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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 11 April 2019

B e f o r e:

LORD JUSTICE GROSS
MR JUSTICE GOOSE

THE RECORDER OF GREENWICH
HIS HONOUR JUDGE KINCH QC
(Sitting as a Judge of the CACD)
R E G I N A
v
GEOFFREY DILLION

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Mr C Witcher appeared on behalf of the **Applicant**
Mr D Swinnerton appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. MR JUSTICE GOOSE: On 15 December 2016 in the Crown Court at Wolverhampton before His Honour Judge Tregilgas-Davey, Geoffrey Robert Dillion was convicted after trial and was subsequently sentenced to two years' imprisonment. His offences were acting in breach of a restraining order, contrary to section 5(5) of the Protection from Harassment Act 1997 (count 1) and making threats to kill, contrary to section 16 of the Offences Against the Person Act 1861 (count 2).

2. After his conviction and sentence the appellant sought leave to appeal against his sentence, which was refused after a renewed application before this court on 16 August 2017 - see [2017] EWCA Crim 1293 (Rafferty LJ, Sweeney and Holroyde JJ). The appellant now seeks leave to appeal against his conviction, together with an extension of time of 312 days which applications have been referred to the Full Court by the Registrar. The Registrar also granted a representation order for counsel to appear on behalf of the appellant. Mr Witcher appears for the appellant in this appeal and Mr Swinnerton for the prosecution, in respect of both of whom we are grateful for the brevity of their submissions and the helpfulness towards the expeditious dealing with this appeal. We extend time and we grant leave.

The facts

3. On 18 June 2016 police officers, including PC Francis, saw the appellant enter the West Bromwich branch of the Lidl store. PC Francis knew the appellant and discovered that he was prohibited from entering the store by the terms of a Restraining Order made by Wolverhampton Crown Court on 12 October 2011 for a period of five years. When the appellant left the store, he was arrested by PC Francis. The appellant denied that he was Geoffrey Dillion. Once arrested, the appellant was taken to a police station where he made repeated threats to kill PC Francis in the presence of witnesses. To reinforce the threat the appellant stated that he knew the route that PC Francis walked with his young daughter when he was taking her to school.

4. During his police interviews the appellant accepted that he had entered the Lidl store and denied having been subject to the restraining order. He also denied having made threats to kill PC Francis. Accordingly, the issues for trial were whether the appellant was the person who was the subject of a restraining order since he admitted that he had entered the store. Further, in relation to the threats to kill, whether such threats had been made intending that PC Francis would fear that they would be carried out. These issues were made clear in the appellant's police interviews.

5. After the appellant was charged with breach of the restraining order and making threats to kill, he was brought before the Magistrates' Court on 20 June 2016 in custody. He refused to confirm his name or address, and insisted that the prosecution should prove them. The magistrates determined that the case was not for suitable for summary trial and sent him to the Crown Court.

6. At the Pre Trial Preparation Hearing (PTPH) on 18 July 2016 the appellant, who was represented but appeared by video link, refused to identify himself or to co-operate in attempts to arraign him. He talked over the judge who ordered the audio to be turned off to allow the hearing to be effective. The judge determined that the appellant had

refused to plead and therefore entered not guilty pleas in respect of the two separate indictments charging each offence.

7. On 15 September 2016 both indictments were listed for a Pre Trial Review. The appellant's counsel indicated that the appellant had been uncooperative, such that no Defence Case Statement had been prepared. Orders were made to list the two indictments for separate trials. The breach of restraining order was listed for trial on 21 September 2016 and the threat to kill trial was listed on 5 October 2016.

8. On 21 September 2016 when the breach of a restraining order indictment was listed for trial, the appellant refused to leave prison to attend court. The judge on that occasion was not satisfied that the appellant had been properly warned of the consequences for not attending. The trial was adjourned to follow on from the second trial on 5 October 2016.

9. On that date, the appellant refused again to attend court. The case was adjourned overnight with a view to a trial taking place in the absence of the appellant. On 6 October 2016, the appellant refused again to attend court from prison. The defence applied for an adjournment of the trial and to obtain a psychiatric assessment. All matters were adjourned until 21 November 2016. In the event, no psychiatric evidence was obtained or served.

10. On 18 November 2016, three days before the next listed hearing, His Honour Judge Webb raised the question on the Crown Court Digital Case System (DCS) as to whether the two indictments could be joined and tried together. On 21 November 2016 the appellant again refused to attend court but was represented by counsel. The court ordered, after agreement between the prosecution and defence, that there would be one trial listed on 14 December 2016. The intention was that the two indictments would be the subject of an application to join the two existing indictments. However no formal application or ruling was made. The following day, 22 November 2016, the prosecution uploaded to the DCS a single indictment charging the two offences. No court order had been made for a joinder to take place.

11. On 14 December 2016 the appellant attended the court building but refused to leave his cell to enter court. It is not necessary to go into the detail of what occurred, but this court has read the transcript of the proceedings in court. No doubt, as a result of the difficult circumstances caused by the appellant, the parties and the court did not appreciate that the joinder application had not been made or granted. The trial however proceeded on the basis that it had. The appellant was represented although he played no part in the trial. The judge correctly ruled that it was appropriate to proceed in the absence of the appellant and the jury were carefully directed in their task. The appellant was convicted of both counts on the trial indictment.

Grounds of appeal

12. On behalf of the appellant, there are two grounds of appeal. Firstly, that the indictment and therefore the trial were a nullity because there should have been a formal application and order for joinder of the two indictments. This has been properly

refined by Mr Witcher, on behalf of the appellant, so as not to assert nullity but to argue that the conviction was unsafe. It is contended that even if an application had been made the two offences could not have been properly joined.

13. The second ground is that the appellant was unfairly prejudiced by the two separate sets of allegations being contained in a single indictment such that the convictions were unsafe.

14. In support of the first ground it is argued that there is no dispute that the indictments were not properly joined by a court order. It is argued that the two offences could not be said to have been founded on the same facts, nor do they form or were part of a series of offences of the same or similar character required by CPR Part 3.21. The only nexus, it is submitted, was that the arresting officer for the breach of the restraining order was the victim of the threat to kill at the police station after the appellant's arrest. Further, even if the two offences could have been properly joined on the same indictment, the court should have severed them, due to prejudice suffered by the appellant in defending a charge of breaching a restraining order where the key witness was the victim of the threat to kill. The alleged comment about the police officer's young daughter prejudiced a fair trial of the breach offence.

15. On behalf of the respondent, Mr Swinnerton has accepted that there was no written application or order made by the court to join the two indictments. It is submitted that the provisions of section 2(3) of the Administration of Justice (Miscellaneous Provisions) Act 1933 mean that the trial judgment in this case should not be quashed. Further, reliance is placed upon the recent decision of R v MJ [2019] 1 Cr.App.R 10 which provides clear guidance upon the approach this court should take.

Discussion and conclusion

16. The starting point for this court's determination of the appeal against conviction is that the appellant faced two valid indictments after he was sent to the Wolverhampton Crown Court by the magistrates. Those indictments separately contained the two offences with which he was charged, namely acting in breach of a restraining order and making a threat to kill. The court proceeded on the basis that the indictments would be tried separately and gave different trial dates. The proceedings developed unusually because of the appellant's refusal to cooperate in the trial preparation process. Accordingly, on 21 November 2016 both counsel and the judge were satisfied that a joint trial of both indictments was necessary, although no formal application or order was made. At the trial on 14 December 2016 the trial indictment was not defective by reason of any misjoinder of counts that should not have been on the same indictment, but because no joinder had taken place. No objection had been made on behalf of the appellant to the proposed joinder. Therefore, the defect in the trial indictment was because it tried two valid but separate indictments in the same trial without an order of the court. If the problem being brought to the attention of both counsel and the judge on 14 December 2016, it is almost certain that no objection would have been raised and the order would have been granted. However, this does not provide the answer to this appeal.

17. What is the effect of this defect in the procedure on the appellant's conviction? Although it is submitted on behalf of the appellant that either the indictment as a whole should be declared as a nullity, or the convictions separately or together should be so declared, we do not consider on analysis that this is correct. The appellant places reliance on the line of authorities beginning with R v Callaghan (1992) 94 Cr.App.R 226, through to R v Smith [1997] 1 Cr.App. R 390 and R v McGrath [2013] EWCA Crim 1261 to concentrate on the effect of a misjoinder of counts to an otherwise valid indictment. In this appeal the complaint is also of misjoinder, but in the sense that no order was made by an oversight of two valid indictments.

18. This court gained greater assistance from the recent decision of this court in R v MJ [2018] EWCA Crim 2485, [2019] 1 Cr.App.R 10. The facts of that case bear short repetition. The court was concerned with two separate appeals involving defendants being tried on an indictment, which differed from the one on which they had been arraigned and put in charge of the jury. The fault lay in the fact that amendments were made to add additional counts to the indictment, but without there being any further arraignment. The appellants were convicted but conceded that there had been no prejudice caused, save for their convictions upon counts on the indictment to which they had not been arraigned. The court dismissed the appeals, relying on section 2(3) of the Administration of Justice (Miscellaneous Provisions) Act 1933, as amended by the Coroner's and Justice Act 2009. These provisions were described by Sir Brian Leveson P, at paragraph 48, as a *"broad anti-technicality provision, clearly intended by Parliament to prevent belated technical objections to the validity of a form of indictment and the proceedings which follow."* The relevant parts of section 2 of the 1993 Act are:

> "**2. Procedure for indictment for offenders**
>
> (2) Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—
>
> (a) the person charged has been sent for trial for the offence;
>
> ...
>
> (3) If a bill of indictment has been preferred otherwise than in accordance with the provisions of the last foregoing subsection..., the indictment shall be liable to be quashed:
>
> Provided that—
>
> (a) if the bill contains several counts, and the said provisions have been complied with as respects one or more of them, those counts only that were wrongly included shall be quashed under this subsection; and
>
> (b) where a person who has been sent for trial is convicted on any indictment or any count of an indictment, that indictment or count shall not be quashed under this subsection in any

> proceedings on appeal, unless application was made at the trial that it should be so quashed.
>
> ...
>
> (6ZA) Where a bill of indictment is preferred in accordance with subsections (1) and (2), no objection to the indictment may be taken after the commencement of the trial by reason of any failure to observe any rules under subsection (6) [Criminal Procedure Rules]."

19. In this appeal, the appellant was sent for trial for two separate offences in respect of which no criticism can be made. The joinder of those offences in the trial indictment without a court order, whilst being preferred otherwise than in accordance with section 2(2) of the 1933 Act, is not required to be quashed under section 2(3). This is because it was a Bill containing several counts in respect of one of which (either the breach of restraining order or the threat to kill) there was compliance with the provisions of section 2(2) of the Act. Further, the appellant having been convicted on the trial indictment and no application having been made at trial to quash the counts or indictment it cannot be quashed now (see section 2(3) of the 1933 Act).

20. A further obstacle to the quashing of a trial indictment exists. The preparation of the trial indictment and its uploading to the DCS by the prosecutor on 22 September 2016 was in accordance with section 2(1) of the 1933 Act. It was the preferred indictment under CPR Part 10.2(5) - see Criminal Procedure (Amendment No.2) Rules 2016 (in force from 3 October 2016). Accordingly, under section 2(6ZA) of the 1933 Act, the trial indictment was a Bill of Indictment preferred in accordance with subsection (2) of the Act, such that no objection to the indictment may be taken after the commencement of a trial by reason of a failure to observe any rule under the Criminal Procedure Rules. Therefore, since no objection was taken by the appellant to the trial indictment before the commencement of the trial, notwithstanding that he was represented throughout the trial, neither the indictment nor any count upon it can be quashed. It follows therefore, that neither count, nor the indictment may now be quashed by reason of any failure to comply with the CPR.

21. The appellant in seeking to argue that the conviction is unsafe, argues firstly, that the two offences could not properly have been joined on the same indictment, and secondly, that had they been properly joined they should have been severed because the appellant suffered prejudice in the conduct of this defence. Both of these submissions fall away for the reasons already stated, but to the extent that it is argued that the conviction is unsafe, we can deal with this issue briefly. We do not accept that in the circumstances of this case that the breach of restraining order count and the threat to kill count should not have been joined on the same indictment. We are satisfied that the offences arose out of the same facts. The threat to kill was only made because the appellant had been arrested by the victim of the threat after he breached the restraining order. Secondly, we do not accept that the appellant was caused prejudice so as to require severance of the indictment. The terms of the threat to kill, including its reinforcement by describing the victim's child, cannot be described as facts of such a nature as might cause unfairness to the appellant in his trial upon the breach of a

restraining order offence. A jury would be properly directed to try the case dispassionately so as to alleviate any risk of prejudice.

22. Accordingly, we have come to the conclusion that neither the trial indictment nor either counts upon it, should be quashed. Further, we are not persuaded that the appellant's conviction is unsafe and, therefore, we dismiss the appeal against conviction.

23. Before parting with this appeal, we seek to echo the comments made by Sir Brian Leveson P, in R v MJ, at paragraph 54:

> "*This case demonstrates, the modern practice of uploading draft indictments onto the DCS, intended to be convenient for all parties and to improve efficiency, is capable of leading to confusion and serious error if care is not taken to ensure that appropriate steps are taken to apply for orders to amend existing indictments and/or to ensure re-arraignment. The risk of multiple versions and uncertainty as to which is the 'true bill' is obvious. We emphasise that it is the duty of both prosecution and defence representatives to ensure that steps are taken to regularise the position as the case progresses and, in particular, that the form of indictment used at trial has received all necessary consideration. In that regard, it would also obviously be good practice for trial judges to enquire of counsel whether there were any outstanding issues in relation to the indictment before it is read before the jury at trial ...* "

24. We seek to add nothing further to those comments but enforce them wholeheartedly.