

**Neutral Citation Number: [2017] EWCA Crim 889**

**No: 2017/2542/A4**

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Friday, 23 June 2017

**B e f o r e:**

**MR JUSTICE EDIS**

**THE RECORDER OF LEEDS**  
**HIS HONOUR JUDGE COLLIER QC**

**R E G I N A**

**v**

**WAYNE HERRINGTON**

Computer Aided Transcript of the Stenograph Notes of  
WordWave International Limited

Trading as DTI

8th Floor, 165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400 Fax No: 020 7404 1424

(Official Shorthand Writers to the Court)

**Mr A Semple** appeared on behalf of the **Appellant**

**Mr M Nassiri** appeared on behalf of the **Crown**

**J U D G M E N T**

(Approved)

Crown copyright©

1. MR JUSTICE EDIS: On 1st March 2017 His Honour Judge Batty QC, the Recorder of York, sent this appellant to prison for a total of 12 months and imposed a restraining order under section 5 of the Protection from Harassment Act 1997 restraining him from contacting Holly Jones, directly or indirectly, for three years. He now appeals against the restraining order only by leave of the single judge. We emphasise that this appeal is limited to the restraining order and the other orders, including the prison sentences imposed, remain entirely unaffected.
2. Despite the limited nature of the appeal, it is necessary to set out the history to an extent. For some years the appellant and Holly Jones have lived together and they have one child who is now three years old. The appellant is a violent and unruly man. Today is his 38th birthday. He has 36 convictions for 97 offences dating back to 1995. His record runs to many pages and includes convictions for offences of violence, arson and possession of weapons. It contains multiple convictions for breaking orders of the court of various kinds.
3. On 24th November 2015 he was sentenced to a total of 11 months' imprisonment for assault occasioning actual bodily harm and criminal damage. The victim was Holly Jones. A suspended sentence of nine months for unrelated offences which had previously been imposed was also ordered to run consecutively. It appears that he was due for release towards the end of January or in early February 2017 and at that time Holly Jones obtained a non-molestation order from the County Court for her protection in anticipation of his release. That order was granted on 1st February 2017. She later explained that she did this because she felt pressured by the social services. The order was to remain in force until 22nd February 2017. It lapsed in due course because she did not seek its renewal.
4. A matter of hours after his release on 6th February 2017 the appellant committed the three offences for which he was sent back to prison by His Honour Judge Batty QC on 1st March. He and Holly Jones were seen to be walking past a kiosk in a bus station by the duty manager. The appellant was swearing at Miss Jones. After walking past Mr Cullen, the manager, she sat on a bench. The appellant crouched in front of her. She was seen to be crying, saying something to him. He then slapped her five or six times, not using great force. He then put his head underneath her chin and pushed it up three times, at the same time shouting at her. Mr Cullen stood up and shouted: "If you carry on I shall have to call the police." This caused the appellant to walk towards Mr Cullen, saying: "Do you want some as well?" He then pushed Mr Cullen in the chest with both hands, causing him to stumble backwards. Mr Cullen then asked the CCTV operators at the bus station to look for the appellant and contact the police, at which point the appellant and Miss Jones left the area. Ten minutes later she came back and apologised to Mr Cullen, saying: "He does this all the time." She also spoke to another young woman who had seen what happened, saying: "You didn't see anything. He didn't hit me. He's my baby's dad and he's just come out of prison for assaulting me." He was found and arrested. Thereafter, as we have said, he was sent to prison for the

three offences disclosed by those facts: assault on Holly Jones, assault on Mr Cullen and both those offences being in breach of the non-molestation order which had been made.

5. When the matter came before the judge there was an email in his possession, which does not appear to have been seen by either of the parties, from the probation service. It said this:

"Wayne Herrington is due in court tomorrow. It is my assessment that no community sentence would be workable as Mr Herrington shows no willingness to work with probation. One of the offences of assault is against the same victim of his index offence. He is assessed as very high risk to her and even more so as it is believed that they want to be together. There is no non-molestation order in place any more as she got rid of it.

He is high risk to staff, public and children. Therefore a custodial sentence would aid in protecting all these groups. He has also just started to work with mental health in custody which may reduce his risk if he continued to do so. If he was to be released he would have no fixed abode and the risk of re-offending would be serious and imminent.

Could a restraining order be considered?"

The judge drew that to the attention of the parties and raised the question of whether a restraining order should be made. The prosecution said that usually that has to be instigated by the complainant and she had refused to make a statement and was indeed in court supporting the appellant. The judge nevertheless went on and made the order saying:

"... the defendant being considered to be a high risk to Probation Staff, to public and children, I am in no doubt that a restraining order will be imposed. That will be for a period of three years, prohibiting the defendant contacting, directly or indirectly, Holly Jones, save and except through the intervention of the probation service."

#### Grounds of appeal

6. The grounds of appeal in a nutshell say that in acting as he did the judge erred in his interpretation of the law. In fairness to the judge, the authorities now relied upon were not drawn to his attention. Those cases are R v Picken [2006] EWCA Crim 2194 and R v Brown [2012] EWCA Crim. 1152. It is unnecessary to quote extensively from those decisions but in the later case at paragraph 13, Thirlwall J (as she then was) speaking on behalf of the court said this:

"This young woman wishes to continue in a relationship with a man who has been repeatedly violent to her. That is a decision that she is entitled to make, however dispiriting it may be. There is no suggestion that she

lacks capacity, or that she has been forced to do this, or that she is in fear of the applicant. She genuinely wishes to pursue her relationship. In those circumstances the restraining order should not have been imposed."

### Discussion

7. This is not a jurisdiction which can be used to prevent an adult from deciding who she wants to live with. Although any person considering this case would consider that Holly Jones is at serious risk of violence from the appellant, she has the right to live with him if she chooses. It is to be hoped that she is genuinely aware of the risk she is running in doing that, but ultimately she is an adult and free to take those decisions for herself. The law does not presently permit the criminal court to act to protect victims of domestic violence against the consequences of decisions of this kind which they freely make. Because of our level of concern for her safety, we caused the police to contact her very recently before this case was heard so that her wishes could be ascertained. She told them unambiguously that she wants this order revoked.
8. That degree of autonomy is the case for an adult who has the freedom to make her own decisions. It is right to say that the judge was concerned also in this case by the risk to the child of the couple and by the risk to the probation service whose staff may have to deal with this violent appellant.
9. To deal with the child first. The child may require the protection of the court. We have considered whether the order should remain in force because of the risk to her. But we consider that compelling the parents of a child to live apart and not to communicate with each other for her protection is a decision which the criminal court is not well equipped to take. A determination of the level of the risk to her and of the steps which are required to protect her from that risk and to promote her best interests requires a carefully calibrated decision of a court equipped to receive evidence from social workers with expertise in such matters and also to hear the evidence of the parents. The appropriate forum for the necessary protective steps for the safety of the child is in our judgment the family court. We consider that if the social services are concerned about the risk to the child presented by her father, as they plainly seem to be, then the appropriate course for them to take is to take proceedings in the family court while he remains in prison. They have this opportunity as a result of the prison sentence which he is serving and it is a matter for them how they proceed.
10. So far as the probation service is concerned, if the probation service is concerned for the safety of its staff it can apply for and obtain an order protecting them, whether by means of a restraining order or by means of an order from the County Court. It is a matter for them to consider. What they cannot hope to achieve is an order which protects those staff by the device of keeping the appellant and Holly Jones apart.
11. A transcript of this decision of this court will in due course be drawn up. We will cause it to be sent as soon as we can to the Crown Prosecution Service which should distribute it to the relevant social services department with responsibility for the care of

the child and also to the probation service with responsibility for the protection of its staff.

12. For the reasons we have explained, the order which was undoubtedly made by the judge with the best of intentions and firmly based on a well-founded fear of harm in its absence, ought not to have been made and must be quashed. This case demonstrates a concerning level of domestic violence but the ability of this court to address that is unhappily limited.
13. For those reasons this appeal succeeds to the extent that the restraining order is quashed but all other orders remain in place.