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No: 201900353/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Friday, 14 June 2019

B e f o r e:

MR JUSTICE SPENCER

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

R E G I N A

v

TERENCE ROBERT MAGUIRE

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Mr M Masson appeared on behalf of the **Appellant**

J U D G M E N T

(Approved)

1. HIS HONOUR JUDGE PICTON: On 3 July 2018, in the Crown Court at Kingston upon Hull, the appellant pleaded guilty to two offences of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Persons Act 1861 and one offence of controlling or coercive behaviour, contrary to section 76 of the Serious Crime Act 2015. On 19 July, before Mr Recorder Palmer, the appellant was sentenced to a total of 4 years' imprisonment, made up of consecutive sentences being imposed for each of the offences.

2. There is no appeal in respect of those sentences. The Recorder, however, adjourned for later consideration a prosecution application that the appellant should be made the subject of a criminal behaviour order ("CBO"), the application being made under section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 ("the Act").

3. On 18 December 2018 the case was listed before His Honour Judge Kelson QC in order for evidence to be considered and submissions made. The transcript of exchanges between the judge and counsel on that date reveals that there were two particularly contentious issues that are relevant to this appeal. It was, however, effectively conceded on behalf of the appellant that the making of some form of CBO was justified in the context of the evidence that formed the basis of the charges, which material fell to be assessed in the context of a history of domestic violence, arising from relationships the appellant had been involved in with other women.

4. The contentious issues during the hearing were.

1. a proposed clause in the draft CBO that was expressed thus:

"The defendant must inform the local police station of the name of any new partner within 14 days of commencing

an intimate relationship…", and

(b) the duration of any order that might be made.

5. The defence conceded then, and concede now, that a CBO with a clause requiring the appellant to inform the police as to where he was living was necessary and proportionate in the context of the history of domestic abuse about which the court heard, both relating to the index offences and events that featured in some prior relationships. Given the concession that the appellant qualified for a CBO of some description it is unnecessary to do more than refer to the facts by way of a brief summary.

6. The offences which brought the appellant before the court were committed against a young student called Amy Partington, who became involved with the appellant in January 2012. By June 2012 the relationship had become volatile and the appellant began to exhibit violence towards the complainant.

7. In July 2012 he assaulted the complainant, causing her injuries that merited her attendance at hospital and formed the basis of count 1 on the indictment. There was a further assault in February 2014 when the appellant strangled and assaulted the complainant in the kitchen. She described how his actions caused her to pass out. This assault was the foundation for what was count 3 on the indictment.

8. The final count reflected behaviour on the part of the appellant that took place between 2014 and 2018 and that by his plea he accepted amounted to an offence contrary to section 76 of the Serious Crime Act.

9. The appellant was 32 at sentence and had 21 convictions for 40 offences spanning from 11 November 1998 to 24 July 2017. His list of convictions includes offences of violence.

10. The Recorder proceeded to pass a sentence in respect of which no complaint is made. The prosecution however, in the course of opening the case, informed the Recorder that Ms Partington did not wish for the court to make a restraining order. The prosecution stated that in the circumstanced they were applying for a CBO.

11. Section 22 of the Act, so far as relevant states:

"Power to make orders

(1)This section applies where a person ('the offender') is convicted of an offence.

(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 caused 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.

(5)A criminal behaviour order is an order which, for the purpose of preventing the offender from engaging in such behaviour

(a)prohibits the offender from doing anything described in the order;

(b)requires the offender to do anything described in the order.

(6)The court may make a criminal behaviour order against the offender only if it is made in addition to

(a)a sentence imposed in respect of the offence, or

(b)an order discharging the offender conditionally.

(7)The court may make a criminal behaviour order against the offender only on the application of the prosecution."

12. As already indicated, it is conceded that the appellant qualified for a CBO. The Recorder however decided, quite properly, that there should be an opportunity for the prosecution to serve any additional evidence upon which it relied along with a skeleton argument and for the defence to respond in kind. The Recorder put the matter thus:

13.

"Rather than muddy the waters today, I will adjourn the application for the criminal behaviour order."

She indicated that she would set a timetable for a further progress of the case once sentence had been passed.

14. So far as adjourning consideration of the CBO is concerned, that is a matter dealt with in section 23 of the Act which, so far as relevant states:

"Proceedings on an application for an order

(1)For the purpose of deciding whether to make a criminal behaviour order the court may consider evidence led by the prosecution and evidence led by the offender.

(2)It does not matter whether the evidence would have been admissible in the proceedings in which the offender was convicted.

(3)The court may adjourn any proceedings on an application for a criminal behaviour order even after sentencing the offender.

(4)If the offender does not appear for any adjourned proceedings the court may

(a)further adjourn the proceedings

(b)issue a warrant for the offender's arrest, or

(c)hear the proceedings in the offender's absence."

15. The matter eventually came to be listed before His Honour Judge Kelson on 18 December. There does not appear to have been any discussion, either when the case was before the Recorder or when it came to be listed before His Honour Judge Kelson, as to whether it was appropriate for the application to be resolved before someone other than the sentencing judge. We have raised this with the parties but neither the appellant or respondent counsel raises any potential technical objection to the way matters came to be listed and in the circumstances we will proceed on the basis that it was permissible for one judge to adjudicate upon an adjourned CBO application arising from a case sentenced by a different one. We would observe, however, that it might be thought at least undesirable for matters to be so organised and perhaps preferable for the judge who sentences the defendant to thereafter resolve any CBO application that has to be adjourned before it can be concluded.

16. His Honour Judge Kelson was presented with evidence concerning complaints that had been made about the appellant by other women with whom he had been associated in the past. The allegations consisted not just of violence of the kind that featured in the indictment but also allegations of rape, albeit ones not pursued at least to conviction. Given that the making of a CBO in the some formulation or the other is accepted as being appropriate it is unnecessary to rehearse the evidence to which the judge's attention was drawn or the legal issues that were ventilated before him. It is sufficient to state that the picture painted was of a man who could be considered a serial abuser of women with whom he formed relationships.

17. The clause to which no objection was taken requires the appellant to:

"Inform the local police of any address at which he resides, whether temporarily or permanently such as any residential premises, including his home, or any temporary or semi-permanent structure, including but not limited to any tent, caravan, mobile home or boat within 14 days of moving to that address or structure..."

18. Having considered the evidence and heard submissions His Honour Judge Kelson adjourned the case until 21 December, in order for the prosecution to further consider the proposed clause requiring the appellant to inform the police of the name of any new partner. The judge ruled that a clause that imposed an obligation of that kind upon the appellant was necessary but said what was required was “some sort of precise, workable definition”.

19. When the case returned to court on 21 December the prosecution presented a draft that was converted into the CBO that the judge imposed. Counsel, referring to the second clause which is the subject of this appeal, saying:

”Paragraph (b) is designed, belt and braces, to also to put him under a duty to tell the police if he is forming a relationship with a female.”

The appellant’s counsel indicated that there was no objection to the `residence’ clause but that the objection to the second was maintained even in this new formulation. Counsel observed that previous instances of domestic abuse had tended to exhibit themselves once relationships had become established as opposed to in the early stages, citing the history of how matters developed with the complainant who featured in the indictment. He also repeated an observation that he had articulated at the earlier hearing, submitting that the clause offended against the principles espoused in the case of *R v Boness & Ors*[2006] 1 Cr App R(S) 120, on the basis it was too vague and difficult to enforce. The judge was unpersuaded by the objections raised, commenting that, in his view, the appellant was, in terms of relationships with females “a danger to shipping”. Thus it was that he made a CBO in the terms the prosecution had requested and he also ordered that it should subsist for 15 years.

20. Turning to the case of Boness, a consolidated appeal which considered the correct approach to ASBOs, which came to be replaced by CBOs, the court stated at paragraph 20 of the judgment that:

21.

”Because an ASBO must obviously 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 [the offender] is prohibited from doing?”

The judgment also referred to a report by a working party set up Thomas LJ (as he then was) which recommended that the prohibition should be capable of being easily understood by the defendant and the conditions should be enforceable, in the sense it should allow a breach to be readily identified and capable of being proved. This general approach can be seen to have been adopted in respect of other behaviour orders and in particular the Sexual Harm Prevention Order regime enacted by the Sexual Offences Act 2003 (as amended) and in respect of which there is a wealth of authority with which all criminal practitioners are familiar.

22. Counsel for the appellant, Mr Masson, who did not appear below but to whom we are grateful for his focused and economical submissions, as well as a supplementary written document he provided overnight, has sought to devlop the objections raised before His Honour Judge Kelson. In the course of discussions, we have put before counsel a draft proposed alternative formulation which he has had an opportunity to consider.

Discussion

23. We do not consider that the “relationship” clause, as it might be described, complies with the guidance that the court in Bonessprovided. We do not accept that the terms of the order are sufficiently clear notwithstanding the respondent’s assertion to the contrary. What is meant by “relationship”? When is one “formed” such as to trigger an obligation on the part of the appellant to inform the local police of the name of the female in question? How is a clause expressed thus to be policed? We consider that the clause is hopelessly vague and that the appellant’s submissions to that effect are well-founded.

24. Identifying flaws in a clause that features in a CBO or SHPO is normally relatively straightforward. It may be thought that the more difficult task, however, is settling upon a formulation that does comply with the Bonesscriteria but at the same time addresses the proper concerns of the court by reason of the appellant’s past behaviour and the risk he poses to women with whom he may be involved in the future. The fact that it may be considered necessary to impose a clause in a CBO that seeks to police this aspect of the appellant’s conduct does not justify the imposition of an obligation that cannot be sufficiently clearly understood and monitored.

25. We consider that there is some force in the observation of the appellant’s counsel to the effect that problematic behaviour on the part of the appellant tends to feature once relationships become reasonably well established. That may not be exclusively so but the fact that a clause in a behaviour order does not address every circumstance that can envisaged does not mean it lacks sufficient utility so as to warrant being made.

26. Accordingly, we have settled upon a formulation which counsel frankly accepts would not have been the subject of an appeal had it been the one that His Honour Judge Kelson had in fact imposed. The terms of the criminal behaviour order that we have proposed, and to which Mr Masson raises no objection, is as follows:

”Terry Robert Maguire must

(1) inform the local police of any address at which he resides, whether temporarily or permanently, such as any residential premises, including his home or the home of another, or any temporary or semi-permanent structure, including but not limited to any tent, caravan, mobile home or boat within 14 days of him moving to the address or structure.

(2) inform the local police of the name and address of any female (excluding family members) with whom he resides for a period of 14 days or more (consecutive or otherwise).”

27. We consider that such a formulation has sufficient clarity and “policeability” to be an appropriate one to impose in this case and accordingly we quash the criminal behaviour order made by His Honour Judge Kelson and replace it with one expressed in the terms that we have just identified. Mr Masson has a copy of the order, the terms of which will obviously need to be communicated to the appellant.

28. So far as the duration of any order is concerned, we consider the judge was correct to order that the clauses should remain in place for 15 years. The appellant has displayed very concerning behaviour towards women for

many years and it was reasonable for the judge to consider that the risk he represents, which the criminal behaviour order was necessarily designed to address, would persist for a long time in the future. Of course, if a stage is reached where one is no longer necessary, there is the capacity to bring the matter back to the court by way application to vary or discharge the order. Accordingly, this appeal will be allowed with the criminal behaviour order now expressed in the terms we have identified but with it remaining in place for 15 years as was originally directed.

29. MR JUSTICE SPENCER: Mr Masson, it is obviously very important that the appellant understands the implications as well as the strict terms of the order as varied. We shall be grateful if you would give us an undertaking that you will ensure through your instructing solicitors no doubt - the solicitors who represented him then - that he will be informed and it will be explained to him.

30. MR MASSON: I indicate that undertaking.

31. MR JUSTICE SPENCER: It seems to us sensible that he also be encouraged in the event of becoming interested in any female in the future to keep a diary of precisely when and where he has been staying with her. So that the question of policing can be established more easily.

32. MR MASSON: I will certainly convey that to those instructing me my Lord.