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IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202400952/A5

[2024] EWCA Crim 378



Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 11 April 2024

Before:

LORD JUSTICE COULSON
MR JUSTICE NICKLIN
HIS HONOUR JUDGE MAYO
THE RECORDER OF NORTHAMPTON
(Sitting as a Judge of the CACD)

REX
V
NICHOLAS WESTGUARD

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MR E FOWLER appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The appellant is now 44. On 8 March 2024, having pleaded guilty before the Magistrates' Court, he was sentenced at Maidstone Crown Court by Mr Recorder McDonagh to 18 months' imprisonment for three separate breaches of a restraining order and a related offence of stalking. He appeals against that sentence with leave of the single judge. We note at the outset that these offences were contrary to section 363(1) of the Sentencing Code, which replaced section 5 of the Protection from Harassment Act 1997, the statute incorrectly noted in the court documents.
2. In our view, it is impossible to address this sentence appeal without setting out, in full, the appellant's previous offending. In our view, the failure to do that by the prosecution in their opening of the facts to the learned Recorder may have meant that the seriousness and persistence of the appellant's conduct was not fully recognised.

Previous Convictions

3. On 29 January 2010, the appellant was convicted of one offence of common assault. That led to the imposition of a restraining order. On 27 July 2011 the appellant was found to be in breach of that restraining order and a two year community order was imposed. On 13 January 2014 the appellant was convicted of burglary and theft from a dwelling. Another restraining order was imposed. It seems clear that those orders were designed to protect unknown third parties who were not involved in the current offences.

4. Sometime in 2015 the appellant began a relationship with RB. The relationship went sour and they separated. Sometime in 2019, a non-molestation order was made in favour of RB. On 19 February 2020, the appellant was found to be in breach of that non-molestation order and a restraining order was imposed.
5. On 28 October 2020 the appellant was found to be in breach of the restraining order on two separate occasions. He was also guilty of stalking RB. In consequence, a further restraining order was imposed. We shall call that “the relevant restraining order”. It is important therefore to note that, contrary to the Court of Appeal summary, the relevant restraining order was not, in some way, the first such order made in this case, but a revised and more stringent order, which had been imposed following three breaches of earlier orders designed to protect RB from the appellant.
6. On 27 February 2021 the appellant was found to be in breach of the relevant restraining order. On 3 May 2021 the appellant was again found to be in breach of the relevant restraining order. In relation to these breaches, the appellant was sent to prison for two years. He was released on licence, and almost immediately, on 18 August 2022, he was again found to be in breach of the relevant restraining order. A further sentence of nine months' imprisonment was imposed.

The Further Breaches

7. The appellant was released on licence sometime in 2023. Again, it appears that, almost immediately, he breached the terms of the relevant restraining order. He did that three

times in less than a month.

8. First, contrary to its terms, on 19 August 2023, he “liked” a number of RB's posts which she had made on Instagram. His licence was revoked in consequence and he was recalled to prison.

9. However that did not stop him. On 2 September 2023 when in prison, he sent a letter to RB's sister, addressed to her children, telling them that he would be moving to Tonbridge where they lived and that he had seen them. That was the second breach of the relevant restraining order. Five days later on 7 September 2023, again from prison, the appellant sent RB a parcel in the name of 'Nancy', a false name designed to bypass the prohibition on communication with RB while in custody. The parcel contained an acrylic memorial butterfly with pictures of RB's family and children. That was the third breach of the relevant restraining order.

The Sentencing Exercise

10. By the time of the sentencing hearing before the Recorder, there was a victim impact statement from RB. In our view this provides a graphic illustration of the harm which the appellant's persistent breaches of the restraining order have caused her. Amongst other things, she said:

"Over these last few years I have had to bend over backwards to protect my children from them seeing me endure domestic abuse and being stalked/harassed by the man they once called dad. My children were one step away from being removed by social services because I

was so badly manipulated by [the appellant] that I was putting them in harms ways and not even realising it. I've attended the freedom project which massively opened my eyes and gave me the strength to finally break free from his clutches. However, at 40 years old I now feel like I live in a prison, we have had to have extra measures put in place in our home including window locks, door locks, chains, CCTV, Ring Doorbell and other measures the police put in place. We have had our letterbox sealed and extra fire alarms installed."

11. A bit later:

"For now, we are safe as we know he cannot reach us but when [the appellant] is released this will be a completely different story."

12. A little later in the statement she said:

"I feel when [the appellant] is out of prison I am constantly looking over my shoulder on high alert. I feel like I cannot be me. I'm not able to be free, I become anxious and friends say I become a completely different person ... I don't know why I as the victim am the one that has to upheave my children and start a new life elsewhere out of an area that I have lived and grown up in for 40 years when this man has no regard to the rules, no respect for women or even his own son."

13. The Recorder had regard to the definitive guideline in respect of the three breaches of the restraining order. He found culpability to be in Category A because the breach was persistent, and put harm in Category 2. That gave a recommended starting point of one year and a category range of up to two years' imprisonment. By reason of the appellant's previous offending, which was a statutory aggravating factor, the Recorder took the two years as his starting point and then reduced that by one-third to reflect the early guilty plea. That gave a sentence of 16 months. The Recorder then added a further two months consecutive in respect of the stalking offence, to give a total of 18 months' imprisonment.

The Grounds of Appeal

14. There are three grounds of appeal. First, it is said that the Recorder was wrong to put this into Category A culpability. The argument was that the breaches were not persistent, although it was accepted that they were "repeated". The second ground of appeal was that the sentence in respect of the stalking offence, since it arose out of precisely the same facts and matters as the breaches of the restraining order, should not have been consecutive but should have been concurrent. The third ground is that the restraining order made by the Recorder was not limited in time and that this was, in the circumstances, excessive.

15. These three arguments were advanced in a fair and realistic way by Mr Fowler both in his written submissions and in his oral submissions this morning. We are very grateful to him for his assistance.

16. We make one overarching point and then address the three grounds of appeal.

The Overarching Point

17. In our view, it is plain from the facts of this appeal that the appellant does not regard himself as bound by any of the orders previously made by the court. He demonstrated prior to his relationship with RB that he was someone who breached court orders with impunity. Since his relationship with RB ended, he has been in breach of the various orders designed to protect her on at least nine separate occasions: the six breaches covered by the previous offending, and the three breaches for which he was sentenced by

the Recorder.

18. In such circumstances, it is plain to us that the appellant has subjected RB to a campaign of harassment designed to exert, whether directly or indirectly, control and power over her. In those circumstances, Mr Fowler's submission, to the effect that these recent offences represented a de-escalation of the appellant's overall pattern of offending, rather misses the point. It is not the facts of the individual offences that matter now: it is the fact that the appellant has repeatedly and persistently disregarded the relevant restraining order itself that is the critical element of his offending.

19. In those circumstances, by reference to s.59 of the Sentencing Act 2020, we consider that it was arguable that the sentencing guidelines no longer applied to the appellant. It might be said to be contrary to the interests of justice, in a case like this, to treat each breach of the order as a separate standalone offence, and then laboriously apply the definitive guideline to that offence. After so long, and with so much harm done, it seems to us probable that justice could only be served by the imposition of a term somewhat nearer the maximum for this offence (five years) less the one-third discount for his guilty plea.

20. Of course, we are not in a position to increase the sentence of 18 months imposed by the Recorder. But our conclusion that the appellant was at least arguably dealt with leniently by the Recorder is important for two reasons. First, it informs our approach to the three submissions advanced by Mr Fowler in support of the appeal. Secondly, it will be important for our conclusions, and a copy of this judgment, to be made available to any judge who may be obliged to sentence this appellant for breaches of these orders in the

future.

21. We now turn to the three grounds of appeal.

Ground 1: Categorisation

22. The Recorder put this offending in Category A2. To the extent that it was appropriate to deal with the offending in that way, that is to say by reference to the individual elements of the sentencing guideline, we agree with that categorisation.

23. No point can be taken that the harm was anything other than in Category 2. On one view of the victim impact statement that was again a generous view as far as the appellant was concerned. As to culpability, the Recorder put this in Category A because the breach was persistent. In our view that was plainly right. Whilst Mr Fowler sought to argue that there was a difference between 'persistent' and 'repeated', we do not consider that the protection of a vulnerable person should depend on such linguistic niceties. On any view, we consider that the appellant's conduct was persistent.

24. In addition, there were numerous aggravating factors. There were the previous convictions. There was the fact that these breaches were committed whilst he was on licence. There was the history of his disobedience of court orders. There was the fact that the breach involved the further offence of stalking. There was the impact upon RB's children. By contrast with those aggravating factors, there were no mitigating factors at all.

25. In those circumstances, we consider that the appropriate starting point before discount for plea was in excess of the upper limit of two years identified in the guidelines. We consider that even with a full credit for a guilty plea a term of at least 18 months' imprisonment was justified for the breaches of the restraining order.

Ground 2: The Stalking Offence

26. The second complaint is that the Recorder erred in imposing a two-month consecutive sentence in relation to the stalking offence. That was because the stalking offence encompassed precisely the same facts as the breaches of the restraining order.

27. It seems clear that the Recorder considered that the term of 16 months that he had arrived at for breaches of the restraining order was insufficient to reflect the appellant's offending overall, and therefore imposed an additional two-month term for the stalking offence. In our view the Recorder was wrong to impose a consecutive term for the stalking offence. That was because it encompassed no elements of the offending that were not already covered by the breaches of the restraining order.

28. In those circumstances, we propose simply to restructure the sentence. The term of 18 months' imprisonment imposed on the appellant should be recorded as relating to the breaches of the restraining order, with the 2-month term in relation to the stalking offence to be made concurrent not consecutive. In that way the overall term of the sentence is not altered. But it is reordered so as to accord with general principle.

Ground 3: The Terms of the Restraining Order

29. The third complaint is that the restraining order imposed by the Recorder was excessive because it was not limited in time.

30. We accept that it is relatively rare for a restraining order of this kind to be made unlimited in time. However, we consider that, on the facts of this case, it was an appropriate order. As we have said, the appellant appears to consider that he is not bound to comply with any orders of the court. He has been the subject of numerous restraining orders limited in time and he has ignored them. In the circumstances, an order that is not limited in time is appropriate.

Conclusions

31. We are in no doubt that the term of 18 months imposed on the appellant was neither excessive nor wrong in principle. Indeed, for the reasons that we have explained, we consider that it was generous to the appellant. The sentence will be restructured, so that the 18-month term is made referable solely to the breaches of the restraining order, and the two month term imposed for the stalking offence is made concurrent, not consecutive. The overall term in this case remains unchanged. Save for that administrative restructuring, this appeal against sentence is dismissed.

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

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