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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday 6 August 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GOSS

MR JUSTICE KNOWLES

R E G I N A
v
OSMAN AWAN

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Miss L Brown appeared on behalf of the **Appellant**

Mr L Chinweze appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: This appellant pleaded guilty before a magistrates' court to an offence of harassment, contrary to section 2 of the Protection from Harassment Act 1997. That is a summary only offence, but the appellant committed it in breach of a suspended sentence imposed by the Crown Court. He was therefore committed for sentence to the Crown Court at Bradford. On 23 May 2019 he was sentenced to two months' imprisonment for the offence of harassment. His suspended sentence was reduced in length from nine months to six months, but activated consecutively, so that the total sentence was eight months' imprisonment. In addition, a restraining order was made. The appellant does not challenge the prison sentence, but appeals by leave of the single judge against the restraining order.

2. The appellant is now aged 36. For about 14 years he was in a relationship with Gemma McDade. There are four children of that relationship. The couple separated on 3 February 2019, at which time the children were aged nine, seven, five and eight months.

3. The suspended sentence to which we have referred was imposed on 24 November 2017 in respect of an ugly incident at the family home on 30 April 2017. Not for the first time, police were called to the house by Miss McDade. In the course of the incident the appellant struck Miss McDade, he inflicted grievous bodily harm on a police officer who fell down the stairs as the appellant struggled to resist arrest, and finally the appellant escaped from lawful custody. The appellant pleaded guilty to those offences. He had no previous convictions. He was sentenced to a total of nine months' imprisonment suspended for 18 months. He was required to perform unpaid work and a rehabilitation activity requirement was also imposed.

4. On 16 August 2018 the appellant was brought back before the Crown Court, having breached the requirements of the suspended sentence order, apparently by failing properly to perform his unpaid work. A number of additional hours of unpaid work was added to the order.

5. It appears that during the period of the suspended sentence the applicant and Miss McDade resumed cohabitation for a short time. However, the relationship then broke down again and in early February the appellant left the family home at Miss McDade's insistence.

6. The offence of harassment was committed between 12 and 27 February 2019, following the breakdown of the relationship. During that period the appellant sent about 400 text messages to Miss McDade. Their content was a mixture of abuse, expressions of love, apologies for past misconduct, pleas for a further reconciliation and self-pity. Miss McDade's replies, comparatively few in number, made it clear that she no longer wanted to live with the appellant. Nonetheless, on 24 February 2019 the appellant went to the family home and refused to leave. He stayed for about four hours until eventually the police were called. Miss McDade did not want to pursue a prosecution in that regard, but thereafter the appellant continued to call and text her. He also texted one of her sisters, Kelly McDade, saying that he wanted to kill both himself and Gemma McDade if she would not take him back. Matters were at that stage reported to the police. The appellant

attended the police station voluntarily but made no comment when interviewed under caution.

7. At the sentencing hearing, the judge was assisted by a pre-sentence report. He was also provided with a victim personal statement from Miss McDade dated 17 April 2019, in which she complained that the appellant was spreading malicious lies about her amongst her family and friends, and that he was also telling lies about her to their oldest son at times when he had contact with the children. It does not appear that prior to that hearing any specific enquiries had been made of Miss McDade as to whether she sought the protection of a restraining order. Counsel then appearing for the prosecution nonetheless invited the judge to make such an order, prohibiting contact with either Miss McDade or her sister Kelly and also prohibiting the appellant from going to Miss McDade's home.

8. We understand that Miss McDade had been in contact with the social services department which was therefore aware of the situation but had not found it necessary to take any action in relation to any of the children. There were no proceedings in the family court or indeed in any civil court between the parties. Miss Brown, then (as now) appearing for the appellant, informed the court that the appellant was living with his mother and was having contact with the children, the arrangements being made through another of Miss McDade's sisters, namely Joanne Garnett. Miss Brown asked that the restraining order, if one be imposed, should be qualified so as to permit the appellant to contact Miss McDade via a third party in order to arrange contact with the children. The judge indicated that any such contact should be through the appellant's solicitor. Miss Brown responded that the existing arrangement had worked satisfactorily without the involvement of any professional and that the cost of engaging a solicitor would be a considerable burden for the appellant. Counsel then appearing for the prosecution submitted that any contact in connection with seeing the children should be made through a solicitor.

9. The judge in his sentencing remarks rightly emphasised the seriousness of persistent harassment of Miss McDade at a time when the appellant was subject to a suspended sentence for offences which included assaulting her. He imposed the prison sentences to which we have referred and against which there is no appeal. He concluded his sentencing remarks as follows:

> "I make the restraining order in the terms sought by the prosecution, with the addition of the words 'Save and except for the purposes of arranging contact, such contact to be through the defendant's solicitor and the solicitor acting for the complainant in this case.' You will pay the victim surcharge."

10. Miss Brown advances two grounds of appeal against the restraining order. First, she submits that the imposition of a restraining order without any limitation of time was both wrong in principle and manifestly excessive. Secondly, she submits that the judge erred in imposing a prohibition which in practice severely impedes the appellant's ability to have contact with his children.

11. In support of these grounds, which she has advanced in her oral and written submissions,

Miss Brown relies upon principles set out by a constitution of this court in the case of Khellaf [2017] 1 Cr.App.R (S) 1. As to the duration of the order, she submits that the harassment took place over a period of about two weeks at the end of a 14-year relationship. She submits that the appellant has, albeit belatedly, accepted that his relationship with Miss McDade is indeed over and she submits that it is reasonable to expect that matters will settle down over a period of time. In those circumstances she submits the making of an indefinite restraining order was unnecessary.

12. As to the proviso to the restraining order intended to permit contact with the children, Miss Brown submits that the appellant cannot in practice take advantage of that proviso as he has no solicitor, and nor does Miss McDade. The order, submits Miss Brown, interferes with the right of the children to a family life, as well as interfering to a disproportionate extent with the appellant's rights.

13. For the respondent, Mr Chinweze, for whose written and oral submissions we are similarly grateful, sets out for the consideration of the court views very recently expressed by Miss McDade to the effect that she wants no contact with the appellant and wishes him to be restrained from contacting her, but that she has no objection to his being able to have contact with the children of the family. In this regard, two possible intermediaries are proposed : Miss McDade's sister Joanne Garnett, and a cousin of the appellant, namely Wajid Choudry. Mr Chinweze suggests that if the order is to be subject to a proviso permitting contact with the children, it should also contain a prohibition on the appellant approaching within 100 metres of Miss McDade's home. We see force in that suggestion, bearing in mind that the start and end of contact meetings with the children would potentially be a time when emotions between the adults might run high. We do not however think it appropriate to make an order in terms which do not specify Miss McDade's present address, because such an order would carry the risk that if there was a change of address not notified to the appellant he might unwittingly act in breach of it. Mr Chinweze acknowledges the submissions made against the indefinite duration of the order, but invites the court to consider whether it be necessary in this case.

14. The power to make a restraining order in the circumstances of this case is conferred by section 5 of the Protection from Harassment Act 1997. By section 5(2):

> "The order may, for the purpose of protecting the victim or victims of the offence, or any other person mentioned in the order, from further conduct which —
> (a) amounts to harassment, or
> (b) will cause a fear of violence,
> prohibit the defendant from doing anything described in the order."

15. Here, the judge was in our view entitled to find that it was appropriate to prohibit contact with the appellant and either Miss McDade or her sister Kelly in accordance with that statutory provision. The judge was also correct to say, as he did in the course of argument, that continuing contact between the appellant and the children was to be encouraged. He said:

> "It's not a question of restricting contact with his children; it's in restricting the circumstances in which further offences can be committed involving adults being used as a conduit for messages."

16. With respect to the judge however, we think it unfortunate that the decision as to the appropriate terms and duration of the order was made with undue haste. The decision of this court in Khellaf (to which we have referred) includes at paragraph 14 four principles. First, the court should take into account the views of the person to be protected, it being the responsibility of the prosecution to ensure that the necessary enquiries are made. Secondly, no order should be made unless the judge concludes that it is necessary in order to protect the victim. Thirdly, the terms of the order should be proportionate to the harm which it is sought to prevent. Fourthly, 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 a child where such contact is otherwise inappropriate.

17. Regrettably, as it seems to us, three of those principles were not observed in the present case. First, it does not appear that any proper enquiry had been made by the prosecution in advance of the hearing to ascertain the views of Miss McDade. That being so, it follows that no sufficient enquiry was made as to whether she opposed contact between the appellant and the children and, if not, what in practice could be arranged to facilitate such contact. The judge was entitled to receive significantly more assistance from the prosecution than he did in this respect.

18. Secondly, with regard to the third principle stated in Khellaf, the relevant harm was further harassment of Miss McDade by direct or indirect contact with her. The appellant had shown himself unreliable when he felt angry or distressed by Miss McDade's attitude towards him, but we can see no basis for the court to make an order preventing harassment indefinitely. The duration of the order seems not to have been fully considered. We agree with Miss Brown's simple proposition that in the circumstances of this case it was realistic to think that the relationship between the adults would settle down within a comparatively short period.

19. Lastly, and with reference to the fourth principle in Khellaf, it seems to us that quite apart from the human rights of the appellant and the children, in a case where there were no current family court or civil court proceedings, there is here a matter of commonsense. Although submissions were made by Miss Brown about the obstacles to the appellant acting through his solicitor, submissions which were dismissed somewhat peremptorily by the judge, no one appreciated at the time that the order was also premised upon Miss McDade having a solicitor, when in fact she had no solicitor acting for her in relation to any matter.

20. We are satisfied that in those circumstances the appeal must succeed. It remains necessary that there be a restraining order, but it can in our judgment be limited in time and can contain a proviso which will in practice facilitate contact between the appellant and his children.

21. We therefore quash the restraining order imposed below. We substitute for it a restraining order which for the period of five years will prohibit the appellant from doing any of the following things. First, he must not contact directly or indirectly Gemma McDade, save that contact may be made indirectly through Joanne Garnett and/or Wajid Choudry for the purposes of arranging contact between the appellant and the children of the family. Secondly, the appellant must not contact directly or indirectly Kelly McDade. Thirdly, the appellant must not approach within 100 metres of 45 Vicarage Road, Shipley, BD18 1HA. To that extent, this appeal succeeds.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk