

Neutral Citation Number: [2018] EWCA Crim 1472
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT MANCHESTER
HIS HONOUR JUDGE BOORA
T20160136

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/06/2018

Before :

LORD JUSTICE BEAN
MR JUSTICE KERR

and

HER HONOUR JUDGE CUTTS QC (SITTING AS A JUDGE OF THE COURT OF APPEAL (CRIMINAL DIVISION))

Between :

	REGINA	<u>Respondent</u>
	- and -	
	KAMRAN KHAN	<u>Appellant</u>

Alistair Reid (instructed by **The Registrar of Criminal Appeals**) for the **Appellant**
Daniel Calder (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date : 21 June 2018

Judgment Lord Justice Bean :

1. On 27 January 2016 there was an incident of road rage on Regent Road in Salford. The appellant was driving a black BMW with Aweis Bashir as a passenger. The BMW was being driven erratically. It then pulled up at traffic lights. Bashir, who had a hood over his face, got out of the car, ran over to a Volkswagen Golf and smashed the windscreen with a steering lock, shouting as he did so. The appellant got out of the BMW but then

both he and Bashir returned to that car.

2. The Volkswagen drove off as if to overtake the BMW but crashed into it. The appellant and Bashir both got out of the BMW, Bashir still holding the steering lock. The Volkswagen reversed, apparently deliberately, into Bashir who was standing at the side of the BMW. Bashir smashed the rear window of the Volkswagen, which then drove off.
3. The appellant then drove after the Volkswagen. It went through a red light and tried to turn left. The appellant, driving the BMW, sped up and crashed into the back of the Volkswagen, causing it to spin around. The Volkswagen managed to drive away. The appellant then continued on his way. He was stopped by a passing police car. He told the officer that someone had collided with his vehicle, then driven off. He was arrested and handcuffed. Officers noticed a smell of cannabis in the car and a small amount of cannabis was found in the car. Two addresses connected with the appellant were searched. Small quantities of cannabis were found at both properties – 12.7 grams with a value of £109.20 and 6.7 grams with a value of £57.77 respectively. In his basis of plea the appellant said he was concerned in the supply of cannabis on the basis that he gave Bashir a lift knowing that he (Bashir) was supplying cannabis.
4. He was charged with dangerous driving; being concerned in the supply of cannabis; and two counts of simple possession. He pleaded guilty to all these charges. On 21 December 2016 he was sentenced by His Honour Judge Boora as follows: 16 months imprisonment, suspended for two years, for dangerous driving; a community sentence for the class B supply offence and no separate penalty for the simple possession. Unsurprisingly there was no application for permission to appeal against these sentences. The defendant can consider himself fortunate that the sentence of imprisonment was suspended. A charge of affray and a number of other counts were ordered to lie on the file. Bashir pleaded guilty to affray; to possession of cannabis with intent and possession of criminal property and was sentenced to 12 months imprisonment suspended for two years.
5. Shortly before this sentence hearing the prosecution applied for a criminal behaviour order (“CBO”) against the appellant alone. We were told by Mr Calder on behalf of the prosecution that this was because the appellant had numerous previous convictions whereas Bashir was of previous good character or very nearly so. Notice of application was given in accordance with Rule 31 of the Criminal Procedure Rules. The order sought was that the defendant should “not associate with Aweis Bashir DOB 04/04/1996 in a public place or place to which the public has access (including inside a mechanically propelled vehicle)”.
6. The last paragraph of the “description of behaviour” section read:-

“the non-association clause is considered proportionate in this current case due to the ferocity of the incident at a busy time of the day on one of the main arterial routes into Manchester in the

plain view of people travelling to and from Manchester. Also, Aweis Bashir is a known long-standing associate of the defendant. It is proposed that this order should apply to the whole of Greater Manchester and be indefinite in length.”

7. The application was not listed before Judge Boora until 9 August 2017. We were told that most of the period of delay was caused by the prosecution deciding whether to pursue confiscation proceedings. The defendant did not attend: this cannot have improved his standing in the eyes of the judge, but did not deprive the court of jurisdiction.
8. The judge made a CBO. The finding was in standard terms:- “the court found that the defendant has engaged in behaviour that caused or was likely to cause harm or distress to one or more persons and the court considers that an order is necessary to help in preventing the offender from engaging in such behaviour”. (We observe at this stage that the word “necessary” does not form part of the current statutory test). The prohibition was:-

“not to associate with Aweis Bashir dob 04/04/1996 in a public place or place to which the public has access (including inside a mechanically propelled vehicle.”
9. The order was to remain in force for a period of three years. There was no geographical limitation.
10. Mr Khan now appeals to this court by leave of the single judge. That leave was originally confined to the issue of the geographical extent of the order. The case was originally listed to be heard before a constitution of this court presided over by the Vice President, Lady Justice Hallett, but was adjourned before the hearing to enable the appropriateness of the imposition of a criminal behaviour order in this case to be considered as a whole. For the avoidance of doubt we grant leave to appeal against the order generally.
11. Section 22 of the Anti-Social Behaviour Crime and Policing Act 2014 provides so far as material:-

(2) The court may make a criminal behaviour order against the offender if two conditions are met:

(3) The first condition is that the court is satisfied, beyond reasonable doubt, that the offender has engaged in behaviour that has cause or was likely to cause harassment, alarm or distress to any person.

(4) The second condition is that the court considers that making the order will help in preventing the offender from engaging in such behaviour.

An order may be in the form of a prohibition or a requirement or may contain both. There are additional provisions in section 24 applicable to requirements, but we are not concerned with them in the present case.

12. It was noted by this court in *R v Browne-Morgan* [2016] EWCA Crim 1903 that, unlike section 22(3), section 22(4) does not require the court to be satisfied beyond reasonable doubt that making the order will help in preventing the offender from engaging in such behaviour.
13. Rules 31.2 and 31.3 of the Criminal Procedure Rules prescribe procedural steps which must be taken in order to get an application off the ground. The necessity to follow them emphasises that an application for a CBO is not one to be either made or considered on the hoof.
14. As with any order of a criminal court which has characteristics of an injunction, it is essential that the guidance given by this court in *R v Boness* [2005] EWCA Crim 2395 at paragraphs 19-23 in relation to anti-social behaviour orders should be borne in mind. The terms of the order must be precise and capable of being understood by the offender. The findings of fact giving rise to the making of the order must be recorded. The order must be explained to the offender. The exact terms of the order must be pronounced in open court and the written order must accurately reflect the order as pronounced. (These four requirements were derived from the previous decision of this court in *R v P (Shane Tony)* [2004] EWCA Crim 287.)
15. Because an order must be precise and capable of being understood by the offender, a court should ask itself before making an order “are the terms of this order clear so that the offender will know precisely what it is that he is prohibited from doing?” Prohibitions should be reasonable and proportionate; realistic and practical; and be in terms which make it easy to determine and prosecute a breach. Exclusion zones should be clearly delineated (generally with the use of clearly marked maps, although we do not consider that there is a problem of definition in an order extending to Greater Manchester) and individuals whom the defendant is prohibited from contacting or associating with should be clearly identified. In the case of a foreign national, consideration should be given for the need for the order to be translated.
16. In *DPP v Bulmer* [2015] EWHC 2323 (Admin) Beatson LJ said:

“26.....I consider that, subject to a qualification, the guidance given in decisions of this court [the Divisional Court] and those of the Court of Appeal (Criminal Division) on ASBOs is of relevance when considered whether to make a Criminal

Behaviour Order. The qualification is that the principles derived from the authorities on ASBOs require modification to reflect (a) that fact that the regiment of necessity, which caused a certain amount of difficulty, is no longer part of that statutory scheme and (b) it is now possible to impose positive requirements.

..

35. S 22(4) of the 2014 Act does not expressly impose any burden of proof upon the prosecution. While the court hearing an application for a Criminal Behaviour Order should proceed with a proper degree of caution and circumspection because such orders are not lightly to be imposed, satisfaction to the criminal standard is not required in what is an evaluative exercise.

36. The matter is not one of "pure discretion". Unless, however, the court hearing an appeal concludes that the judge has plainly erred in some way, either in his assessment of the facts or in applying the wrong test or leaving out of account matters which he was required to take into account, it should not interfere with his conclusion. I add one qualification to what Rix LJ stated [in *Leeds City Council v Fawcett* [2008] EWCA Civ 597] about not interfering with the detailed provisions of an order, and second-guessing the judge's evaluation. The decisions on ASBOs show that an appellate court will, while giving due weight to the evaluation of the judge, be particularly concerned about the proportionality of an order. This is seen from the cases in which an appellate court has narrowed the area of an exclusion zone, as in *Barclay* [2011] EWCA Crim 32; [2011] 2 Cr App R (S) 67 where the court reduced the area from which the appellants were excluded to a smaller one bounded by specified roads. It is also seen where a particular restriction is removed or refined to ensure that the order is better tailored to the anti-social behaviour of the particular offender, as in *Boness* where the court targeted the order of two of the offenders more closely to football matches."

17. At para 43 Beatson LJ noted that there were examples of orders with wide exclusion zones, but added:-

"It must however, be emphasised that the order must be tailored to the specific circumstances of the person on whom it is to be imposed and that assessments of proportionality are intensively fact sensitive."

18. We agree with and endorse these observations of Beatson LJ. We note also that on 24 December 2017 the Home Office issued an updated version of its document *Anti-social Behaviour; Crime and Policing Act 2014: Anti-social behaviour powers: Statutory*

guidance for frontline professionals, which states that the CBO “is intended for tackling the most serious and persistent offenders where their behaviour has brought them before a criminal court.”

19. We are still in the early days of CBOs and the case law is not yet fully developed. Section 22 of the 2014 Act might on a literal construction be said to apply to a high proportion of cases in the criminal courts. Many offences are committed in public places and cause a degree of alarm and distress either to the victims or to members of the public who observe them. We asked Mr Calder in what types of case a CBO is appropriate: his response was that s 22 of the 2014 Act confer on the Crown Prosecution Service a wide discretion to apply for a CBO in any case which satisfies the requirements of the section. That may be strictly correct, but it does not give any assistance to judges before whom such applications are made.
20. We do not believe that it was the intention of Parliament that criminal behaviour orders should become a mere matter of box-ticking routine. As Beatson LJ said, such orders are not lightly to be imposed; the court should proceed with a proper degree of caution and circumspection; the order must be tailored to the specific circumstances of the person on whom it is to be imposed; and assessments of proportionality are intensively fact sensitive.
21. Turning to the present case we observe that: (a) it was the conduct of Bashir (reflected in the charge of affray which he admitted) in wielding the vehicle lock as he did, and the response of the driver of the Volkswagen, which must have caused alarm and distress to any onlookers, rather than the appellant’s driving as such; (b) the application for and the making of a CBO against the appellant alone had the curious result that the appellant is prohibited from associating publicly with Bashir, but not the other way round, despite the fact that the appellant was not the one convicted of affray; (c) there was no evidence to demonstrate even on the balance of probabilities that the appellant and Bashir were fellow members of a gang.
22. It was also in our view most unsatisfactory that the application for a CBO did not come before the judge until more than seven months after the main sentencing hearing. The notice of application under Rule 31.2 has to be served (as it was in this case) before the judge passes sentence for the offences which form the factual basis for the application; but although there is power to adjourn the CBO application, a delay of several months (save in the most exceptional circumstances) seems to us to be wholly unacceptable.
23. We consider that this CBO should not have been made at all. It is therefore unnecessary to decide whether it should have been limited to Greater Manchester. We need only say that while a nationwide order or one of wide geographical extent might well be disproportionate if the restriction is a broad one, it might more readily be justified when the only prohibition is against associating in public with a named individual who is not a member of the defendant’s family.

24. For these reasons the appeal is allowed and the criminal behaviour order quashed.