Neutral Citation Number: [2019] EWCA Crim 2238

Case No: 201901584/A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM St Albans Crown Court
HHJ Simon
T20187093 & T20180509

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/12/2019

Before :

LORD JUSTICE GREEN
MR JUSTICE NICOL
and
HER HONOUR JUDGE WALDEN-SMITH

- -

Between :

REGINA
- and -
RICHARDS

(Transcript of the Handed Down Judgment.
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Mr Tim Nutley (instructed by **Buxton Ryan & Co**) for the **Appellant**

Hearing date: Tuesday 3rd December 2019

Judgment
As Approved by the Court

Lord Justice Green :

A. Introduction: Legality of a city-wide restraining order – Article 8 ECHR

1. The present appeal concerns a provision of a Restraining Order prohibiting the appellant from entering Stevenage. It is contended that the restriction is contrary to Article 8 of the European Convention on Human Rights ("Article 8") and the Human Rights Act 1998. It is said to be unnecessary and disproportionate.

2. The appellant was sentenced to an extended sentence of 9 years and 4 months imprisonment pursuant to Section 226A CJA 2003 comprising a custodial term of 5 years and 4 months imprisonment and an extension period of 4 years. In addition, he was subject to a Restraining Order, current for 10 years: (i) not to contact directly or indirectly his previous partner save for contact with the children directed by the family court; and (ii) "*not to go to Stevenage*".

3. The reporting restrictions of the Sexual Offences (Amendment) Act 1992 apply to this case.

B. The Facts

4. The facts may be summarised as follows. On 19th November 2018 in the Crown Court at St Albans, the appellant pleaded guilty on re-arraignment to four counts. Count 1 related to the making of a threat to kill contrary to Section 16 OAPA 1861. Count 2 concerned sexual assault pursuant to Section 3 SOA 2003. Counts 3 and 4 comprised two instances of doing an act tending and intending to pervert the course of public justice contrary to the common law.

5. The offences relate to the appellant's relationship with a former partner. The appellant and the complainant had two children together. The complainant also had another child from a previous relationship. The complainant and her children live in Stevenage.

6. There was an extended history of the appellant acting abusively towards the complainant in a manner causing her to fear for her personal safety. At the time of the events in issue, the appellant was awaiting trial for alleged battery against the complainant.

7. On 30th March 2018, the complainant received telephone messages and silent calls from a person she believed to be the appellant. She was concerned that she was being tracked. That night, at around 1am, she was upstairs in bed with her son next to her when she became aware of a person entering her bedroom through the window. She grabbed the panic alarm that had earlier been installed by the police as a result of the appellant's previous abusive conduct. He grabbed it from her hand. She did not know whether it had been activated. The appellant then confiscated her mobile phone. He asked her if she had pushed the panic button on the alarm but she told him that she did not know whether it had been activated or not.

8. He started to cuddle the complainant. In relation to the pending prosecution for battery he said: "*Drop everything. I'm sorry. Please drop everything.*" He cuddled their son who was now awake and placed him back in his own bed. The complainant

was now concerned that the appellant might become violent, in the absence of his son. The appellant began to touch the complainant's bottom. He told her that he had missed her.

9. However, before matters could progress further, car engines were heard and the appellant said: "*It's the Police, tell them I'm not here*". He allowed the complainant to go downstairs and she opened the door. Officers witnessed that she was crying and was obviously frightened. She told them that the appellant was upstairs. They entered the son's bedroom and noted that he appeared frightened and was crying. They located the appellant hiding in a wardrobe and he was arrested. The panic alarm was in his pocket.

10. It was discovered that the appellant had removed an electronic tag which he had been required to wear as part of his bail conditions in relation to the earlier battery. This was found at his mother's address in Stevenage to which he had been bailed.

11. The appellant was remanded in custody. In interview, he explained that his presence at the complainant's home was due to the complainant telephoning him to inform him that their son was sick and that she wanted him to come over. He gave the complainant's name as "*Jane*" which was false and said only that she was a friend. The police placed the name "*Jane*" on a list of individuals to be contacted. The complainant later discovered this when she was telephoned by the prison and asked if she was "*Jane*".

12. On 14th April 2018, the appellant managed to speak by phone to the complainant. He again asked her to drop the battery charges against him.

13. On 11th June 2018, the appellant was found guilty of the battery charges in the Magistrates Court. A 3-year restraining order was imposed upon him. In the course of the hearing the appellant, and whilst the complainant was in close proximity, he said: "*If I could jump over there, I'd break her fucking neck. I'll be in life for murder. I swear on my kids' lives*". He then stared at the complainant and ran his finger across his neck. He was not interviewed in relation to this threat at the time but he subsequently informed the officer in the case that he had understood that the effect of the restraining order imposed upon him was that he would be prohibited from seeing his children ever again.

14. The appellant was subsequently prosecuted for the four offences which form the basis of this appeal. As observed, the judge ultimately imposed an extended sentence of 9 years and 4 months imprisonment and in addition, he imposed a Restraining Order with a prohibition, for 10 years, upon the appellant going to Stevenage. As part of the sentencing exercise a Pre-Sentence Report had been prepared in which the author concluded that the appellant met the test for dangerousness, in particular, to the complainant and any past or future partner.

15. In his sentencing remarks, the judge observed as follows:

> "Given what I have been told about you and the assessment I have made of your dangerousness, despite the fact that, as I understand it, your mother lives in Stevenage and that is the place to which you would wish to go when released, I am

> satisfied that for a period of 10 years, which is the length of time for which I make the current restraint order, that you are not to enter Stevenage. Should the situation arise whereby there is some need to vary that order, an application can be made to the court at the appropriate time and it will be considered. But in my judgment, [the complainant] and your children are entitled, and indeed [the complainant's] other child and her family, are entitled to live in peace and quiet and not under constant threat once you are allowed out from prison and if that message gets home to you then this whole sentencing exercise will have had an additional impact, not just that of protecting [the complainant] and others from you in the future. That, therefore, is the sentence of the court."

C. Appellant's Submissions

16. It is acknowledged that it is proper to justify an order excluding an individual from his home address: see by way of example, *R v Richardson* [2014] Cr. App. R(S) 5. In that judgment, Spencer J identified the test to be "*whether the order pursued a specific aim and whether the restriction was proportionate and necessary to achieve that aim*." (ibid paragraph [44]). In that case the judge also took into account that there was a power on the part of the court to vary or discharge an order which amounted to a "*important safeguard*". It is said that in the present case the "*true risk*" is of the appellant attending at the complainant's address as he did when he committed the present offences. It is argued that a Restraining Order limited to the address "*would provide the necessary protection against this risk*". However, the imposition of a restriction to cover the entirety of Stevenage was wrong in principle and disproportionately interfered with the appellant's Article 8 right to family life.

D. Conclusions

17. In our judgment there was no error on the part of the judge in imposing the restriction in the broad terms now challenged.

18. Article 8 ECHR is entitled "*Right to respect for private and family life*". It provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There should be no interference by a public authority with the exercise of this right accept such in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

19. It is not in dispute that the appellant has rights under Article 8 which are not extinguished by virtue of his having been sentenced to imprisonment. But these rights are not unqualified. Article 8(2) permits a public authority (here the courts) to

interfere with a person's Article 8 rights for reasons of, *inter alia*, public safety, the prevention of crime, and for the protection of the rights and freedoms of others. The complainant and other woman who might be the subject of abuse from the appellant and affected children also have Article 8 rights which include the right to conduct their lives free from the risk of violence from the appellant.

20. In any case involving a restriction of the present sort a court must consider: (i) the purpose for which the order is being sought; (ii) its necessity; and (iii), its reasonableness in relation to the risk arising.

21. In our view the following matters are relevant.

22. First, orders of this breadth are rare. Restraining orders more usually focus upon specific roads or premises rather than whole towns. However, this does not mean that in an appropriate case a broader restriction may not be appropriate and might stretch to include an entire town or city. The evaluation is always fact and context specific.

23. Second, in this case the object or purpose behind the order was the protection of the complainant and other partners from violence and relevant children who might witness violence. This is a perfectly proper and legitimate reason justifying an interference with a person's Article 8 right.

24. Third, there was ample support for protection of this nature set out in the Pre-Sentence Report which assessed the appellant as "*dangerous*" and whose antecedents revealed a pattern of escalating violence. The appellant had a long list of previous convictions dating from 2003 onwards including many for violence. He had previously been convicted of: using threatening, abusive and insulting words and behaviour; multiple breach of court orders; assault of a constable; conduct amounting to harassment putting persons in fear of violence; and other offences against the person. The Report assessed the appellant as amounting to a high risk of harm specifically towards known adults including the victim in the present case, and future intimate partners. The author took into consideration that the appellant had previous convictions for violence against former partners. He engaged in controlling and coercive behaviour which had included sexual assault and threatening and intimidating conduct. The appellant's offending was "*oppressive and controlling*" and it was escalating. In our view any judge considering these facts would have concluded that the complainant and her children (at the least), were entitled to protection from the appellant. Accordingly, protection in the form of a Restraining Order served a legitimate object and purpose and it was "*necessary*".

25. Fourth, the next question concerns the reasonableness of the restriction itself. It was upon this component of the Article 8 test that the argument primarily centred. Is the restriction more than justified on the facts of the case? In our view it is not. The risk sought to be negated was harm to specific individuals and by its nature was not confined to the safety of those individuals when they were at home. The risk related to any point in time when the appellant was out and about in Stevenage and might encounter the complainant and the children. The appellant has proven to be uninhibited by court orders. He has tracked the complainant and has been prepared to break into her premises at night. He is not prepared to abide by electronic tagging orders if they stand in the way of his contacting the complainant. There was therefore no reason to believe that the appellant would abide by any restriction limited to the

complainant's premises or its immediate environ. The complainant and her children live in Stevenage and move around the town. Stevenage is not so large that there is no material risk of a chance encounter. Moreover, the appellant's family lives in Stevenage, at an address not far distant from that of the complainant. It is contemplated that the appellant, upon release, would live with his parents in Stevenage but in any event their presence in Stevenage is a reason for the appellant to visit Stevenage. This being so, a restriction limited to the premises and roads in which the complainant lived would not suffice to negate the risk of a chance encounter and hence the risk of violence. Given the proximity between the appellant's family and the complainant, the risk would in fact have been quite significant.

26. It has not been suggested that there is some other logical half-way house between the narrow restriction sought by the appellant and the broader, Stevenage-wide, restriction imposed by the judge which would serve to address the risk identified.

27. The fact that the appellant has been sentenced to an extended sentence means that he will not necessarily be released subject to approval of the Parole Board. He will in due course be entitled to be released automatically regardless of whether, at the point of release, he still poses a threat to the complainant and others.

28. It is in our judgment also relevant that any hardship to the appellant is mitigated by two factors. First, for a substantial part of the ten-year period the appellant will be in custody. The operative part of the term is therefore substantially less than ten years. Second, if there is a change in circumstances, for example, because counselling or training whilst in custody alters the appellant's conduct and behaviour such that he no longer represents a risk to the complainant, then the order may be varied and the restrictions lifted or modified. The restriction upon entering Stevenage is not immutable.

29. We conclude that the broad restriction was reasonable in relation to the risk in all these circumstances. For these reasons, the facts recorded by the judge in his sentencing remarks including in his brief analysis of the reasons for imposing the order are justified and consistent with Article 8 ECHR. This appeal fails.