then applied for a restraining order on acquittal which was granted on the same day. The terms of the proposed restraining order sought by the prosecution were that the appellant should not have contact with the complainant save through his sister, Social Services or a solicitor dealing with child contact or welfare.
7. It appears from what we were told today that the whole of the order was resisted, and it is apparent, for reasons that we will come to later, that the formalities of the Criminal Procedure Rules when these orders were sought were not followed.
8. It seems that the part of the restraining order against which this appeal is brought, namely relating to the children, was raised by the judge himself, who stated that if the proceedings had been in a Family Court, then there is no question that such an order would have been granted. The judge said the order should be extended to include a prohibition on the appellant having contact with the children mentioned because it was well known that domestic violence was a form of child abuse. The judge made it clear that the appellant could approach the Family Court to ask for child contact. We were told this morning, and accept, that attempts were made to obtain legal aid and private representation but that has yielded nothing.
9. The court then made an order that the appellant is “not to contact directly or indirectly [the complainant] and/or her children [and their children were identified], save through his sister, Social Services or solicitors in respect of contact and welfare of their children”. Such banned contact to include: “any form of telephonic communication, social media of any kind. This order to apply for 5 years 22 March 2028 or until further order of this Court or the Family Court”. It then appears that an email was sent saying that a member of court staff had spoken to the judge, who had amended the order to provide:

“Defendant to be restrained from contacting [the complainant]

and/or the children of the family [name given] by telephone, letter, card, internet, social media or in any other form/format whatsoever, either directly or indirectly or causing or inciting another to do save that he may through his sister, Social Services or his solicitors seek to agree contact in respect of the children.

This order to have immediate effect and be for a period of 5 years (that is until 22/3/28)”

The slip rule hearing

10. Defence solicitors immediately asked for the matter to be re-listed before the Recorder so that submissions could be heard on the proportionality of the order and the fact that it was internally inconsistent. That application was made under the slip rule. The matter in fact was not listed until 13 June 2023. It appears that, although the slip rule hearing had been requested in March 2023, the reason it was not listed until June was a lack of court time and indeed a delay in dealing with the application.
11. At the renewed hearing in June 2023, it was conceded by the defence that the slip rule period had expired and the application to vary the order was refused. In refusing the application, the judge stated that the court did not have jurisdiction to amend the restraining order and, even if it did, the court did not consider that the original order was in error because the matter could be challenged in the Family Court.
12. The right to appeal a restraining order imposed following an acquittal is pursuant to section 5A(5) of the Protection from Harassment Act 1997, which provides the same right of appeal as if the defendant had been convicted of the offence in question.

Grounds of appeal

13. The grounds of appeal before us are that it was not necessary to prohibit the appellant from having contact with the children, the restraining order was not proportionate, and

the terms of the restraining order were contradictory and internally inconsistent. This was because it prohibited the complainant from having contact with the children but permitted the appellant to have indirect contact with the complainant to agree contact with the children.

14. The Crown had put in a Respondent's Notice submitting that, although the Crown did not apply for an order that restricted access both to the victim of the alleged abuse as well as the children, the judge's assessment that a threat to a mother within the home was a form of abuse to the children was not unreasonable and, if the judge took that view, there was not anything unreasonable or disproportionate about the order, and therefore there was no error in law. Having said that, the Crown recognised that a restraining order should be monitored. The Crown had made contact with the complainant and from that contact it was clear that there was no difficulty with unrestricted access to the children from the point of view of the complainant. That being the case, the Crown said that the defence should reapply to the Crown Court for an amendment of the order and the Crown would not oppose the application, meaning that there need not be an appeal. We were told that such an application had been made to the Crown Court but that had also been delayed in listing and we are here.

Relevant Legal Provisions

15. The relevant legal provisions applicable to section 5A of the 1997 Act have been addressed in a number of decisions of this Court including R v Major [2010] EWCA Crim 3016; [2011] 1 Cr App R(S) 25; R v Smith [2012] EWCA Crim 2566; [2013] 1 WLR 1399; R v AJR [2013] EWCA Crim 591; [2013] 2 Cr App R(S) 12; R v Taylor [2017] EWCA Crim 2209; [2018] 2 Cr App R(S) 39 and R v Baldwin [2021] EWCA Crim 703; [2022] 1 Cr App R(S) 14. It is not necessary for us to summarise all the

relevant principles, but we do need to identify some principles relevant to the fair disposal of this appeal.

16. As the terms of section 5A of the 1997 Act make clear, this is an order which is imposed after an acquittal and may be imposed even where the prosecution has offered no evidence. A restraining order is a civil order and does not reflect on the guilt of the appellant. The civil standard of proof applies. Section 5A of the 1997 Act addresses a future risk of behaviour which might amount to the relevant course of conduct. An order can only be imposed if the statutory conditions are met. The legislation was aimed at protecting victims of domestic violence but was not limited to such circumstances and the order must be “necessary... to protect a person from harassment...” The word “necessary” must not be ignored.
17. Although an acquittal order may be made after acquittal it must be made on the evidence, a restraining order on acquittal is a criminal behaviour order for the purposes of the Criminal Procedure Rules 31.1(a). 31.2 of the Criminal Procedure Rules requires a person to whom the order is directed to have had an opportunity to consider the evidence in support of the application. If a prosecutor applies for a restraining order on acquittal, the prosecutor is required to identify under rule 31.3 what evidence is relied on to justify the making of the order. If hearsay is relied upon the parties are required to serve hearsay notices and counter notices under rules 31.6, 31.7 and 31.8.
18. In circumstance where a judge decides to consider whether imposing a restraining order after an acquittal where no evidence is offered, natural justice and the Criminal Procedure Rules require the person against whom an order may be made must be given an opportunity: to consider what is proposed and why; to consider the evidence in support; and to adduce evidence against the making of the order. It will be necessary to know the

updated position before deciding what order is to be imposed in most cases.

Appeal allowed

19. So far as this appeal is concerned, it is now common ground that the restraining order on acquittal in respect of the complainant is not to be challenged. This meant that it was not necessary to address the procedure which was adopted when the application was made so far as it related to that part of the restraining order.
20. In our judgment, however, that part of the restraining order relating to the children should not have been made. First, there was no evidence from the children, their mother or anyone acting on their behalf about the desirability or impact of any order on them. Secondly, there was no evidence showing that an order restraining the applicant from having contact with the children was necessary. The judge's comment about domestic violence being a form of child abuse did not take account of the fact that the first part of the restraining order prohibited contact between the appellant and the complainant, meaning that there would not be any further domestic abuse. Thirdly, none of the procedural safeguards set out in the Criminal Procedure Rules relating to the second part of the order were applied. Fourthly, it was inappropriate to make the order subject to the order of the Family Court. It is clear that there will be occasions when the Criminal Courts and Family Courts work together, for example, case managing and co-ordinating timetables for proceedings where there has been an alleged baby shaking murder and there are other children of the family. Given however that a restraining order will have been imposed in the criminal courts because it was necessary to make the order, as opposed to being generally desirable or something that another court might do, it is not immediately clear what test would be applied by the Family Court in varying or discharging the order made by the Criminal Court. Fifthly, the duration of the restraint

order meant that the appellant would have no contact with the children as they transitioned from childhood. That is a draconian order to be made after an acquittal which was not asked for by the prosecution.

21. We will therefore allow the appeal and vary the restraining order so that the prohibition on contact with the children is removed. This means it will now read that “the defendant is to be restrained from contacting the complainant by telephone, letter, card, Internet, social media or any other form/format whatsoever, either directly or indirectly, or causing or inciting another to do so, save that he may through his sister, Social Services or his solicitors seek to agree contact in respect of the children”. The order is to have immediate effect and will be for a period of 5 years, that is until 2022 March 2028. We should conclude this short judgment by thanking both Ms Lake and Mr Carmichael very much for their assistance.

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

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