IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202978/A1
[2023] EWCA Crim 598

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 25 April 2023

Before:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE
MR JUSTICE JEREMY BAKER
MRS JUSTICE COLLINS RICE DBE

REX
v
NATHAN MCMAHON

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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 R QUAIFE appeared on behalf of the Appellant
MISS K CHURCHER appeared on behalf of the Crown

J U D G M E N T
(Approved)

1. THE VICE-PRESIDENT: This applicant pleaded guilty to offences of stalking involving serious alarm or distress, contrary to section 4A of the Protection from Harassment Act 1997 (count 1) and possession of a class C controlled drug, contrary to section 5(2) of the Misuse of Drugs Act 1971 (count 2). On 16 September 2022, in the Crown Court at Truro, he was sentenced by Recorder Oldland KC ("the judge") to a total of 40 months' imprisonment, comprising 40 months on count 1 and one month's imprisonment concurrent on count 2. He was also made subject to a restraining order. His application for leave to appeal against his total sentence has been referred to the full court by the Registrar.
2. We can summarise the facts quite briefly. The applicant is now 35 years old. He was in a relationship with the complainant for a few weeks in 2022. The complainant ended that relationship in May 2022. The applicant refused to accept that fact and continued to contact the complainant by phone calls and text messages.
3. At 2.30am on Sunday 15 May 2022 the applicant went to the complainant's home uninvited and let himself in through an unlocked door. He became angry when he saw another man in the property. The complainant managed to persuade the applicant to leave via the back door. He then went to the front of the property and shouted that he wanted to talk to the complainant. When she did not respond, he kicked the door, causing damage to the door and its hinges.
4. The complainant telephoned the police. They attended and found the applicant sitting on the complainant's doorstep. He was arrested. When searched he was found in possession of two Diazepam pills, the subject of count 2.
5. Later that day, in the early afternoon, the applicant was released from police custody on bail, with conditions not to contact the complainant and not to go to the road where she

lived. Within a few hours, in breach of those conditions, he telephoned the complainant and left a series of voice mail messages. When the complainant woke on the morning of Monday 16 May she found that between 1.00am and 7.00am the applicant had called her phone 60 times.

6. On the following afternoon the applicant made calls to the complainant in which he said he was going to jump off a building or set fire to himself. At about 8 o'clock that evening, when the complainant was at home with her children aged 17, 15 and 9, the applicant appeared at her door. He was visible through the frosted glass. The complainant was immediately scared and told her children to go upstairs whilst she telephoned the police. She ignored the applicant's repeated requests to let him in so that he could talk to her. She messaged her neighbours for help.
7. Whilst she was waiting to speak to the police she could smell petrol. Petrified for the safety of herself and her children, she told the children to leave via the back door and go to a friend's house. She then saw the applicant in her front garden with a petrol can in his hand. Shortly after that two men wrestled the applicant to the ground and held him until the police arrived. The police noted that petrol had been poured around the applicant and on the front door. A jerrycan still containing some petrol was nearby, and so too was a cigarette lighter.
8. When interviewed under caution the applicant provided a prepared statement denying that he had stalked the complainant, saying that he was having a mental health crisis and had intended to take his own life but did not intend to harm the complainant or her family.
9. The applicant had previously been sentenced on 31 occasions for a total of 57 offences between 2004 and 2020, including offences of harassment and assault and multiple

breaches of court orders. A number of the previous offences had been committed against former partners, including an offence of inflicting grievous bodily harm, contrary to section 20 of the Offences Against the Person Act 1861, for which he had been sentenced to 32 months' imprisonment in July 2019.

10. At the sentencing hearing on 26 July 2022, the court was assisted by a pre-sentence report, which assessed the applicant as posing a high risk of reconviction and a serious risk of causing both physical and psychological harm; by a report assessing the applicant as suitable for a mental health treatment requirement; and by a number of testimonials speaking to the good side of the applicant's character and describing the commendable efforts he has made in the past to deal with his problems.

11. The judge considered the Sentencing Council's definitive guideline in relation to the stalking offences. He found that the offence fell into category B high culpability on two grounds: the applicant's conduct was intended to maximise fear and distress and it was persistent action over a prolonged period. As to harm, which the judge found to fall into category 1, the judge said:

> "I have reached the inevitable conclusion that what happened would have caused very serious distress..."

12. He noted that the starting point for a category B1 offence was two-and-a-half years' imprisonment, with a range from one to four years. The judge said that the applicant was towards the top end of that range even before consideration of the aggravating features. He identified those features as the previous convictions, the breach of bail, the impact on others including the children, and the commission of the offence soon after the expiry of the applicant's licence period following the sentence for the section 20 offence. The

judge accepted that there was mitigation in that the applicant "was probably suffering from a learning disability or some form of mental disorder". He concluded:

> "In my judgement, those aggravating features are so serious that they elevate this case into a higher category, so category 1, culpability A, with a starting point of 5 years and a range of 3½ to 8 years."

13. The judge decided that the appropriate custodial term was 54 months' imprisonment, which he reduced to 40 months by credit for the guilty pleas.

14. The offence charged in count 1 is a specified offence. The judge found that the applicant was a dangerous offender as that term is defined for sentencing purposes. He believed that the applicant met one of the two qualifying criteria for an extended sentence of imprisonment contained in section 280(1)(e) of the Sentencing Code, namely the earlier offence condition. On count 1 he imposed an extended sentence of six years four months, comprising a custodial term of 40 months and an extension period of three years. On count 2 he imposed a concurrent sentence of one month. He made a restraining order for 10 years which prohibited the applicant from contacting the complainant directly or indirectly by any means whatsoever and prohibited him from going to Penzance, Cornwall. By oversight, it appears the judge did not impose the necessary surcharge of £190.

15. Unfortunately, the judge was mistaken in his belief that the "earlier offence condition" was satisfied. He had been led into error by a rare mistake in the Crown Court Compendium which has subsequently been corrected. The true position was that none of the applicant's previous convictions was for an offence listed in schedule 14 to the Sentencing Code and the earlier offence condition was accordingly not met. Nor was the four-year term condition met, as the custodial term imposed was 40 months. The

imposition of an extended sentence was therefore unlawful.

16. The judge realised that he had sentenced in error and directed that the case be listed on 29 July 2022 in order to vary the sentence under the slip rule. He rescinded the extended sentence unlawfully imposed on count 1 and adjourned the hearing so that a psychiatric report could be prepared.

17. The case came back before the court on 16 September 2022. It appears that the judge thought that his power to vary a sentence under the slip rule was only open for a period of 56 days and would therefore shortly expire. He was mistaken in that regard, because on the authority of Attorney General's Reference (R v Nguyen) [2016] EWCA Crim 448, [2016] 2 Cr.App.R (S) 18, it was open to him, having rescinded his original sentence, to adjourn the resentencing to a date later than 56 days from the date of sentence.

18. There were two obstacles to the judge proceeding to resentence without further adjournment. First, the psychiatric report which he had directed had not been prepared. Secondly, although a defence solicitor was present, counsel Mr Quaife was absent because of the Bar's action at the time. Nevertheless, because of the error he had made as to his powers, the judge clearly felt that it was imperative to resentence without further adjournment. He said:

> "In the absence of Mr Quaife and the psychiatric report, I do not consider that it would be fair to reimpose an extended sentence by increasing the determinate custodial term to one of over 4 years. I have also read the references that have been provided to me today which provide support for reaching this conclusion."

19. The judge therefore varied the sentence on count 1 to a determinate sentence of 40 months' imprisonment. The sentence on count 2 and the restraining order remained as before.

20. When referring this application for leave to the full court, the Registrar wisely directed that a psychiatric report be obtained. We have received it and have considered it *de bene esse*.

21. On the applicant's behalf, Mr Quaife submits that the sentence was wrong in principle and manifestly excessive. Helpfully refining his written submissions in his oral address to us this morning, he has focused on his ground of appeal to the effect that the judge took too high a starting point. Mr Quaife argues that the case should not have been sentenced within the range applicable to a category 1A offence, in particular because the culpability could not properly be assessed as "very high" and also because, in the absence of any victim personal statement, there was no basis on which the judge could properly find that very serious distress had been caused to the complainant.

22. Mr Quaife acknowledges that an upwards adjustment from the category 1B starting point would have been justified, but his simple argument is that by elevating the sentence into the range appropriate to a 1A offence, the judge imposed a sentence which was manifestly excessive in length.

23. Mr Quaife's written submissions drew attention also to the judge's failure to give the applicant any opportunity to make representations in person at the hearing when counsel was absent and further submitted that the judge, having directed a psychiatric report, was wrong to proceed to sentence without having received it. Mr Quaife realistically acknowledges, however, that notwithstanding those procedural deficiencies the real issue for this court is as to the length of the custodial term.

24. Finally, Mr Quaife challenges the restraining order on the ground that the prohibition on going to Penzance was too vague and imprecise. Other grounds of objection to the restraining order, which were advanced in writing, are no longer pursued.

25. On behalf of the respondent, Miss Churcher (who also appeared below) took a neutral stance in relation to the grounds concerning sentencing in the absence of counsel and sentencing without a report, but made helpful submissions in relation to the grounds principally pursued.

26. We are grateful to both counsel. Having reflected on their submissions we have reached the following conclusions.

27. Mr Quaife's initial written submission was that the judge had found this to be a case of very high culpability because of the extreme nature of the high culpability feature of conduct intended to maximise fear or distress. That analysis, with which we did not agree, is no longer pursued by Mr Quaife. He acknowledges that the judge placed the case into the category of high culpability. In our view the judge, was correct to do so.

28. For the reasons which the judge explained, the judge regarded the aggravating features as being so serious as to take the appropriate sentence into the range of the next category. He was entitled to do so.

29. Next, the judge was, as Miss Churcher had submitted in writing, entitled to find on the evidence before him that the complainant must have suffered and did suffer very serious distress. The judge would no doubt have been assisted if there had been a victim personal statement; but the absence of a victim personal statement is never to be taken as indicating an absence of harm. The circumstances which we have summarised in our view justify the judge's finding as to the inevitability that very serious distress had been suffered. After all, a woman with children in the house was confronted by the prospect of a former partner setting himself on fire immediately outside her front door.

30. In those circumstances, we reject the challenge to the length of the sentence. This was a serious case of its kind, committed by a man with a bad record for similar offending

against former partners and a bad record for flouting court orders. In addition to the aggravating features rightly identified by the judge, the offence was made more serious by its domestic context.

31. As we have explained, the judge was in error in believing that he had to sentence on 16 September 2022. We accept that as a result of that error, and in the belief that he was being as fair to the applicant as he could be in the circumstances, the judge wrongly proceeded without first considering a psychiatric report, and without giving the applicant an opportunity to make representations. Those unfortunate features of the case do not, however, alter our view that the total sentence of 40 months' imprisonment was just and proportionate in all the circumstances.

32. Turning to the restraining order, we are satisfied that it was necessary to make one in the circumstances of this case, and we can see no ground for challenging the duration of the order. We do, however, accept Mr Quaife's submission that the second prohibition was unacceptably imprecise in its wording and unnecessarily wide in its scope. In the absence of any clear basis for imposing a more clearly defined geographical prohibition, that part of the restraining order must be quashed.

33. Given that the appeal will succeed to that limited extent, we are satisfied that we must now impose the necessary surcharge. To do so will not offend against section 11(3) of the Criminal Appeal Act 1968.

34. For those reasons we grant leave to appeal. We allow the appeal to this very limited extent: we vary the restraining order by deleting the second prohibition, namely the prohibition on entering Penzance. We order that the appellant, as he has now become, must pay the surcharge of £190. In all other respects the sentencing remains as before.

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

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