NCN: [2024} EWCA Crim 50
IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE CROWN COURT AT SHEFFIELD
His Honour Judge Kelson KC

Case No: 20203 01943/A4
Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 18 January 2024

Before:

LADY JUSTICE ANDREWS
MR JUSTICE JAY
HIS HONOUR JUDGE ANDREW LEES
(Sitting as a Judge of the CACD)

REX
V
NABEEL SHAH

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MR B ROBINSON appeared on behalf of the Appellant.
MR N COXON appeared on behalf of the Crown.

J U D G M E N T
(Approved)

LADY JUSTICE ANDREWS:

1. On 3 March 2023, at the pleas and trial preparation hearing in the Crown Court at Sheffield, the appellant (then aged 23) pleaded guilty to an offence of stalking causing serious alarm or distress, contrary to section 4A of the Protection from Harassment Act 1997 (Count 1 on the indictment), and an offence of disclosing private sexual photographs, contrary to section 33(1) and (9) of the Criminal Justice and Courts Act 2015 (Count 2 on the indictment). He also pleaded guilty to Count 3 on the indictment, a charge of criminal damage, which had been sent for trial to the Crown Court by the Magistrates' Court, pursuant to section 51(3) of the Crime and Disorder Act 1998. The case was adjourned for a pre-sentence report to be prepared.

2. On 23 May 2023, the appellant was sentenced by HHJ Kelson KC to a period of imprisonment of 3 years, comprising 18 months' imprisonment on Count 1, 9 months' consecutive on Count 2, and 9 months' consecutive on Count 3. The appellant appeals against sentence by leave of the single judge.

3. The victim of all the offences was the appellant's former partner, to whom we shall refer as "A". They were in a relationship off and on for just over 6 years which finally terminated on 5 November 2022. She was then aged 22. Count 1 on the indictment, in its final form, concerned the appellant's offending conduct during the period from 20 October 2022 to 17 February 2023. Count 2 covered a wider period from 7 March 2022 to 17 February 2023. Count 3 concerned a single incident of criminal damage to A's Mercedes car on 14 February 2023, which caused around £8,600 worth of damage and caused it to be written off, as evidenced by a statement from A and a letter from the vehicle's insurers.

4. There was some confusion at the sentencing hearing, which persisted for some time after the appeal was set in train, about whether the charge of criminal damage was triable either way (as would only be the case if the value of the damage caused exceeded £5,000) and indeed about whether the criminal damage matter was sent for trial rather than referred for sentence. However, further inquiries at the Magistrates' Court and of the solicitor who represented the appellant in that court have now confirmed that this was indeed the situation. The Crown had contended in the Magistrates' Court that the value of the damage exceeded £8,000 and was not prepared to accept a plea of guilty on the basis that it was less than £5,000. It was recorded on a form completed by the parties' legal representatives at or just prior to the time that the sending decision was taken by the Magistrates, that the appellant intended to plead guilty to the charge of criminal damage, but that the value of the damage was in dispute. The confusion was caused by an entry on the Magistrates' sending sheet which mistakenly recorded that the value of the damaged property was under £5,000.

5. The upshot is that the Crown Court was not constrained to sentence on Count 3 as if it were only triable summarily. That was the view which the judge took on the more limited material available to him at the time of sentencing. An adjournment of the sentencing hearing to make further inquiries in the Magistrates' Court would therefore have led to no different result, and the judge's refusal of such an adjournment has caused no injustice to the appellant.

6. Before us this morning Mr Robinson, on behalf of the appellant, floated the idea that his client should have been afforded full credit for a guilty plea on the basis of what happened before the Magistrates' Court. However, he did not plead guilty before the Magistrates. As the form recorded, he intended to plead guilty, but the value of the damage was then in dispute. Therefore, the judge, in our judgment, was entirely right to afford him 25 per cent credit and not full credit.

7. It is unnecessary to go into great detail about the facts of the offending, which are set out in the Prosecution Opening Note For Sentence. It occurred against a background of a relationship which began well enough, but gradually degenerated because of the appellant's behaviour towards A, which included sending her abusive and belittling messages. In the summer of 2022, during a period when they had split up, he caused her such acute distress by frequently turning up at her place of work unannounced and waiting outside for her, that her supervisor arranged for her never to be left alone during breaks, and to be escorted by security officers to and from the car park. A told her supervisor that the appellant would constantly film her, though she was never sure exactly how he was able to do so.

8. Before the couple finally split up, A made a complaint to the police in 2022 about the appellant's behaviour towards her, in particular that he had threatened to distribute, and then did distribute, private sexual images of her. Following a temporary reconciliation, she refused to support that complaint, and no charges were brought at that time. However, after their final split, on 5 November 2022, the appellant pursued a relentless campaign of harassment against A, bombarding her with mobile phone calls after she blocked his number, and sending her abusive messages by text and on WhatsApp and via other social media including Snapchat and Instagram.

9. The calls were often made late at night or in the early hours of the morning. Just by way of example, between 11.51 pm on 23 January and 12.10 am on 24 January 2023, he rang her 56 times from a withheld number. She answered the phone once (to confirm her suspicion that it was him) and, among other unpleasantries, he called her a "fucking slag" and a "dirty ugly cow" and accused her of sleeping around. Shortly afterwards he sent a direct message to her personal and business accounts on Instagram, using a fake account, expressing similar sentiments. On 26 January he made a further 94 calls to her between 11.16 pm and 11.37 pm.

10. The offending on Count 2 both pre-dated and post-dated the final breakdown of the relationship. On numerous occasions between March 2022 and mid-February 2023, the appellant contacted or attempted to contact one of A's male cousins ("N") from various Snapchat or Instagram accounts, sending him videos or photos of A of a private sexual nature, asking him to send them to her family, and threatening to do so himself if N did not comply with that request. These photos or videos were often accompanied by derogatory comments of a deeply misogynistic nature, and appeared designed to provoke a reaction from N, who the appellant appears to have believed that A's family wished her to marry.

11. In October 2022, the appellant sent similar photos and videos to A's stylist and to a different cousin, some of which had been taken without A's consent while they were still in a

relationship. In the messages to that cousin, the appellant referred to A as a "slag" and a "slut". On 26 October, following these incidents, A answered a call from the appellant and the couple had an argument on the phone. Following the final breakdown of the relationship on 5 November, the appellant sent photos and videos of A in her underwear to A's mother and revealed to her that A had terminated a pregnancy, causing A considerable distress. On 8 November, one of her female friends told A that she had received a video on Instagram from the appellant, but had deleted the message without opening it.

12. In January 2023, the appellant sent a video of a private sexual nature to one of A's female work colleagues. Following that incident, the appellant was arrested. He was initially charged with stalking between 5 November 2022 and 29 January 2023 and with disclosing private sexual photographs between 24 August 2022 and 24 January 2023. He appeared before Sheffield Magistrates in connection with these offences on 3 February 2023, and was granted bail on conditions which included not contacting A, not going to her place of work and not going to her home address.

13. Despite those bail conditions A's offending behaviour continued, and indeed escalated. Within a week, he rang A at 11.56 pm on 10 February. Initially he apologised to her, but then he told her: "You've ruined my life, I'm going to ruin yours". A made no response at any point during that call, which lasted only 18 seconds. True to his word, the appellant then made approximately 100 further calls to A between 11.56 pm on 10 February and 12.11 am on 11 February. Around 30 to 40 minutes later her cousin N contacted A to say that the appellant had sent him messages and private sexual videos of A from another fake Snapchat account. The filming had been carried out at A's home address some years earlier without her consent. The appellant had also posted one of these images on Instagram and tagged N. At 1.37 am, another member of A's family contacted her to say that they had been sent topless images of her, and at 4.00 pm one of her female friends phoned to say that she had been sent explicit images of A.

14. Three days later, on 14 February, the appellant caused serious damage to A's car whilst it was parked in the car park at her place of work. He was captured on CCTV in the vicinity of the car. He should not have been there because of his bail conditions. He was arrested and gave a "no comment" interview on 15 February. He appeared before Sheffield Magistrates' Court for the breaches of bail and the further offences committed since his last appearance and, on that occasion, he was remanded into custody. However, the Bail Act offences were not made the subject of a separate charge. Instead, the fact that some of the offending occurred whilst on bail, and in direct contravention of the expressed bail conditions imposed on the appellant, were treated by the Crown and by the judge as aggravating features of the index offences.

15. At the sentencing hearing the Crown submitted, and the judge accepted, that applying the Definitive Guideline for Intimidatory Offences, Count 1 fell into category 1 for harm because of the very serious distress caused to the victim, as evidenced by her five victim impact statements, and category B (high culpability) because of the persistent action taken over a prolonged period and the appellant's clear intention to maximise fear or distress. The starting point in that category is one of 2 years 6 months, with a range of 1 to 4 years'

imprisonment. The judge reached a sentence of 18 months' imprisonment, after giving an approximate 25 per cent discount for the guilty plea, which indicates that the notional sentence after trial, after taking into account all the aggravating and mitigating features, was one of 2 years' imprisonment. He made it clear that, in sentencing on count 1, he did not take into account the criminality involved in counts 2 or 3.

16. On behalf of the appellant, Mr Robinson submitted in his written grounds, as he did to the judge, that the level of harm to be attributed to the stalking offence (Count 1) was difficult to truly identify, as the stalking occurred within the currency of the Count 2 offending which would have generated the driving factors for A's distress. There was no medical evidence of protracted psychological harm; the victim had not changed her place of employment or moved home, as is often the case with offending of this nature, nor had she made considerable changes to her lifestyle to avoid contact with the appellant. In the light of this, Mr Robinson submitted that the level of harm sustained more comfortably fell within category 2 than category 1.

17. In his submissions to the Court this morning, Mr Robinson also pressed that the categorisation by the judge of category B for culpability was wrong in principle, and he submitted that the appellant's culpability should have fallen into the lower category. He took issue with the categorisation of the stalking as persistent; he accepted that it took place over the period of time that was set out in the indictment, but he submitted that the offences seemed to be sporadic and of an isolated nature. He said that there were no threats of violence. This was unlike some cases of this nature, where the perpetrator turns up at the victim's address and makes threats directly to them. There was also an element of desperation about the offending that ought to have been taken into account.

18. In our judgment, however, the judge was fully justified in placing this offending into the category that he did, for the reasons that he gave at the time. As the judge pointed out, the stalking continued in breach of bail. It is not inapt to describe the proliferation of repeated abusive calls and messages in late January and early February 2023 as "persistent", particularly when they continued in defiance of an express court order prohibiting all contact between the appellant and A. The sentence passed on Count 1, taken by itself, is not excessive, let alone obviously so.

19. So far as the remaining counts are concerned, the prosecution submitted that Count 2 fell within category A (higher culpability) and category 1 for harm, with a starting point of 1 year's custody and a range of 26 weeks to 18 months. As to the criminal damage, there were serious economic consequences for A, because not only was her car a write-off, but her insurance premiums increased significantly. This was a revenge attack and the appellant plainly intended to cause very serious damage to the car. Accordingly, this was category A for culpability and category 1 for harm, with a starting point of 18 months' imprisonment and a range of 6 months to 4 years.

20. As regards Count 2, in his written grounds, Mr Robinson made the same submissions regarding harm as he did in respect of Count 1, though he did not press them upon the Court in his oral submissions. As the judge said, it was rightly categorised as a 1A offence. Again,

we consider he was entitled to take that view on the evidence before him.

21. Mr Robinson did not expressly take issue with the prosecution's categorisation of the criminal damage offence. The judge did not expressly address the categorisation of that offence in his sentencing remarks, though he did describe it as "a serious offence of criminal damage committed by you in breach of bail".

22. The judge made it clear that he had taken into account the contents of the pre-sentence report and the submissions made orally in mitigation. We have read the report, which is balanced and fair. One of the aspects of it which did not reflect well on the appellant was his total lack of empathy for the victim. It appeared that the appellant thought his behaviour was justified in retaliation for things that A had said or done during their relationship. However, as the judge pointed out, the problems in their relationship did not give the appellant the right to behave in the misogynistic way in which he behaved. As he remarked, the appellant had a lot to learn about how to treat women.

23. It appears from his sentencing remarks that, although he was not urged to do so by Mr Robinson, the judge felt constrained by the language of the indictment (as it then appeared) to sentence the appellant on Count 2 for a single offence committed on one occasion. We explored this matter this morning with Mr Coxon, who appeared for the prosecution. He helpfully indicated that the wording of the indictment at the time could have been interpreted as referring to a single offence, although the period of offending was stated to be between March 2022 and February 2023. However, he confirmed that the Crown had very clearly indicated that this was a multiplicity of offences, committed over that period, that they had opened the case on that basis, and that the defence had not been taken by surprise.

24. Mr Coxon told the Court that he had raised this matter with the judge in the course of oral argument, and had suggested that because the court was not yet functus officio it might be possible to amend the indictment to clearly reflect the fact that there was multiple offending. However the judge did not revert to that suggestion. In the event, he took the course (which was perhaps very benign) of maintaining that he should sentence on Count 2 for a single offence committed on one occasion. Taking into account the period specified on the indictment, the judge selected the last of the disclosures to A's cousin N, which was made in breach of bail.

25. Even if the judge had been correct to do so because of the strict language of the indictment as it then appeared, given that the plea of guilty was not entered on a different factual basis from the way in which the case had been opened by the Crown, the earlier incidents of distributing sexual photographs and images on videos and films formed a very important part of the background to the offence which the judge selected. It would have justified a very significant uplift in the starting point for sentence on that count, or indeed an uplift to the sentence which was passed on Count 1. The judge did not expressly indicate in his sentencing remarks that he was adopting that approach, because the only aggravating feature he specifically identified was the commission of the offence whilst on bail.

26. Although it cannot alter the sentence that was passed, this Court is entitled to take into account, when determining whether the overall sentence was disproportionate or unjust, or manifestly excessive, the fact that the approach taken by the judge meant that the full gravity of the offending was not truly reflected in the sentence which he passed on Count 2. To end up with a sentence of 9 months' imprisonment, the judge must have reached a notional sentence, after trial, of 12 months' imprisonment, having weighed up the aggravating features and the mitigating features, including the appellant's relative youth, his lack of previous similar convictions and his employment history. That is also true of Count 3, although the starting point for that offence, under the relevant Guideline, was 6 months higher than for Count 2, and the aggravating and mitigating features identified by the judge were exactly the same. It could be inferred from this that the judge made downward adjustments of around 6 months to reflect totality.

27. Mr Robinson, this morning, did not press the argument on totality, but a point was taken in the grounds of appeal. It has not been abandoned. In his written grounds, Mr Robinson submitted that the judge was wrong to have passed consecutive sentences for each count instead of passing a sentence on Count 1 which was aggravated by the other two matters. The judge gave the following explanation for his approach:

> "With totality uppermost in mind, bearing in mind the legal issues that I have referred to, I anticipate one could arrive at an end sentence by many means in this case, but I have decided to impose the following sentences. For the stalking – and, I should say, you'll get 25 per cent credit for all of your guilty pleas – 18 months' imprisonment. For the disclosure of sexual photographs, 9 months' imprisonment consecutive, and for the damage, 9 months' imprisonment consecutive. I make it clear that I did not take into account in the stalking sentence the photographs or the damage to the car. I sentenced for the stalking offence on all the other matters. The total sentence is therefore 3 years' imprisonment."

28. It is quite clear from this passage in his sentencing remarks that the judge did pay due regard to totality, and he took pains to make it clear that he had avoided double counting. He also took all relevant factors into account. He was generous to the appellant in his approach to the sentence on Count 2, which in truth reflected prolific offending behaviour that can be regarded as being at least as serious and distressing for A as the behaviour that was the subject of Count 1, if not more so. No complaint could possibly be made about a sentence of 9 months' imprisonment on that count, imposed on the assumption that it related to a single disclosure made in breach of bail. The sentence for the offence of criminal damage was well within the available range.

29. As Mr Coxon pointed out in the Respondent's Notice, and as this Court was at pains to stress in R v Bailey & Ors [2020] EWCA Crim 1719, the overriding principle to be applied when considering the Totality Guideline is whether the overall sentence, however structured, is just and proportionate. The fact that a judge has chosen to impose consecutive sentences, instead of reflecting the overall criminality of the offences in the sentence passed on one of the offences and passing shorter concurrent sentences on the others, does not by itself indicate

that the sentence is not just and proportionate.

30. Given the seriousness of the overall offending in this case, if the judge had decided to reflect it in an uplift to the sentence on Count 1, to reflect the criminality in Counts 2 and 3, it could easily have taken him to a sentence in the region of the sentence which he actually passed after giving the appropriate credit for plea. Mr Robinson realistically accepted that, if all of the offending behaviour in Count 2 had been taken into account in sentencing on Count 1, it was likely that the judge would have passed a sentence of at least 2 years and 6 months' imprisonment, which is not far short of the sentence that he actually passed. The same would be true if the judge had uplifted the sentence on Count 1 to reflect the criminality in Count 2 and passed a concurrent sentence on that Count but a consecutive sentence in respect of the criminal damage to the car; or reflected the criminality in Count 3 in the sentence he passed on Count 1, and passed a consecutive sentence on Count 2 - either of which approaches he could also have justified. As he acknowledged, one could arrive at an end sentence by many different means.

31. Whereas another judge might have produced an overall sentence which was slightly shorter, we are not persuaded that 3 years is disproportionate or unjust for this offending, nor is it obviously too long. For those reasons, this appeal is dismissed.