Neutral Citation Number: [2021] EWCA Crim 1511

Case No: 202102929 A2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**
**ON APPEAL FROM THE CROWN COURT AT INNER LONDON**
**REFERENCE BY HM SOLICITOR GENERAL UNDER**
**SECTION 36 OF THE CRIMINAL JUSTICE ACT 1988**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2021

**Before :**

**LORD JUSTICE BEAN**
**MR JUSTICE GOSS**
and
**SIR RODERICK EVANS**

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**Between :**

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| **R** | **Appellant** |
| **- and -** | |
| **HORACE WHITE** | **Respondent** |

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**Mr B Lloyd** for the **Solicitor General**
**Ms A Renou (solicitor advocate)** for the **Respondent**

Hearing date: 12 October 2021

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**Lord Justice Bean :**

1. This application was made by the then Solicitor General (Michael Ellis QC MP) for leave to refer to this court the sentence passed on Horace White ("the Offender") on 18 August 2021 in the Crown Court at Inner London by Recorder Daniel Fugallo. The Recorder imposed a community order of 18 months for an offence of harassment causing fear of violence. The Offender had been convicted following a trial in the Magistrates' Court and committed to the Crown Court for sentence.

2. The Offender and the victim, Gwa Corbett, were neighbours for about 10 years. Initially relations were mostly fine between the two. However, the Offender became extremely abusive and aggressive towards her, initially after the victim asked the Offender to turn down his music one day. The victim is a trans bisexual woman and the Offender was homophobic and transphobic towards her. That would occur frequently, often every few days, and over a lengthy period of time, essentially beginning in late 2019. He played homophobic and transphobic songs so that the victim would hear them. He would often call the victim a 'batty man' or a 'man in a wig in a dress'. He had shouted "go put on a man's clothes" more than once.

3. On a day in September 2019, the Offender was sitting on the steps outside his property as the victim left for work, and he shouted to her, 'Shoot, shoot', which she took to be a reference to a song about shooting a "faggot". She was very upset about this comment and made various complaints to the Housing Association about the Offender.

4. From early January 2020 until 3 April 2020, the victim made various complaints about the Offender. She put up in her window some rainbow lights and that seems to have escalated the Offender's behaviour. The victim heard him saying, through the wall, 'you know who needs sorting out? My neighbour'.

5. On 19 April 2020, the victim was at home. During the morning the Offender was again playing music very loudly (at that time, not homophobic music). She asked him to turn it down by speaking to him over the fence. The conversation was unpleasant, and the Offender said to her, 'Where is the man clothes?', which the victim took as a transphobic comment, and as he walked away from her, he said, 'Are you male or female?'.

6. On 26 April 2020, at about 4.45pm, the victim had just left her own house. She asked him again to turn down his music, and the Offender replied, 'Fucking wanker, you'll be sorry'.

7. Later on that day she heard the Offender say, 'He's a homosexual. I'm going to fuck him up', again referring to the victim. The victim reported the matter to the police.

8. On 2 May 2020, further homophobic comments were made to the victim. Later on, at about 10pm, the Offender arrived home and shouted aggressively at the victim for a few minutes. He was then on the phone talking to someone about having been arrested. He raised his voice so the victim could hear him saying, 'Batty boy, transvestite cunt'. Those were words that he had used previously in reference to her. He continued, 'I'm going to get the boys round. You like that, don't you?', and again although it was through the wall, the victim took this to be a reference to her. The Offender continued

for about 2 minutes and the victim felt unsafe in her own home. When officers attended and arrested the Offender, he said to the officer, 'Don't be gay, don't be a bitch'.

9. In interview following that incident, the Offender claimed that the victim had been aggressive towards him and often filmed him on her mobile. On 2 May 2020, he was released on police bail with conditions not to contact the victim.

10. On 9 May 2020, the victim was at home, and the Offender was heard talking to another resident outside. The Offender could be heard saying, 'He's probably jerking off to pictures of me', referring to a (dummy) CCTV camera outside the property. The man the Offender had been with later returned to the property with a large stick and removed the camera from the wall.

11. Later the same day, at about 8pm, the victim saw the Offender with the man outside the property. A third man was also present. The first man pointed towards the victim's window and then all of those present outside joined in a conversation about the victim. Whilst the Offender walked away, the others remained facing the victim's window and starring at it for about 30 seconds. The victim was concerned for her safety.

12. On 20 May of 2020, the victim had replaced the camera, this time with a working camera. At 8.15pm, the Offender and one of the other men were again outside the property, and they began talking, looking up at the victim and laughing. The Offender was heard saying to the other male, 'Yeah, have you got a long stick? Have you got a tennis bat?' and then laughing. They appeared to be talked about the new camera. The other male said, ''I've got some…', something that the victim could not hear, but she was very concerned that the Offender was planning something.

13. On 26 May 2020, the Offender was heard to say, 'He's wanked off to it', another apparent reference to the camera.

14. The following day, the Offender was talking to another man outside the property. He made a sexual gesture, and then said, 'He's got a camera. It's illegal. He's a criminal', and then they looked up at the victim's window. Later the same day, the victim overheard the Offender talking in his flat with another male who said, 'You shouldn't have anything to do with that fucking gay man, right? They tried to fuck with you'. The Offender said, 'It's been going on for a couple of weeks now. It's a power battle and I'm not going to lose'. She also later heard the Offender talking to a man about smashing up the camera.

15. On 29 May 2020, the Offender was playing his music very loudly. The lyrics involved references to murdering witnesses and informants and the victim took that as a direct threat to her. Later the same day, the Offender was heard by the victim in his flat talking very loudly and someone saying, 'He's made a mistake. He's a fucking homo'.

16. On 4 June 2020, again outside the property, the Offender said, 'I was born in 1965 when homosexuality was illegal'.

17. On 17 June 2020, the Offender was talking in a loud raised voice about the victim. He was overhead to say "I'm going to kill the fucker". He stated, 'she can hear me calling her a batty man through her wall' 'I hate batty men'.

18. On 19 June 2020, the Offender said, 'We want to take the door down you fucking [something inaudible] next door'. The victim took this to mean the Offender wanted to break her door down; she was caused real fear.

19. The Offender was arrested on 10 July 2020 and released on police bail on 11 July 2020. He went on to breach the bail conditions by his behaviour towards the victim.

20. The threats and abuse made the victim scared and fearful for what he could do to her, and she believed he would carry out these threats. The victim was left scared and concerned for her own safety. She was caused great distress and fear.

21. In interview the Offender provided a prepared statement in which he denied the offending.

22. On 22 July 2020 the Offender was charged with harassment putting a person in fear of violence, contrary to s 4(1) of the Protection from Harassment Act (with an alternative charge of harassment contrary to s 2 of the same Act). When he appeared in the South London Magistrates' Court both prosecution and defence argued that the case was appropriate for summary trial and it was tried accordingly. He was found guilty on 15 June 2021 and the case was committed to the Crown Court for sentence.

23. In a victim personal statement, dated 21 June 2021, the victim explained she was in fear within her own home. The Offender had made her scared. She was not sleeping well and had been sleeping in her clothes and shoes as she was so scared of something happening in the middle of the night. She had listened to abuse almost every day and her mental health had suffered. His conduct had taken away her sense of humanity. Since June 2020, the Offender's behaviour had escalated into death threats. He had also breached bail 15 times over the weeks leading up to 19 August 2020. She would become homeless if the Offender was allowed to return to the address.

24. The victim addressed the judge directly at the sentencing hearing. She stated that she had been suffering as a result of her neighbour. She was in fear of being in her own home, which was awful. She should not be afraid of being at home, but the Offender had really scared her. She was not sleeping well. Because of lockdown, she had not been able to get away from the Offender. She had been stuck in her own home listening to him abuse her almost every day. Her mental health had suffered. She felt alone and scared because of him. Every time she saw a car pull up outside her house, she thought the worst, that he had got someone to come and hurt her. His actions had insulted her and made her feel subhuman. The Offender made her feel awful and just through pure hate. She wanted to be who she was without being abused and living in fear. Since June 2020, the Offender's behaviour escalated into death threats. He had breached bail a number of times. She was afraid that, if the court permitted the Offender to re-enter the road, he was very likely to reoffend. If he returned, she would be homeless as she was not willing to put herself through the ordeal again.

25. A pre-sentence report was prepared in respect of the Offender. The Offender told the author of the report that he did not agree with the allegations against him. The victim, when she moved in, had decided that she did not like the Offender. He claimed the victim acted aggressively towards him. He was the victim of malicious lies and a campaign to have him evicted from his home. He denied holding any discriminatory views. He did accept on one occasion making an offensive comment during an

argument: 'are you a man or a woman - go and put some clothes on'. He also admitted playing homophobic music. The author found it hard to believe that the Offender was not being purposefully loud in his home, to ensure that the victim could hear him. He appeared to hold some animosity towards the victim, which likely commenced when the victim started transitioning. The Offender told the author that the victim has told the Court "nothing but lies". The Offender said that he suffers bi-polar but denied that he was suffering from poor mental health when the offences occurred.

26. The author assessed the Offender as having targeted the victim. He had made threats to harm the victim and had used derogatory language and music in order to degrade the victim. He was aware that such language was not acceptable and was likely to have a profound ongoing affect. He told the author that he smoked cannabis about twice a week. However, he did not appear to be honest about that.

27. The pre-sentence report indicated that the Offender had mental health issues and it appeared that the use of drugs made his health worse. He was on medication for his mental health, which he self-administers. The Offender's community psychiatric nurse provided the probation service with information which confirmed the Offender has bi-polar disorder. It was a longstanding diagnosis. The illness follows a remitting and relapsing nature. His symptoms were characterised by poor sleep, irritability, agitation, elation, pressure of speech, paranoia and hostile and threatening behaviour. He was currently engaging well with the Mental Health Team, and they did not have any current concerns about his compliance. He did not need a treatment order.

28. The author assessed that the Offender minimised his offending behaviour. He denied that his mental health had impacted his behaviour in anyway; he alleged that he had been stable for some time. The author questioned that as they felt that his behaviour appeared to be characteristic of his mental health (in keeping with information provided by Dr Priyo Ghosh, Consultant Psychiatrist).

29. The Offender was assessed as posing a low risk of reconviction. The risk was heightened should he come into conflict with the victim, or if he continued to hold discriminatory views and should his mental health deteriorate. The Offender's risk was manageable in the community with the additional support of the Probation Service. A Community Order was recommended with an RAR for 15 days and 200 hours of unpaid work.

30. The prosecution submitted that the offence was within high culpability, on the basis that the offence was motivated by or demonstrated hostility towards characteristics including transgender identity and sexual orientation. Pursuant to s 66 of the Sentencing Act 2020, the court was required to announce an uplift to reflect those elements. The judge noted that the uplift would be achieved by placing the offence within the higher category.

31. The prosecution also noted that the offending was persistent over a prolonged period of time. The prosecution submitted that as regards harm, the offence fell between categories 1 and 2.

32. Ms Renou submitted to the judge that the Offender had been convicted on the basis of what was said through the walls of the property, and the playing of the music. The defence relied upon the contents of the PSR and the Offender's mental health. He had

lived at the property for 30 years; and over a 10-year period next to the victim. He had the support of his family. He had been abused as a young boy.

33. Ms Renou invited the court to consider the guideline for sentencing offenders with mental disorders, development disorders or neurological impairment were relevant and submitted these must be considered when determining culpability. She argued that culpability level D factors were present, whilst also acknowledging the features of category B. The offending straddled multiple categories. As for harm, it was category 2 on the basis of a prolonged period of time and the victim has suffered some distress. In addition to the Offender's mental health, there was also the fact he was without previous convictions. This was a case where a community order could be imposed.

34. There was no medical report before the court, but we accept that there was enough information contained in the pre-sentence report for the Recorder to be aware of the nature of the Offender's illness.

35. In his sentencing remarks the Recorder said this:

> "Your behaviour has been repeated and persistent. You have used transphobic language directly to Ms Cobbett and I have seen one incident that was recorded by her, no doubt, to record your likely conduct after having suffered many previous incidents, where you are recorded as telling her to 'Get or wear man's clothing'.
>
> Now, you have repeatedly and deliberately referred to her in derogatory terms; deliberately referred to her as male in a transphobic way. You have acted together with others to create a menacing and offensive atmosphere outside her home. You have been overheard using language such as 'I'm getting the boys around; you'll like that' and you have done all this and continued to do all this despite efforts from Ms Cobbett herself and then from the police to persuade you to live in a peaceful and decent way alongside her.
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> Offences of this kind are profoundly painful to their victims, and I have heard today from Ms Cobbett who has read a moving and eloquent statement about the impact on her that your conduct has had; making her feel miserable and unsafe in her own home. As she has powerfully put it, your daily abuse has made her feel subhuman.
>
> However, conduct of your kind is not just an affront to its victims, it is an affront to the values of our society. It is an affront to our values of fairness, tolerance, decency and equal treatment, and that is why your offences are aggravated, in the eyes of the court, by the homophobic and transphobic nature of them, which puts them, as a result, in a different sentencing category. In that way, the court marks the uplift in the gravity of your offending as a result of its transphobic and homophobic nature."

36. We entirely endorse these observations of the sentencing judge, and the careful and sensitive manner in which he approached the difficult sentencing decision in this case.

37. The judge went on to consider how the case should be categorised within the Sentencing Guidelines for this offence. He accepted the submission of Ms Summers for the prosecution that the case was one of high culpability, that is to say Category B because the Offender had demonstrated hostility based on the victim's sexual orientation and transgender identity. He treated it as a Level 2 offence in terms of harm because, as he observed, the victim had suffered distress and had had to change the way she lived.

38. He continued:-

> "As a Category 2B offence, the starting point after a trial is one of 36 weeks' custody and the range, 12 weeks to one year and six months. There are important mitigating features in your case. The most important is that you are a 55-year-old man who has never before this miserable series of events, committed any offence at all in your life. I have taken that into account, but I have also taken into account all the other matters of mitigation, including your mental health history, that are set out in the very full and frank presentence report. Additionally, I have taken into account everything that has been urged before me by Ms Renou. I cannot give you any credit for a guilty plea because you contested this case. You had a trial in the Magistrate's Court; that was your right. However, as a result, you get no credit.
>
> I have, in the light of the Sentencing Guidelines, reached the view that your case crosses the custody threshold."

39. Again, we agree with this conclusion of the sentencing judge. We reject the submission in the Reference that the case should have been treated as a Category 1A offence, with a starting point of 5 years' imprisonment. Moreover, such a categorisation would be wholly inconsistent with the prosecution submission in the Magistrates' Court that the case was suitable for summary trial.

40. Where we part company with the judge is in the next passage of his sentencing remarks. He noted that the guideline on the imposition of community sentences states that the fact a case crosses the custody threshold does not mean that custody is inevitable. He continued:-

> "The pre-sentence report in your case, Mr White, does not pull any punches. It is frank about your attitudes and the limitation of your insight into the seriousness of what you have done. Despite that, the author of the report, taking all that into account, is of the view that you can be adequately punished in the community whilst, at the same time, in a way that would not be possible in custody, work can be done on rehabilitating you and addressing your discriminatory views with a view to preventing future offending. I also note that the author of the report has concluded that you are of no risk of reoffending.

> In light of all of the above, I am minded to impose the recommendation of the report. ………..You are going to be made subject to an 18-month community order with two requirements. The first is a rehabilitation activity requirement; that is to address your discriminatory, transphobic and homophobic attitudes and beliefs. The indication is for 15 days and that is what you must do. However, you must also be punished, and you are to do 200 hours of unpaid work………
>
> In addition I am going to impose a restraining order. The terms of the order are that you are not to contact directly or indirectly Gwa Corbett, you are not to approach Gwa Corbett, and you are not to go to [her home]. That order will be for a period of 5 years from today."

41. As we have said, we agree with the Recorder's categorisation of this case as category 2B, and we agree with him that the case crossed the custody threshold. But we do not agree that a community order was sufficient to mark the seriousness of this campaign of harassment. Ms Renou describes it as a neighbour dispute: so it was, but the fact that the Offender was the victim's next door neighbour and was convicted of harassment causing a fear of violence makes it a serious case of its kind. The transphobic and homophobic elements were aggravating factors, but even if they had not been present this was a case which went far beyond simple bad behaviour by a neighbour. Everyone has the right to feel safe in their own home and to be protected from the fear of violence from their next door neighbours.

42. The starting point under category 2B is 36 weeks imprisonment with a range up to 18 months. If Mr White had not had any mental illness we take the view that the appropriate sentence would have been one of 12 months immediate imprisonment. Given Mr White's mental illness, however, and the other factors identified in the Definitive Guideline on Community and Custodial Sentences, it would have been appropriate for the sentence to be suspended for two years, with the rehabilitation activity and unpaid work requirements which the Recorder attached to the Community Order.

43. Accordingly, in our judgment, a community order, while possibly constructive from the point of view of the rehabilitation of Mr White, was unduly lenient. We grant leave to the Solicitor General to make this reference; we quash the community order; and we substitute a sentence of 12 months imprisonment suspended for two years, together with the rehabilitation and unpaid work requirements imposed by the judge.

44. There are two further matters which should be mentioned, the first being the effect of the restraining order. The Offender had at the time of sentencing moved to another home but we were told at the hearing before us that he has now returned to live next door to the victim. The judge quite rightly imposed a restraining order for a period of five years in the terms we have indicated.

45. On Tuesday of this week we heard argument in the case and reserved judgment. The next day the court received an email from the CPS attaching a witness statement from PC Smith, the investigating officer in the case. This stated that after the Recorder had passed sentence and imposed the restraining order in the terms we have indicated, the

Offender "immediately moved back into his home address next to the victim". A member of the CPS is said to have advised the victim that she should leave her address. For a month she "was sofa surfing as she had nowhere else to stay and could not go back and live next door to Horace who has continued to verbally harass and threaten her". She "managed to obtain temporary emergency accommodation on 20 September but this is not a permanent solution".

46. We are not in a position to make findings of fact about these allegations. What we can say is that if it is indeed true that following service of the restraining order the Offender "continued to verbally harass and threaten" the victim, the CPS should have initiated urgent proceedings for breach of the restraining order. There may also be civil remedies open to the victim such as an application in the county court for an injunction to oust the Offender from his home. She may wish to seek legal advice about that.

47. We were told at Tuesday's hearing that the housing association which is the Offender's landlord has instituted county court possession proceedings to evict him. It might be thought that this is a strong a case of nuisance as anyone could imagine, and that it is in everyone's interests for this man to be removed from close proximity to the victim, but Ms Renou informed us that her client intends to defend the possession claim.

48. Mr White should be under no illusions as to the danger for him of any repetition of the appalling behaviour for which he was sentenced by the Recorder. He would be liable to prosecution for breach of the restraining order as well to having this suspended sentence activated.

49. Although it does not affect the merits of this reference, we record our great concern at the application made by the prosecution for the case to be relisted before the sentencing judge purportedly under the "slip rule". By an email to the Inner London Crown Court sent on 15 September 2021 (that is 28 days after the judge passed sentence) a member of the "Crown Advocate Liaison" section of the South London CPS (not Ms Summers who had appeared at the hearing) wrote applying for the case to be listed "under the slip rule" and for the court to vary the sentence under s 385 of the Sentencing Act on the ground that "the learned Recorder failed to follow the procedure set out s 66 of the Sentencing Code and the authorities of Kennedy & Donnelly, Fitzgerald and Higgins below."

50. The email went on to develop that submission, and concluded:-

> "The court should **always** be invited to apply the staged approach that the Court of Appeal and the Sentencing Council recommend unless it is a rare case that relies on verbal abuse alone and where there are no abusive words other than the racist (or other hate) words the court should be invited to record and state in open court why it cannot follow the staged approach and prosecutors should ensure those comments are recorded."

51. This was a wholly inappropriate email. The slip rule is not a procedure under which the prosecution can invite the court to impose a higher sentence, nor to give a further explanation of a decision which the prosecution regard as unsatisfactory. It is confined to cases where the court has made an error of law (for example, exceeding its jurisdiction, or failing to impose an order required by statute) or an obvious and material

error of fact (for example, miscalculating the total of sentences imposed on various counts), and matters of that kind. If the prosecution are dissatisfied with the sentence imposed on its merits they can ask the Law Officers to consider whether to make an application to this court for leave to refer. In the present case that had already been done when the email of 15 September was sent.

52. The Recorder would have been entirely justified in refusing the application without a hearing. In fact the matter was re-listed and the Recorder, having courteously listened to brief submissions, adhered to his previous decision and helpfully explained his reasoning. But such an attempt to exert pressure on a sentencing judge should not be allowed to occur again.