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Neutral Citation No. [2024] EWCA Crim 40

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/02840/A1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 16th January 2024

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE GARNHAM

MR JUSTICE ANDREW BAKER

R E X

- v -

NICHOLAS IKUNNAH

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Miss L Fisher appeared on behalf of the Appellant

J U D G M E N T
(Approved Transcript)

Tuesday 16th January 2024

LORD JUSTICE HOLROYDE: I shall ask Mr Justice Andrew Baker to give the judgment of the court.

MR JUSTICE ANDREW BAKER:

1. This appeal against sentence is brought with the leave of the single judge. It relates to a total sentence of 39 months' imprisonment imposed by Mr Recorder Stephens in the Crown Court at Nottingham on 3 August 2023. That total sentence comprised five consecutive sentences each of 3 months, two consecutive sentences each of 6 months, and two sentences each of 12 months' imprisonment, which were ordered to run concurrently with each other but consecutively to the other sentences.

2. The appellant, who is now aged 24, faced 13 counts in the Crown Court. Counts 1, 3, 4 and 11 were ordered to lie on the file on the usual terms when the appellant was sentenced upon guilty pleas he had entered to the other nine counts. Those counts charged the following offences:

(i) counts 2, 5, 6, 7 and 8 each charged breach of a non-molestation order, contrary to section 42A of the Family Law Act 1996, which resulted in the five consecutive terms of 3 months' imprisonment;

(ii) count 9 charged disclosure of a private sexual photograph and film with intent to cause distress, contrary to section 33(1) of the Criminal Justice and Courts Act 2015, which resulted in one of the consecutive terms of 6 months' imprisonment;

(iii) count 10 charged assault on an emergency worker, contrary to section 39 of the Criminal Justice Act 1988 and section 1 of the Assaults on Emergency Workers (Offences) Act 2018, which resulted in the other consecutive term of 6 months' imprisonment;

(iv) count 12 charged witness intimidation, contrary to section 51(1) of the Criminal Justice and Public Order Act 1994, which resulted in a consecutive term of 12 months'

imprisonment; and

(v) count 13 (the facts of which occurred prior to those of count 12) charged the sending of an electronic communication with intent to cause distress or anxiety, contrary to section 1(1)(a) of the Malicious Communications Act 1988, which resulted in a concurrent term of 12 months' imprisonment.

3. Miss Fisher appeared on behalf of the appellant before us, as she did in the court below. Her helpful and focused Advice on Appeal and oral argument did not seek to criticise the sentence on count 10. Her overarching submission as regards the rest was that a total sentence of 33 months' imprisonment for the appellant's offending over a 14 month period which arose out of his failure to accept or move on from the breakdown of a relationship was manifestly excessive for a young man with limited previous convictions, who had never served a custodial sentence, who had pleaded guilty (albeit mostly at a late stage) and who had other personal mitigation. She argued in particular that there was a failure properly to apply offence specific guidelines; that no obvious credit was given for the guilty plea; and that there was an inadequate allowance for the principle of totality.

4. The Crown Court sentenced without a pre-sentence report. However, we agree that a report was unnecessary and we do not consider it necessary to obtain a report at this stage in order to do justice to the appeal.

5. The principal complainant, to whom we shall refer as "AH", comes from Nottingham, as does the appellant. They were previously in a relationship. On the account AH gave to the police, that lasted for two years or so, until March 2020 when she plucked up the courage to end it because of his abusive behaviour towards her. Thereafter, again as AH described events, the appellant was guilty of harassing and threatening behaviour, leading her to obtain a non-molestation order from a Family Court Judge on 14 June 2021. Amongst other things, that order prohibited the appellant from contacting AH by any means, except through her family law solicitors. The order was sought and granted, without notice to the appellant, but it was served on him. No point arose in the Crown Court about his awareness of it when he

later acted in breach of it. The order remained in force until 4 pm on 13 June on 2022.

6. On 3 August 2021, AH received an email sent by the appellant in breach of the order. The email stated: "*I still love you. I don't want to hurt you. Stop playing with me. You really didn't need to run like that. You and me both know that.*" She received further emails from the same email address on 3 August 2021, on 29 August 2021, and on 1, 9, 10 and 13 September 2021. On 25 November 2021, she received a yet further email which stated: "*I still don't want to kill you lol*". Count 2 covered that email contact.

7. The appellant was arrested and interviewed in December 2021, but that did not deter him from continuing to breach the order. On 14 February 2022, he left a scrapbook, a jar full of notes and a box of chocolates outside the front door to AH's parents' home (count 5). One note read as if it had been written by a third party, but it was from the appellant. AH recognised his handwriting. The note read: "*Nick is good now. He still loves you. A boy with problems, so disappointing that you had to add to them. You were so good together.*"

8. On 26 March 2022, AH received a series of phone calls from a withheld number (count 6). When she answered one of them, she recognised the caller as the appellant. He asked her to confirm her parents' address in a manner that she found threatening and intimidating.

9. On 21 April 2022, the appellant contacted AH through Instagram (count 7). He made reference to her new boyfriend and commented: "*Your last BF was actually half decent, what happened?*"

10. On 8 June 2022, the appellant sent two further emails to AH, with an image of the two of them together from the time when they were seeing each other (count 8).

11. During their relationship, AH had sent the appellant some nude pictures and clips of herself. She had asked him to delete them when they broke up, but he did not do so. A week or so after sending AH the emails under count 8, the appellant sent a nude picture of her to her new boyfriend, attached to an email entitled "*This is your chick*", and a further email with a video clip of AH in underwear (count 9).

12. On 29 June 2022, police officers went to arrest the appellant upon a complaint of assault (unrelated to his offending in relation to AH). He was very aggressive and said: "*Don't even try to put me in handcuffs*". He then proceeded violently to resist arrest. He grabbed the hair of one of the officers and kicked out at her, causing injuries. That is the assault that was charged in count 10. It caused him to be remanded in custody until 28 July 2022, when he was granted bail by the Crown Court.

13. On 24 September 2022, AH's boyfriend received an email from the appellant which stated: "*I'm going to enjoy chopping you up*" (count 13); and finally, in mid-October 2022, AH received a series of further messages from the appellant, generally pleading with her to drop charges against him and making threats if she did not (count 12). One read: "*You see these dickheads you're rolling with? I'm going to take them all out one by one … So if you really liked that you'll leave them alone before it all gets out of hand*". Another read: "*I can't account for what I'll be planning to do when I get out … Do the right fucking thing and drop those charges before you make it 10x worse for everyone*".

14. In police interview the appellant stated that he had not contacted AH or her boyfriend, and thereafter denied any offending or declined to comment in response to questions. His mobile phone was seized and was found to contain evidence supporting AH's complaints.

15. The appellant pleaded guilty to counts 8 and 10 in February 2023, between a preparatory hearing in November 2022 and a trial listing of April 2023. There were ongoing discussions as to what pleas might be acceptable to the Crown. It seems that the April trial date was not kept. Guilty pleas to counts 2, 5, 6, 7, 9, 12 and 13 were in due course entered on 28 July 2023, and the sentencing hearing in August 2023 followed.

16. The appellant was not of good character. In June 2018, when he was aged 19, he accepted a caution from Nottinghamshire Police for being in possession of a Class A controlled drug. In August 2018, in the Nottinghamshire Magistrates' Court he pleaded guilty to an offence of assault by battery. In April 2022, he was convicted in that court of driving without a licence or insurance and of resisting or obstructing a police constable. The latter resulted in a 12

month community order. On 4 October 2022, he pleaded guilty in the same magistrates' court to a complaint of failure to comply with the requirements of that order, which resulted in an additional unpaid work requirement.

17. The offences charged in counts 7 to 10, 12 and 13, therefore, were all committed during the operative period of that community order. The offences charged in counts 5 to 10 were all committed whilst either on police bail or after having been released under investigation by the police. The offences charged in counts 12 and 13 appear to have been committed whilst on bail as granted by the Crown Court on 28 July 2022. Furthermore, both of those offences were in breach of a specific condition of that bail: not to contact AH or any other prosecution witness directly or indirectly.

18. In sentencing the appellant, Mr Recorder Stephens stated that he had had regard to everything said on the appellant's behalf by counsel and that he had had regard to "*the relevant sentencing guidelines*". He noted that counsel and the appellant himself had accepted that a custodial sentence was inevitable, and then reasoned that

> "Bearing in mind the number of offences that you have admitted, together with the nature of those offences and the time period over which they were carried out, I have to bear in mind the totality of the sentence. So what I intend to do is pass modest sentences in respect of each of the offences. They will be consecutive to reflect the fact that you continued to misbehave, notwithstanding the non-molestation order and the fact that you had been arrested and therefore knew that you were in trouble for that type of behaviour."

19. The individual sentences we have identified were then stated, in each case after a very brief statement of the basic facts, but with no explanation of how the chosen custodial term was derived, what if any credit had been given for the appellant's guilty plea, or how the principle of totality had affected the outcome, if it had. That was not helpful to the appellant in understanding or being advised about the sentencing court's assessment of the seriousness of his offending; nor is it helpful to this court in evaluating whether the sentence was a proper one. In particular, there is no explanation of how, if at all, the applicable offence specific sentencing guidelines were applied as regards the categorisation of the offending.

20. Each of the breach offences attracted the same sentence. However, there are obvious graduations in severity between the relevant counts, if they are to be considered separately as the recorder did, with a troubling escalation over time, both in the content of the messages and in the aggravating circumstance of persistence in the face of police involvement following earlier episodes. Different aspects of the appellant's conduct in breach of the non-molestation order were reflected in separate counts on the indictment, no doubt to facilitate clarity at a trial in presenting the case to a jury and obtaining verdicts: for example, in case a jury would have been sure that the appellant had sent emails from a given email address, but not sure that he was responsible for other types of messaging sent perhaps from an account not in his name. Those distinctions were of limited, if any, relevance to the sentencing exercise, which was for breach of the non-molestation order, as constituted by a reprehensible course of conduct over the duration of the order.

21. The gravamen of the private sexual image offence (count 9) was the sending of one nude picture. It may be aggravated by a degree of uncertainty over whether other such transmissions would occur. It was sent, though, privately to a single recipient (AH's boyfriend) and, bravely on AH's part it might be said, he already knew from her about the history with the appellant and the risk that he (the appellant) might still have the image. In the event, therefore, what the appellant did under count 9 caused by itself only limited distress. Of course, that came on top of the distress caused by the conduct of the appellant towards AH that made up the breach offences.

22. However, looking at the wide range of possible offending behaviour that would be covered by the sentencing guideline for the count 9 offence, it was only itself of modest severity. Under that guideline, to which regrettably the recorder was not referred, the offence charged in count 9, if it was being sentenced on its own, should have been placed in category 3 for harm (limited distress or harm caused to the victim), with medium culpability (there was some planning in obtaining AH's new boyfriend's email address and, we think, an obvious intention to cause some real distress and humiliation). That would have guided the court to a

starting point of a high level community order and to consider a category range of up to 12 weeks' custody. The consecutive term of six months' imprisonment imposed by the recorder on a guilty plea, and bearing in mind totality, was in our view wrongly calibrated.

23. Although it was properly charged as a different, separate offence, the factual substance here was that the appellant's conduct charged in count 9 was a further element of, and escalation in, his persistent, improper behaviour towards AH during the period of the non-molestation order. In our view, the better approach in this case was to sentence counts 2 and 5 to 9 together, and to impose concurrent sentences on all counts of a length commensurate with the overall seriousness of the conduct covered by those counts.

24. In the usual way, the sentencing guideline for breach of a protective order calls, first, for an assessment of culpability and harm. On no view was this a case of a minor breach, or a breach where the offender fell only just short of having a reasonable excuse. For culpability, therefore, the question was whether it was a "*very serious and/or persistent breach*" so as to be culpability A. In this case that naturally fell to be assessed by considering the conduct that put the appellant in breach of the non-molestation order as a whole, and that is how the Crown invited the case to be considered. The submission was that, looking at the totality of the appellant's conduct, he was guilty of a persistent and serious breach. We agree with that submission. We also agree with the Crown's submission that – again, taking the entirety of the conduct covered by the breach counts as a whole – the appellant's offending behaviour had caused substantial distress, but not very serious harm or distress. We bear in mind the victim personal statement evidence that was available to the court below, which we have considered but will not lengthen this judgment by reciting. This was, in terms of the guideline, category 2 harm.

25. The breach offences, taken together, therefore should have been sentenced, in our view, as a single course of conduct falling into category 2A under the guideline. That would have given a starting point of 1 year's custody and a category range of up to 2 years. Most of the offending conduct was committed whilst on bail, and much of it during the period of the

community order imposed in April 2022. It also started within only a few weeks of the making of the non-molestation order. It was further aggravated, on the approach we prefer, by the sending of the nude picture to AH's new boyfriend just after the non-molestation order expired, in an attempt to add humiliation or distress.

26. The appellant was a young adult still, but he was not only just an adult. Although there are some signs of immaturity in some of the facts, there were also darker, rather sinister elements consistent with the concerns about the appellant that led AH to seek the non-molestation order in the first place. But this was a first custodial sentence for a young man whose remorse, expressed through counsel, the court was not in a position to refuse to accept as genuine.

27. The aggravating features, in our view, outweigh substantially the mitigation. A sentence of 18 months' imprisonment, prior to discount for the guilty plea, was justified. The appellant's guilty pleas were mostly late in the proceedings, but they still achieved the substantial good of relieving AH of the stress of revisiting any of the facts at a trial.

28. Taking counts 2 and 5 to 9 together, in our judgment a proper sentence was 16 months' imprisonment, rather than 21 months, as effectively imposed by the recorder.

29. Finally, we turn to counts 12 and 13. They represented a significant further escalation in behaviour, after the expiry of the non-molestation order. We consider that they were rightly treated by the recorder (a) together, but (b) as consecutive to all previous matters. There are no offence specific guidelines relating to the offences charged in counts 12 and 13, although for completeness only we note that there is now such a guideline for the offence of witness intimidation; it came into force only in October 2023.

30. This was, thankfully, a short-lived additional episode at the end of the overall course of the appellant's offending conduct, but it was a serious matter. It sought improperly to influence the ordinary, proper workings of the criminal justice system as it applied to the appellant's previous conduct, and it threatened serious violence against AH's boyfriend. We do not consider that the custodial term of 12 months fixed by the recorder was excessive for

a conviction after a trial, and if no issue of totality had arisen. But this was a conviction on the guilty plea of a young man with no previous custodial disposal, and it was rightly ordered to run consecutively to a term of 2 years or thereabouts for the appellant's other offences. It is not apparent that the recorder took those factors into account at all. In that respect we consider that he erred, and we would reduce the 12 month term to 10 months for totality, and reduce that term further by 10% to give the appellant credit for his guilty plea.

31. As we indicated, there was no challenge to the sentence on count 10 (the assault on the police officer in June 2022). In considering ultimately whether the sentence passed was manifestly excessive, of course we are not bound by that. But for our part we also have identified no reason to criticise the sentence on count 10, in either direction. The sentence imposed was 6 months' imprisonment, which was ordered to run consecutively, to which we shall adhere.

32. The outcome on this appeal, therefore, is as follows:

(1) We quash the sentences on counts 2 and 5 to 9 which totalled in aggregate 21 months' imprisonment, and we substitute on each of them a sentence of 16 months' imprisonment. All of those sentences are to run concurrently with each other.

(2) The sentence on count 10 remains a consecutive term of six months' imprisonment.

(3) We quash the sentences of 12 months' imprisonment on counts 12 and 13, and we substitute sentences of nine months' imprisonment, which will run concurrently with each other but consecutively to the other sentences.

33. The appeal is therefore allowed, but to that extent only. The effect overall is to reduce the appellant's total sentence from 39 months to 31 months' imprisonment.

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

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