[2019] EWCA Crim 1180

2018/05252/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

5th July 2019

Before:

Lord Justice Irwin
Mr Justice Popplewell
and
HIS HONOUR JUDGE Field QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

Regina
and
Lina Tantash

Miss K O'Raghallaigh appeared on behalf of the Applicant

Friday 5th July 2019

Lord Justice Irwin
On 25th October 2018, having been convicted after a summary trial in the Sussex Central Magistrates' Court of two offences of stalking, the applicant was committed for sentence, pursuant to section 3 of the Powers of Criminal Courts (Sentencing) Act 2000, to the Crown Court at Lewes.

On 22nd November 2018, she was sentenced by Mr Recorder Lennard as follows: on offence 1 (stalking involving serious alarm or distress, contrary to section 4A of the Protection from Harassment Act 1997), four years' imprisonment; and on offence 2 (stalking involving serious alarm or distress, contrary to section 4A of the 1997 Act), four years' imprisonment. The sentences were ordered to run concurrently, and so the total sentence was four years' imprisonment.

The applicant now renews her application for leave to appeal against sentence following refusal by the single judge.

The facts may be summarised as follows. The two offences of stalking were both of a serious nature. Chronologically, the first offence was a course of conduct against a man called Jarlath Rice. He was someone with whom the applicant had had a brief relationship. The two had met in Dublin in 2007. The applicant quickly became obsessive about Jarlath Rice. She took to waiting outside his work place and turning up uninvited at events. This behaviour rapidly became overwhelming. According to his account of events, Mr Rice ended the relationship within a very short period of its commencement.

In the summer of 2015, things had become so pressurised as a result of the applicant's activity over the intervening years that Jarlath Rice left his home country and moved to Brighton in order to avoid – or to attempt to avoid – further contact with the applicant. However, he continued to receive at that point 40 to 50 emails a

week from her. When he blocked the email address, the applicant created a new one and simply carried on. Some of the emails told Mr Rice that the applicant would find out where he lived and worked, and that he would regret not being with her. Eventually, the applicant's behaviour was reported to the police who warned her about her conduct.

Following that warning, the applicant called the workplace where Jarlath Rice had worked some 20 times a day, asking to speak to him and requesting his contact details. The calls were made from withheld numbers. She was abusive and threatening when making the calls.

Despite the fact that he had moved from Ireland to Brighton, the applicant continued to contact his family in Ireland in an attempt to make contact with him. She became possessed of the idea that a woman called Sarah Bolland (the victim of the second offence) was in a relationship with Mr Rice, and she commenced to harass and stalk her. Ms Bolland received numerous threatening calls from the applicant. In one of the calls, typical of many, the applicant stated: "I'm going to fucking kill you". She also was abusive about Ms Bolland's looks and threatened her if she entered into or continued any relationship with Mr Rice.

On 11th October 2017, the school where Mr Rice then worked had an open evening. The applicant, having set up a "Just Eat" account using the school email address, sent more than £200 worth of food to the school, ordered in the name of Ms Bolland. That disrupted the open evening.

Another example of what this offending involved can be given of the events of 9th February 2018. Mr Rice intended to attend a works staff party in Brighton. When he arrived, he noticed the applicant standing opposite the venue. She attempted to speak to him. He had to evade her. Three days later he received an email from her saying that she would kill herself if he did not speak to her. Later that day, she was arrested by the police.

In an initial interview she denied leaving the voicemails, or organising the food delivery, or communicating any abusive messages. In a subsequent interview she answered "no comment" to all questions.

It is not necessary in an application of this kind to elaborate further on the facts. Some sense of the scale of what happened was that there were in the region of 20,000 emails sent to Mr Rice in the course of the relevant years.

The offending had a great impact on both victims. In his victim personal statement, having described the quantity of emails, text messages and phone calls, Mr Rice said:

> "Thousands of phone calls have made it a struggle for me to function on a personal level and to perform professionally in my work. She [the applicant] has hacked into my voicemails and then stalked and harassed myself and others connected to me through private information gathered on those messages which has caused anguish and fear for all involved."

A little later in his statement, he indicated that the applicant had in the past physically assaulted him and his ex-partner. He then said:

> "The aggressive and abusive dismantling of my life here in Brighton over this past year by [the applicant] has left me vulnerable, frightened and exhausted. Over the past year my life has become a living nightmare. I have moved address numerous times, recently having to move to a cheap hotel for a short period because I feared anywhere I was she would target me as has been the pattern in the past."

He went on to indicate that he has had trouble with his sleep, has had stress-related bouts of anxiety and has been pushed into deep depression. He has gone through periods of despair and has contemplated suicide. He said:

> "I do not have the freedom to live a normal life."

In her victim personal statement, Ms Bolland indicated that there were many anonymous phone calls to the school, both in Brighton and Bexhill. She indicated that the pressure mounted over the relevant period. Not only

did the applicant ring constantly, but called "very aggressively and assertively" to the reception in the school and insisted on being put through. On one occasion, when a phone call came through, Ms Bolland's guard dropped. She said "I had a lapse in concentration" and she indicated that she was Sarah Bolland. The conversation, as she recalled it, went on as follows:

> "She [the applicant] said 'Are you in a relationship with Jarlath Rice?' I panicked, and because it is our usual response not to give out any personal information and deflect personal questions, I said 'That's not an appropriate question' and hung up. … She called back immediately … and she said [and this was recorded] 'You need to fucking answer the question. It is appropriate and you need to answer yes or no. You look like a fucking horse. You're an ugly fucking bitch. Answer my question'."

It is not often grasped how destructive this kind of behaviour can be.

Before sentence, the learned Recorder had the benefit of a report from a psychiatrist, Dr Oluwole. He set out something of the personal background of the applicant. He said that she has experienced anxiety symptoms, low mood and suicidal thoughts following the breakup of long-term relationships. She had had a number of such relationships and similar emotional experiences, but she had never had a psychiatric hospital admission or engaged in deliberate self-harm or attempted suicide, although "she has threatened suicide to control others". He concluded:

> "[The applicant] does not suffer from an enduring mental illness such as schizophrenia or a major mood disorder …"

He concluded that using the Autistic Spectrum Quotient questionnaire, the applicant scored 37 out of 50, which put her in the range of having clinically significant autistic traits. He said:

> "… it is highly likely that [the applicant] suffers from Asperger's condition, a high functioning neurodevelopment disorder. It is also likely her tendency to obsessively focus on an interest with some difficulty with perspective taking may have contributed to her index offence."

It is clear from the psychiatric report that her Asperger's syndrome, as the psychiatrist described it, probably played some part in what the applicant did.

There was also a pre-sentence report before the Recorder. It is not necessary to recapitulate all of its contents. The conclusion of the pre-sentence report as to harm was as follows:

> "[The applicant] is assessed as presenting a medium risk of serious harm to the victim Mr Rice, as well as any females with whom he may be in a relationship, or with whom [the applicant] believes him to be in a relationship. The nature of this risk is emotional and psychological harm through stalking."

The applicant has no previous convictions.

In his sentencing remarks, the learned Recorder described the facts and their impact. He indicated that within the relevant guidelines very serious distress and significant psychological harm had been caused to the victims; Mr Rice had had to make considerable changes to his lifestyle to avoid contact. The Recorder concluded that the culpability was very high; that the conduct was so calculated as to maximise fear and distress; and that there was a high degree of planning and persistent action over a prolonged period. He categorised the offending as category 1A.

In written Grounds of Appeal it was submitted that such categorisation was inaccurate. But, sensibly, Miss O'Raghallaigh, who has appeared on behalf of the applicant today, has accepted that that was a proper categorisation of the offending. In our judgment it was obviously always so, not only because of the nature of the offending, but because there were two victims.

The Recorder concluded that, within the guidelines, the appropriate starting point for a category 1A offence,

which this was, was five years' custody. He allowed for some mitigation for the applicant's good character and for the surrounding circumstances, and reduced the sentence to four years' imprisonment. In refusing leave, the single judge observed that the decision was entirely justified.

Since the single judge considered the papers, and before the application was renewed today, we have seen two pieces of material which could not have been before the court below. The first is a report on the applicant's progress in prison. It is clear that she had made progress. She has all along been understood to be an able, intelligent and high-functioning individual. No doubt she will continue to be so, aside from this aspect of her personality.

The renewed application, however, is principally based on the other fresh document, which is a report from Dr Farnham. Technically speaking, leave is required to introduce this report because it is fresh evidence. It should not be assumed that a second expert report, psychiatric or otherwise, will be accepted by this court as fresh evidence when, not merely could it have been attained below, but a psychiatric report of this kind, addressing these considerations, was before the court below. However, so as to deal with the application as fairly as possible, we have agreed to look at this report *de bene esse* and see where it takes us.

Before doing so, it is necessary for the court to deal with a preliminary point raised by Miss O'Raghallaigh. She, with an eagle eye, spotted that the recital of the maximum penalty for this offending in the Criminal Appeal Office Summary in respect of the offending in relation to Ms Bolland, was wrongly stated to be five years' imprisonment. Having corrected that, she also considered what was the maximum for the offending in relation to Mr Rice. The change in the maximum sentence for this offence came about in April 2017. Miss O'Raghallaigh is correct that all the offending in relation to Ms Bolland post-dated that and therefore clearly the recital should have been ten years' imprisonment. But she then submitted to us that, because the offending in relation to Mr Rice pre-dated April 2017, in the sense that, as we have indicated, a significant course of stalking had taken place, that meant that the maximum for his offending in relation to Mr Rice was five years' imprisonment, which, in turn, should affect the application of the starting point set out in the guidelines.

In our judgment, this argument is misconceived in two ways. The first derives from the authority which has been placed before us by Miss O'Raghallaigh of R v Hobbs and Others [2002] EWCA Crim 387, [2002] 2 Cr App R 22. In that case the court was dealing with conspirators. The relevant act for a conspiracy is the agreement. The case concerned an argument there presented that in a case of conspiracy, where the agreement is complete before the date of a relevant change in maximum sentence, then the conspirators only fall to be sentenced under the earlier lower maximum. The court rejected the argument in relation to the offenders in Hobbs. The essential logic is contained in [16] and [17] where, having been referred to earlier authority ((R v Brown unreported, 7th December 2001) and (R v Khurshid Ahmed unreported, 8th February 2000)), the court said this:

> “16. We respectfully doubt whether the Court in Brown was bound because the Court in Khurshid Ahmed, while finding that the offence was being committed before 1 November, did not find that it was not still being committed after 1 November 1995. In that case, it was sufficient for the defence to establish pre 1 November powers in the judge. In Brown, it was necessary to exclude different post 1 November powers.
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> 17. Having said that, we consider that the approach of the Court in both cases supports the case of the present appellants. Defendants should not be affected adversely, with respect to powers of sentence, by changes in the law occurring during the currency of a conspiracy entered into before the changes.”

In other words, if a course of offending straddles the relevant commencement date for an increased maximum sentence, as in this case, then the increased maximum applies. Indeed, even where the relevant sentence is confined to an earlier maximum, as in historic sex offences, this court has been clear that, nevertheless, the earlier, lower maximum penalty forms a constraint on the application of guidelines only to the extent that it prevents sentences exceeding the maximum. It does not alter the approach to be taken from the guidelines in the way submitted by Miss O'Raghallaigh. For those reasons, the approach of the Recorder to the guidelines was untrammelled by any thought that the offending against Mr Rice altered the maximum and therefore should amend his approach to the guidelines themselves.

We return to the report of Dr Farnham. It is possible to extract the nub of his opinion from relatively limited passages in his report:

> "51. In my opinion [the applicant] is on the autistic spectrum and meets the diagnostic criteria for autism spectrum disorder (ASD) … In my view her condition is mild but is likely to affect her ability to manage relationships, particularly intimate relationships. I am largely reliant upon her self-report of her symptoms in making the diagnosis, but it seems to me that her stalking behaviour, inability to understand that the relationship with the victim was at an end and the very concrete measure of asking the victim to sign a love contract are all in keeping with the diagnosis. …
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> …
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> 54. In my opinion [the applicant's] mild ASD is likely to affect her ability to manage relationships and deal with the emotional aftermath of the end of relationships. People with ASD tend to view relationships, particularly where they feel they have made a significant emotional or financial commitment, as more or less permanent and find it very difficult to accept that they can come to an end. She [the applicant] is prone to very concrete thinking and is likely to misinterpret the actions of the victim as possibly suggesting that the relationship is not over or will continue. She is likely to become preoccupied with her own feelings and emotional state and is likely to find it difficult to appreciate the impact of her behaviour on the victim(s). … Individuals with ASD are at risk of becoming deluded in stressful situations. However, from a psychiatric perspective I suspect her campaign was more of an obsessional 'wish fulfilment' where she believed that she could continue the relation[ship] by bombarding the victim."

We have carefully read Dr Farnham's report. Although the expression of opinion is fuller and may be more elegantly constructed than that in Dr Oluwole's report, in our view the conclusions to which it comes are a little different to those in the report that was before the Recorder.

The heart of Miss O'Rallallaigh's submissions is that the applicant has a serious mental disorder; that the offending should be treated differently; that this additional evidence should reduce her culpability somewhat; that not enough weight was given in the sentencing exercise when reducing from five years to four; and that there should have been a greater reduction. She places emphasis upon the idea that there may have been delusional thinking on the part of the applicant.

We reject these arguments. This is not a mental disorder of the kind intended to alter the conclusions under the guideline. As Miss O'Raghallaigh has acknowledged, with frankness and charm, this kind of personality is the commonplace in cases of this kind, and must be taken to be the commonplace when the Sentencing Council concluded their definitive guidelines. This is not a mental disorder in the sense of a psychiatric disorder, such as schizophrenia or other such acute conditions, which would, as an incremental matter, fall to reduce culpability. In any event, both of the experts have indicated that the applicant is a very highly able person and that her condition is mild.

We do not think that there is sufficient merit in the application to grant leave to appeal. Accordingly, the renewed application is refused.