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IN THE COURT OF APPEAL  
CRIMINAL DIVISION



CASE NO 202203418/A1  
[2023] EWCA CRIM 309

Royal Courts of Justice  
Strand  
London  
WC2A 2LL

Tuesday 28 February 2023

Before:

LADY JUSTICE SIMLER DBE

LORD JUSTICE WILLIAM DAVIS

HER HONOUR JUDGE DHIR KC  
(Sitting as a Judge of the CACD)

REX  
V  
CHRISTOPHER CLARK

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MR A ROXBOROUGH appeared on behalf of the Appellant.

MR K LAIRD appeared on behalf of the Crown.

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**J U D G M E N T**



LADY JUSTICE SIMLER:

Introduction

1. This is an appeal against sentence with leave of the single judge.
2. In addition, a question has been raised by the Registrar about the lawfulness of the sentence passed in the Crown Court because of apparent irregularities in the committal or sending by the Magistrates' Court to the Crown Court. We shall describe these in more detail below. For now it is sufficient to record that following his guilty plea on 4 July 2022 in the Magistrates' Court to the offence of breach of a restraining order contrary to section 363(1) and (2) of the Sentencing Act 2020, the Magistrates' Court nonetheless purported to send Mr Clark for trial in relation to that offence, alongside an offence of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861, to which he had pleaded not guilty.
3. Subsequently, on 18 August 2022, in the Crown Court at Minishull Street in Manchester Mr Clark pleaded guilty to common assault. He was then sentenced on 21 November 2022 in respect of both offences. HHJ Savill imposed a sentence of two years' immediate imprisonment for the breach offence with a concurrent sentence of three months' imprisonment for the common assault. A further restraining order was made and a statutory victim surcharge order was imposed.
4. We have had the benefit of written and oral submissions from Mr Roxborough for Mr Clark and from Mr Laird for the prosecution. We are grateful to both counsel for the assistance they have provided us with.

The facts

5. Mr Clark and the victim, Emma Westwood, had been in an on-off relationship for a period of about four years. In 2019 Mr Clark was convicted of battery against her when he

bit her, causing injuries to her face. A restraining order was made against him. Under the terms of the order he was prohibited from contacting Emma Westwood directly or indirectly and prohibited from entering a number of identified named roads including the road on which she lived. He breached that order on six occasions between 2019 and 2021. In addition to serving a number of short custodial sentences for those breaches, the restraining order was extended until 22 December 2023.

6. On 1 July 2022 Mr Clark was released from serving a custodial sentence in respect of breach of that restraining order. He contacted Emma Westwood by email on the same day, asking her if he could come over to her address. She refused. He turned up regardless, asking Emma Westwood for money for a taxi. In the hope that he would leave her alone, she gave him some money. He left but returned to her address some ten minutes later with a bottle of vodka.

7. During the second visit an argument ensued and he questioned her loyalty to him whilst he had been in prison. He struck her to the face with the back of his hand. This caused her to fall to the floor. He pulled her hair extension off and threw a drink over her. During the incident he took her mobile phone and locked the front door so that she could not get out. She ran upstairs to bang on the windows. He followed her. She managed to shout for help out of her son's bedroom window before he dragged her away from the window by her neck and arms. There were photographs of her injuries provided to the judge and we too have seen those. The incident lasted for approximately 20 minutes.

8. Ms Westwood fled the address and contacted 999. Officers attended at the address. Whilst they were taking her statement Mr Clark appeared at the back door of her home address holding a bottle of vodka. He was arrested and cautioned. He was then taken to Pendleton Police Station where he was interviewed. He largely answered “no comment” to

questions asked of him but said that the injury to Emma Westwood's eye was already there when he arrived and that the injury to her neck was from having consensual sexual intercourse with her the night before.

### The procedural irregularities

9. Before addressing the appeal itself it is necessary to consider and address the question raised by the Registrar as to whether there was a valid committal to the Crown Court and whether the sentence that followed was lawful. The chronology of what occurred can be summarised as follows.

10. On 4 July 2022, Mr Clark appeared before the Greater Manchester Magistrates' Court charged with assault occasioning actual bodily harm and breach of a restraining order. Both offences are either-way offences and therefore subject to the procedure contained in section 17A of the Magistrates' Courts Act 1980. This procedure is mandatory and contains important safeguards for a person appearing in the Magistrates' Court in relation to an offence that is triable either way. It requires the court to communicate directly with the individual in ordinary language so that it is clear in open court that he or she understands the procedure and the consequences of indicating a guilty plea. The procedure taken as a whole is designed to ensure that the right to trial by jury is not lost through misunderstanding or ignorance. It is important that it is complied with for this reason and also, so that in the event that there is a committal for sentence, the Crown Court knows that the guilty plea was properly taken if any issue should arise about it.

11. As Edis LJ explained, presiding in this court in R v Gould [2021] EWCA Crim 447, there is no transcript of proceedings before the justices and one purpose of the statute is to achieve a situation where the Crown Court can safely assume that this important procedure has been properly undertaken. A failure to follow the procedure by the Magistrates' Court

renders what follows a nullity and liable to be quashed.

12. Despite pleading guilty to breach of a restraining order, the sending sheet for Mr Clark states that both offences were sent for trial pursuant to section 51(1) and (2)(b) of the Crime and Disorder Act 1998. The case lawyer in the Magistrates' Court has confirmed that the court record shows that a not guilty plea was entered in respect of the assault offence, but no plea is recorded against the breach of a restraining order and both matters were sent for trial. It appears that this error was later identified and there was an attempt to correct the error by amending the paperwork afterwards to give rise to a committal for sentence. However, it remains the case that the sending sheet which is the primary record reflects that the breach offence was sent for trial. We note also that the wrong legislation was referred to, namely section 3 of the Powers of Criminal Courts (Sentencing) Act 2000 and not, as it should have been, section 14 of the Sentencing Act 2020. (A copy of the memorandum of conviction has been requested but has not yet been received.) The point was not further explored or addressed in the Crown Court.

13. It is common ground, as both counsel have made clear, that when the charges were put to Mr Clark he did in fact plead guilty to the offence of breach of a restraining order. Upon that plea of guilty the proper course would have been for the Magistrates' Court to follow the procedure prescribed by section 17A(6) of the Magistrates' Court Act 1980. That would have resulted in the conviction being entered in the Magistrates' Court. It would then have been open to the court to commit Mr Clark to the Crown Court for sentence pursuant to sections 14, 18 or 20 of the Sentencing Act 2020.

14. In relation to the assault offence, in respect of which there was a not guilty plea, the Magistrates' Court would have had to determine whether the offence was more suitable for summary trial or trial on indictment (see section 19 of the Magistrates' Court 1980). Instead

however the Magistrates' Court record states, as we have indicated, that Mr Clark was sent for trial in respect of both offences pursuant to section 51 of the Crime and Disorder Act 1998.

15. Under section 66 of the Courts Act 2003 a Crown Court judge and other judges listed in that section may make orders and pass sentence in relation to cases normally reserved to Magistrates' Court when disposing of related cases in the Crown Court. The scope of the section 66 power, as amended in 2013, and the potential perils of Crown Court judges using it, were considered in R v Gould. This court concluded that a judge of the Crown Court, or indeed this court, is vested with all the powers of a DJ(MC) in relation to criminal causes or matters by virtue of holding that office. That includes sitting as a Magistrates' Court and includes any power which a Magistrates' Court can lawfully exercise. However, this court also identified that the important parameters within which the section 66 powers have been used may have been overlooked in some cases. Edis LJ restated them as follows:

“80. These important parameters within which the section 66 powers may be used have been overlooked in some of the present cases and perhaps elsewhere. It is worth restating them:-

(i) When the Magistrates' Court make an order which gives jurisdiction in the case to the Crown Court, whether by committal for sentence or sending for trial, that is the end of their jurisdiction in the case. In technical language they are *functus officio*. The Crown Court judge cannot use section 66 to make any order which the Magistrates' Court could no longer make.

(ii) There is no power in the Crown Court to quash an irregular order. Where it is plainly bad on its face, the Crown Court may hold that nothing has occurred which is capable of conferring any jurisdiction to deal with it.

We shall return to these points. We appreciate that this consequence of the decision in R. v. Sheffield Crown Court limits the power under section 66 to correct errors in committals for sentence, but it is unavoidable. If quashing is required this can only be done by a

Divisional Court. We have held above that it is open to the judge in the Crown Court, as a DJ(MC), to lay and commit a new charge in the correct form. The relevant Rules Committees should consider whether an expedited and summary procedure could be adopted for the quashing by consent of unlawful committals and sendings which have been overtaken by events.”

16. Both counsel in this case suggest that the error was simply an administrative error in the failure accurately to record Mr Clark's guilty plea and the correct statutory basis pursuant to which this case was sent to the Crown Court. Mr Roxborough submitted that the evidence, in particular the Better Case Management form, clearly demonstrates that a valid guilty plea was entered in the Magistrates' Court but that the Magistrates' Court failed properly to record that plea. That failure does not however, he submitted, alter the fact of the plea. The Magistrates' Court had the requisite power to commit the matter for sentence either alone or with the assault matter to which Mr Clark had pleaded not guilty. The error was not fundamental but was simply administrative. There was nothing contrary to the interests of Mr Clark and he suffered no injustice or prejudice.

17. Mr Laird emphasised that there can be no doubt that it was the intention of the Magistrates' Court to commit Mr Clark for sentence in respect of the breach of a restraining order following his guilty plea. In the circumstances this error can be treated as a mere error in recording so that the sentences passed were valid and passed with the jurisdiction to do so. In the alternative, Mr Laird submitted that the most efficient way of dealing with this case, should the court take a different view, would be for the court to quash the sentence imposed by the Crown Court, for one of the members of the constitution to sit as a Crown Court judge, take a plea on indictment if that is necessary, and sentence accordingly. Alternatively, a member of the court could commit the conviction for breach sitting as a DJ(MC). Out of an abundance of caution Mr Laird made clear that a fresh indictment and



an application with a draft restraining order have been prepared by the prosecution and served on Mr Clark.

18. Both counsel referred us to R v Duigan [2022] EWCA Crim 1452, where this court held:

“14. Unless the sending is obviously invalid, the Crown Court should not be unduly unconcerned about a mistake in recording the statutory basis for the sending. Care must be taken though to ensure that any sentence subsequently imposed falls within the jurisdiction that would have been available if the basis of sending was correctly recorded: see *R v Ayhan* [2011] EWCA Crim 3184.

15. If the sending is obviously bad on the face of it, such that the Crown Court concludes that it cannot proceed on the basis of it, the prosecution may have to consider the position carefully. ...”

They invited us to proceed on the basis identified in paragraph 14.

19. We have considered counsel’s submissions with care, but have concluded, contrary to their submissions, that this is not a case where a mere administrative error occurred. It would have been an administrative error if the committal for sentence was made under the wrong statutory provision. It is that sort of case that the Crown Court need not be unduly concerned by and can proceed with by treating the error as an administrative one. In this case, by contrast, the sending by the Magistrates’ Court was a sending for trial. That was obviously invalid because a guilty plea had been entered and there was therefore no jurisdiction in the Magistrates’ Court to send the breach offence for trial. The only evidence of what the Magistrates did is the sending sheet itself and this does not support or confirm that the procedure set out in section 17A of the Magistrates’ Court Act 1980 was followed. Counsel relied on the Better Case Management form but that does not assist us. That form would have reflected a guilty plea if Mr Clark had merely indicated a plea before venue on an either-way offence. As we have said, it is the sending sheet that is the primary record, and it is the sending sheet that matters.

20. Moreover, having made the decision to send for trial and recorded it in the sending sheet, the Magistrates' Court was *functus officio* and the attempts afterwards (even by the Magistrates' Court itself) to correct the error were a nullity. Any attempt by the Crown Court to exercise the section 66 powers would have been equally invalid since that power does not extend to correcting errors in committals for sentence once the Magistrates' Court is *functus officio* and no longer has jurisdiction to act as R v Gould has explained.

21. For those reasons, we have concluded that the sending for trial had to be quashed and a lawful committal effected before the Crown Court could sentence in this case. The quashing order could only be made by the Divisional Court. Once the sending is quashed the case would then in effect never have left the Magistrates' Court and the Magistrates' Court's jurisdiction would remain. The section 66 power could then potentially be exercised subject to the constraints identified so clearly in R v Gould.

22. As counsel have emphasised, a guilty plea was entered by Mr Clark in the Magistrates' Court. That was a lawful plea and conveyed his desire to admit what he had done. The failure was in the sending of that charge for trial when there should have been a committal for sentence. The failure meant, as we have said, there was no valid committal. It seems to us, in those circumstances, that the following steps must and will be taken. We will sit as a Divisional Court. We grant permission to apply for judicial review. We extend all time limits as necessary. We dispense with service requirements. We quash the original sending by the Magistrates' Court in respect of the breach offence. The sending of the assault offence is unaffected. The sentence passed in the Crown Court for the breach offence was without jurisdiction in the circumstances and must fall away.

23. In light of the lawful guilty plea entered in the Magistrates' Court, Mr Roxborough has conceded that the justices would inevitably have committed this case to the Crown Court had

the proper procedure been followed. That concession is properly made. On the facts of this case, it is clear to us that the use of the section 66 power could not deprive Mr Clark of any procedural protection or cause him any prejudice. We are satisfied accordingly that the section 66 power can be used in this court to regularise the position. Having quashed the sending of the breach offence as a Divisional Court, I shall now sit as a DJ(MC) to correct what is plainly an error of omission, namely the failure by the Magistrates' Court to take the next step in the committal for sentence process. As already indicated, it is inevitable that the case would have been committed for sentence because of Mr Clark's history and the inevitable conclusion that the Magistrates' Court would not have sufficient power to sentence him for the breach offence. I accordingly commit the breach offence to the Crown Court for sentencing under section 14 of the Sentencing Act 2020 following his guilty plea and acknowledging that the Magistrates' Court powers are insufficient in this case. The breach falls to be sentenced alongside the assault offence to which Mr Clark pleaded guilty in the Crown Court. This court can act under the 1968 Act with all the powers of the Crown Court.

24. At this point, we are therefore in effect sentencing Mr Clark for the first time under the powers of that Act rather than considering this appeal. However, in the course of doing so we will reflect on all the submissions made by Mr Roxborough in support of his ultimate contention that the sentence passed by the judge was manifestly excessive and that a shorter sentence should now be passed.

#### The sentence

25. Mr Clark was aged 37 at the date of sentence (born 27 April 1985). He had nine convictions for 12 offences spanning the period 13 September 2019 to 23 December 2021. Significantly he had convictions in 2019 for battery and for breach of a restraining order. In 2020 he had two convictions for breach of a restraining order and in 2021 three convictions

for breach of a restraining order. The convictions all involved the same victim and the same restraining order.

26. There was a pre-sentence report available to the judge and we have read that with care. The report author assessed Mr Clark's risk as not manageable in the community. The updated report maintains that view. The evidence indicates that Mr Clark is unable to comply with court orders and lacks the internal regulation necessary or the insight to do so. He was assessed by his community probation officer and the pre-sentence report author as presenting a very high risk of serious harm to Ms Westwood. If released it was thought highly likely that he would approach her or attend her home and cause her physical or emotional harm of a serious nature. The judge also had a victim personal statement from Emma Westwood dated 2 July 2022. We too have read that statement.

27. In his sentencing remarks the judge said this was a very serious breach of its kind, therefore culpability was A within the Sentencing Council Guideline. In terms of harm, HHJ Savill concluded that this was a category 2 case based on the actual and intended harm. He rejected the submission that harm fell at the bottom end of that category. He said that Mr Clark made Ms Westwood's life a real misery over the years and did so once again with six previous breaches in the background. The judge's conclusion that this was an A2 offence meant a starting point of 12 months. However, he said that the facts of the offence itself justified a starting point at the top of the category, namely 24 months' imprisonment. The judge then went on to consider aggravating and mitigating features. He referred to the high likelihood of reoffending, the serious risk presented by Mr Clark, the fact that he was not manageable in the community and the offender manager's report which said he had really only paid lip service to community orders in the past and was a very manipulative individual. The judge continued:

(iii) “The aggravating features in this case are these: this was committed against the background of numerous previous convictions for breach and violence against this victim. I have mentioned that I am taking into account the assault as part and parcel of that as well, and it was committed while you were on licence, the very day that you had been released from custody. Accordingly, it seems to me that I am entitled to on the facts and circumstances of this case to go beyond and I do so deliberately, the upper limit of a Category A2 offence, to a starting point, had you contested the matter, at 36 months. You are entitled to a full one-third reduction. That reduces the sentence to one of 24 months.”

28. The judge went on to explain why the sentence that he passed had to be one of immediate custody and that conclusion is not challenged on this appeal.

#### The appeal and the re-sentence

29. Mr Roxborough contends that the sentence passed by the judge was manifestly excessive. He accepts that there were aggravating features that permitted the judge to increase the sentence from the starting point of 12 months in the agreed category A2 for this offence, but submits that the judge went too far in taking the sentence outside the range for an A2 offence and up to three years. This was well into the category range for an A1 offence. Mr Roxborough invited this court to sentence on an appropriate category A2 basis.

30. He developed those points submitting that the range of a high-level community order to two years' imprisonment for A2 offences was sufficient to reflect the seriousness of the offence, the persistent nature of the breach and the common assault. He submitted that to aggravate in respect of the previous breaches, characterised as persistent by the judge, was in effect to double count. Mr Clark has served sentences for those previous breaches and they should not have been treated as aggravating the sentence to the extent that they were. Moreover, he submitted that the facts of the index offence itself did not indicate any particular persistence. The incident lasted a mere 20 minutes and the question of persistence can only have come from the frequency of the other breaches overall. Moreover, to elevate

the starting point to three years was simply not justified on the facts. If the judge felt that this was a category 1 case, he should have made that clear and the matter could then have been ventilated in open court.

31. In his submissions Mr Laird maintains that the sentence was just and proportionate. The offence was both persistent in and of itself and also reflected a very serious breach. The Guideline makes clear that once aggravating features are considered, it may well be appropriate to move outside the category range and that was entirely justified in this case.

32. We have considered the submissions made by Mr Roxborough with care. He has said all that could have been said on behalf of Mr Clark.

33. We start with the Sentencing Council Guidelines for breach of a restraining order. We agree with the judge's assessment that this was a high culpability offence because it was a very serious breach. Having contacted Emma Westwood by email in breach of the restraining order, Mr Clark went to her home address at night. While he was there in her home, where she was entitled to feel safe, he interacted with her and asked her for money. She gave him money no doubt to get rid of him and he left. But he returned a little while later with a bottle of vodka (itself a concerning feature of this case given the apparent link between alcohol and offending by him). On his return, he went into her home once again. He again interacted with Emma Westwood. He sought to humiliate her. It seems to us that this sequence of actions by Mr Clark demonstrates persistence in the offence itself and reflects high culpability with a very serious breach.

34. As for harm, while Mr Clark did not cause very serious physical harm, there can be no doubt that harm of at least category 2 was caused. We are sure, having read the victim impact statement, that there was emotional harm caused not only by the constant anticipation of harm that Ms Westwood no doubt experienced, but also by what he did while he was at

her address that night. This was undoubtedly an A2 offence, and the seriousness of the breach and the multiple culpability factors were sufficient to justify movement to the top of the category range. We are sure that the judge was correct to reach those conclusions and they are the conclusions we ourselves have reached.

35. The Guideline makes clear that it is then necessary to consider aggravating and mitigating features. Further, if and to the extent that aggravating features are identified, the Guideline states that it may well be appropriate to make an upward adjustment in the sentence and move outside the category range. Here there were a number of aggravating features. There were the previous convictions reflecting similar behaviour towards this very victim. Significantly there was the commission of this serious offence within a matter of hours of Mr Clark's release on licence. Ms Westwood had barely any respite from Mr Clark's unwelcome attention from 2019 onwards. The assault had also to be reflected. There were no mitigating factors apart from his guilty plea. The judge increased the sentence before discount to three years and was amply entitled to do so. Doing so involved no double counting of the same factor and nor did it involve resentencing for previous breaches as Mr Roxborough suggested. The features identified are all features that the judge was entitled to rely on as increasing the seriousness of the offence. We consider that they are features we should rely on too. In the result, we do not consider that the judge went wrong in any part of this sentencing process and cannot see any basis for departing from the judge's approach. In our judgment, the sentence was not arguably manifestly excessive in light of the facts of the breach offence itself, together with the aggravating features we have identified.

36. The result is that we reject the contentions advanced by Mr Roxborough on this appeal and by way of submissions in relation to the sentencing process we are now conducting. We agree with the judge that the index offence was very serious. It involved not only direct

contact on two occasions but a nasty assault, committed on the very day of his release from his last sentence. Not only had previous prison sentences for breaches of the order in relation to the same victim not deterred him, but they were part of an established pattern of complete disregard for orders of the court. This too had to be reflected. After credit, a sentence of two years for the breach offence was entirely justified and proportionate and it is the sentence that I shall invite my lady, HHJ Dhir KC, to pass.

37. HER HONOUR JUDGE DHIR: For the reasons given by Simler LJ, the sentence that I pass for the offence of breach of a restraining order contrary to section 363(1) and (2) of the Sentencing Act 2020 is two years' imprisonment. For the offence of common assault, the sentence is three months' imprisonment. These sentences are to run concurrently to each other, making a total sentence of two years' imprisonment. These sentences are to be treated as if they were passed on 21 November 2022 when this case was listed at the Crown Court in Minshull Street, Manchester. The restraining order passed by the judge, which was a restraining order made for an indefinite period falls away and is replaced with the new restraining order which shall be treated as if imposed on 21 November 2022. The victim surcharge of £187 applies.

#### Conclusion

38. The result is that the appeal is dismissed for the reasons we have given. We are grateful to both counsel for the assistance they have given us. We invite Mr Roxborough to explain to Mr Clark the effect of the sentence that has now been imposed.



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

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