Neutral Citation Number: [2016] EWCA Crim 1297
No. 201600231 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 14th April 2016

B e f o r e
THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(Sir Brian Leveson)

MR JUSTICE SAUNDERS

and

THE RECORDER OF REDBRIDGE
(His Honour Judge Radford)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

v

BILAL KHELLAF

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(Official Shorthand Writers to the Court)

Mr B Waidhofer appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Thursday 14th April 2016

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION: I shall ask Mr Justice Saunders to give the judgment of the court.

MR JUSTICE SAUNDERS:

1. On 11th December 2015 in the Crown Court at Norwich the appellant was sentenced to a total of nine months' imprisonment for three breaches of a non-molestation order and one offence of assault by beating. There is no appeal against those sentences, which were entirely appropriate and merited.

2. The appeal, which is brought with the leave of the single judge, relates solely to the restraining order that the judge imposed which was in these terms:

> "The appellant is prohibited from:
>
> 1. communicating either directly or indirectly with Malgorzata Pawlowska either by telephone or by text message, email, letter in in any other way, save in accordance with an order that may be made by Cambridge Family Court in relation to arranging contact with the child of the family [MK] … and the appellant is further prohibited from instructing, encouraging or in any way suggesting that any other person should do so;
>
> 2. coming within 50 metres of the home address of Malgorzata Pawlowska …"

3. The submissions made by counsel in his original application for leave in relation to the restraining order were: first, that it was inappropriate to make one; secondly, that the terms of the restraining order were wrong in principle; and thirdly, that the duration of the restraining order was excessive.

4. In oral argument before us counsel has not pursued those matters on which the single judge refused leave, but, having considered his written submissions, we will deal with them in our judgment.

5. The appellant married Malgorzata Pawlowska in September 2011. In May 2012 their daughter was born. Since then there has been a history of violence and harassment by the appellant on his wife, mainly initiated because of his desire to have more contact with, or to see, the child.

6. On 4th July 2013 the appellant was sentenced to a community order with supervision and unpaid work requirements for three offences of battery against Ms Pawlowska. The last offence involved slapping and grabbing her by the wrist during a domestic argument. He failed twice to comply with the requirements of that order and was dealt with by the magistrates for both those breaches.

7. On 13th June 204 a non-molestation order was made by the Cambridge Family Court which prohibited the appellant from using or threatening violence against Ms Pawlowska and from communicating with her in any way, save for urgent welfare or contact issues concerning their daughter.

8. On 26th June 2014 the appellant breached the non-molestation order by going to Ms Pawlowska's home address. He was sentenced for that breach on 4th August 2014 to a community order with supervision and activity requirements.

9. Finally as to the history, on 16th July 2014 a Child Arrangements Order was made by the Cambridge Family Court specifying in detail how contact with his daughter was to take place.

10. We deal briefly with the facts of the current offences. On 31st August 2014 the appellant approached Ms Pawlowska and their daughter at a supermarket near to her home. He said that he wanted to take the daughter away to play. He took the child out of her pushchair and held her and talked to Ms Pawlowska for about ten minutes before returning the child to her pushchair and leaving.

11. On 7th September 2014 Ms Pawlowska was in a coffee shop when the appellant entered. She exited the shop in order to join her mother and daughter at one of the tables outside, and the appellant sat down at a nearby table and played with their daughter. It is correctly said by counsel that there was no immediate violence involved in either of those offences; nor were they the most serious of breaches. Nevertheless, they were breaches of the order.

12. More seriously, on 22nd November 2014 Ms Pawlowska returned to this country from Poland, where her daughter remained with permission of a court order dated 30th October 2014. As she was walking home on that day, Ms Pawlowska encountered the appellant. He told her that he had things for their daughter and wanted to talk about her. Ms Pawlowska reminded him that he was not allowed to contact her. The appellant followed her home. She told him to leave or she would call the police. The appellant replied, "Don't be silly, they won't come". He pushed his way into her flat against her will. He held the door shut behind them. She screamed repeatedly for the appellant to get out and leave her alone. He pushed her in the face and put his hand over her mouth to prevent her from shouting. Ms Pawlowska went to another room to call the police, but the appellant grabbed the telephone from her. Ms Pawlowska managed to exit the

premises and borrowed the mobile phone of a passer-by, but the appellant again grabbed it from her. In our judgment, that was a serious and persistent breach of the order.

13. In his Advice counsel referred to a large number of cases, some of which establish principles which should be taken into account when deciding whether to impose a restraining order, and some of which do not.

14. In our view, the authorities set out the following propositions:

> (1) A court should take into account the views of the person to be protected by such an order as to whether an order should be made. We do not say that there will never be a case where it would be inappropriate to make a restraining order, even though the subject of the order does not seek one, but the views of the victim will clearly be relevant. Nor do we say that a court must have direct evidence of the views of the victim. That may prove impossible. The court may be able to draw a proper inference as to those views, or may conclude that a restraining order should be made whatever the views of the victim, although clearly if a victim does not want an order to be made because she wants to have contact, that may make such an order impractical. But we accept that in normal circumstances the views of the victim should be obtained. It is the responsibility of the prosecution to ensure that the necessary enquiries are made.
>
> (2) An order should not be made unless the judge concludes that it is necessary to make an order in order to protect the victim.
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> (3) The terms of the order should be proportionate to the harm that it is sought to prevent.
>
> (4) Particular care should be taken when children are involved to ensure that the order does not make it impossible for contact to take place between a parent and child if that is otherwise inappropriate.

15. We have no doubt that this was an appropriate case for a restraining order. In his application for leave, counsel argued that this was not an appropriate case, but that has not been pursued in oral submissions before the court. The appellant had assaulted his wife on a number of occasions, including in her own home. He had breached a number of orders. He continued to try to contact her despite those orders. There had been a trial. At the end of the trial there had been an application for a restraining order, although drafted in terms of which the judge did not approve. He had heard evidence from the complainant in the trial. He was entitled to infer, even if she had not told him directly, that she wished for a restraining order to be made. It was also both necessary and proportionate, in our judgment, to make such an order.

16. We turn to deal briefly with the terms of the order. The trial concluded on 16th November. Sentence was adjourned until 11th December. On that date different prosecution counsel was

instructed who clearly had no idea of what had transpired at the trial. An issue arose as to whether the complainant had returned to live in Poland with her child or still lived in the Haverhill area. That issue, in our judgment, was never satisfactorily resolved. Apparently attempts had been made to contact her, but without success. Enquiries were made by the prosecution while mitigation took place. Prosecution counsel was instructed that the complainant lived at the address in Haverhill named in the order. Where that information came from and what it was based on is not clear to us. There was clearly doubt as to whether the complainant was still in this country or whether she had returned to live in Poland. It is not clear to us how reliable the evidence of her address was.

17. In those circumstances, in our judgment, that part of the order directing that the appellant cannot approach that address cannot stand.

18. As for the second part of the order, we see no reason why it should not remain in force. There is no reason why the order should not prevent communication, including communication about access, except through the Family Court. That proposition is supported by *R v C* [2014] EWCA Crim 343.

19. We have also considered the length of the order, which was indefinite. Counsel has pursued that matter in oral submissions to us. We take into account that any order should be necessary and proportionate. Counsel has sought to address us on various other cases where short orders have been deemed to be appropriate. They do not, in our judgment, establish any matter of principle. The appropriate length of the order, which should be necessary and proportionate, is a matter for the trial judge who will have all the facts properly before him.

20. We consider, looking at this matter again, that an indefinite order in this case is not necessary or proportionate. We consider that in all the circumstances it is possible to attach a fixed period to the order, namely three years. There is a reasonable expectation, in our judgment, that by that time matters will have settled down and the order will be unnecessary. If further problems arise, then an application can be made for a further order to be considered.

21. Accordingly, we alter the length of the order from until further order to a fixed period of three years. Although we alter the order made by the judge in this case in those two respects, we would like to commend the way in which he dealt with this aspect of the case where he had very little, if any, help from the prosecution. He redrafted to order himself which had been originally proposed by the prosecution because in his judgment it was inadequate. On the day of sentence, when he was entitled to assistance from prosecution counsel who knew something about the case, he had none.

22. Accordingly, we delete the second prohibition from the restraining order and we vary the length of the order from until further order to a period of three years or further order. To that extent the appeal is allowed.