IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2020] EWCA Crim 457

No. 201901760 A4
201903884 A4

Royal Courts of Justice

Tuesday, 10 March 2020

Before:

LORD JUSTICE HADDON-CAVE
MR JUSTICE CARR DBE
MR JUSTICE PEPPERALL

REGINA
V
MICHAEL ROGER BRAIN

_____

Computer-aided Transcript prepared from the Stenographic Notes of
Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

_____

MR W. PARKHILL appeared on behalf of the Appellant.
MR T. FAULKNER appeared on behalf of the Respondent.

_____

J U D G M E N T

MRS JUSTICE CARR:

Introduction

1 This is the hearing of the appeal of Michael Roger Brain ("Mr Brain") against the sentence imposed on him on 12 April 2019 in Plymouth Crown Court of two years' imprisonment for two offences of breach of a Criminal Behaviour Order ("the CBO") made pursuant to s.22 of the Anti-Social Behaviour Crime and Policing Act 2014 ("the 2014 Act") as part of a sentence imposed on him on 2 September 2016 for 14 offences of theft and fraud. The appeal came before this court in September 2019, but was adjourned in order for Mr Brain, if so advised, to seek permission to appeal the terms of the CBO, along with the necessary extension of time. Mr Brain has sought permission and an extension of time in line with the order made on that occasion.

2 This is therefore a combined hearing of Mr Brain's appeal against the sentence imposed in 2019 ("the 2019 sentence") and his application for leave to appeal the sentence imposed in 2016 ("the 2016 sentence") and an extension of time. His challenge to the 2016 sentence is limited to a challenge to the imposition, terms and duration of the CBO.

Relevant facts and sentences

3 We divide the facts into the following sections: events leading up to the 2016 sentence; the 2016 sentence; events leading up to the 2019 sentence; and the 2019 sentence.

Events leading up to the 2016 sentence

4 In overview, between 2012 and 2015 Mr Brain, who is now 50 years old, used social media in order to form relationships with women, having provided them with a fictitious account of his identity, personal history and intentions. He then stole from them and obtained money from them by deception. His *modus operandi* involved using numerous dating websites and bombarding potential victims with flattering messages. He would have relationship with numerous women at any one time and move between them and back again, whilst grooming another victim for the purpose of establishing a further relationship.

5 He would pretend to empathise and sympathise with his victims by a portrayal of shared experiences, including claims that he was the victim of violence and sexual violence or of being the victim of an abusive or controlling partner. This would result in his victims, who were often true victims of such behaviour, to lower their guard to him. Significantly, he would regularly claim to be an ex-Royal Marines Regimental Sergeant Major with a career spanning 23 years, including service with the Special Forces. He had purchased items of military uniform and there were photographs of him posing in different Royal Marines Uniforms. He used his claim that he had been trained to kill to debilitate his victims with fear that he would return to harm them. He would also claim to be suffering from Post-Traumatic Stress Disorder as a result of his experiences and injuries sustained during his military service. In reality the truth was that his military service was limited to being in the Royal Navy from February 1988 to July 1990 when he was discharged.

6 He would say that he was a good man who had fallen on hard times after leaving the Royal Marines and that he unwittingly found himself homeless and penniless. He would ask to borrow money from his victims and lead them to believe that he would in a position to repay them once his ongoing claim for compensation against the Royal Marines was paid to him. The women that he targeted would feed him and pay for cigarettes and alcohol on the understanding that he would repay them when he got back on his feet. He would also often steal small amounts of cash and jewellery from his victims' homes. Once a potential source

of money was established, he would push it to its limits. If he encountered resistance, he would often behave in an intimidating manner and bully his victims into providing him with further sums of money and he had a history of using violence against his partners.

7 The four victims the subject of the 2016 sentence included elderly or vulnerable women. One charge related to an employment application in which Mr Brain lied in his supporting CV.

8 In more detail, Counts 1 to 5 covered a period between May 2012 and December 2015. Elizabeth Tamaria was 75 years old and living in Cornwall alone when she met the applicant in 2012 following contact through a website called Badoo. A motherly relationship developed, during the course of which she lent the applicant over £20,000. In October 2013 a cheque in the sum of £10,000 written by the applicant to the victim bounced. In addition, Mr Brain used her bank card without authority to withdraw sums of money.

9 Count 6 to 9 covered a period between 15 November 2012 and January 2013. Dawn Sharp was a 50-year-old mother of two who suffered from low self-esteem. As a result of her history of an eating disorder and diabetes she had partial amputations. She started chatting to Mr Brain online through the Plenty of Fish website. After their first meeting in November 2012 she noticed that sentimental items of jewellery went missing from her bedroom. Mr Brain told a petrol station attendant that the victim who had unwittingly driven off would be paying for the patrol. He stole £40 from her address and had used her bank card without authority.

10 Counts 10 to 12 covered a period between January 2013 and September 2014. Sinead McCallion was first contacted by the applicant online, again through the Plenty of Fish website, in January 2013. This was when Mr Brain was living with Ms Tamaria and whilst he was developing a relationship with Ms Sharp. Early on in the relationship, he asked Ms McCallion to borrow Ms McCallion's bank card and pin to borrow £20. In total, he took just under £1,500. He attempted to repay her with a cheque for £1,200 signed by Ms Tamaria. The cheque bounced as by now, due to the fraud committed against Ms Tamaria, her account had insufficient funds. Mr Brain also stole items of jewellery from Ms McCallion.

11 Count 13 covered the period between November 2014 and February 2015. Hazel McLeary met Mr Brain in November 2015, again having made contact through the Plenty of Fish website. Mr Brain moved into her address uninvited and tried to borrow money from her. He stole a 20 euro note from her home.

12 The offending in Count 14 took place on 15 September 2015 when Mr Brain submitted an application for employment in which he lied on his CV.

13 Taking these offences and other offences to be taken into consideration together, the total monetary value obtained by Mr Brain was in excess of £40,000.

The 2016 sentence

14 Mr Brain pleaded guilty before the Magistrates on 20 August 2016 to ten offences of fraud by false representation contrary to s.1 and s.2 of the Fraud Act 2006 and four offences of theft contrary to s.1 and s.7 of the Theft Act 1968. He had 12 previous convictions spanning from 1999 to 2015, including for theft and fraud. In December 2015 he had been sentenced to 70 weeks' imprisonment. He was committed to the Crown Court for sentence and on 2 September 2016 an overall term of four years' imprisonment was imposed on him. No pre-sentence report was obtained and, like the sentencing judge, we do not consider that one

was necessary. A further 18 offences were taken into consideration, including others involving other victims and comprising 13 offences of fraud, one offence of making off without payment and four offences of theft between January 2011 and June 2015.

15 A restraining order pursuant to s.5 of the Protection from Harassment Act 1997 prohibiting Mr Brain from contacting and approaching the 28 victims until further order was made. Mr Brain's Royal Marines clothing was forfeited.

16 The prosecution applied for a Criminal Behaviour Order relying on a witness statement of PC Graham Seaborne dated 25 August 2016. Large parts of that statement were either read out to or summarised for the Judge. Aside from one of the proposed prohibitions relating to being intoxicated in a public place, the CBO, including both its terms and duration, were unopposed. The order and its terms and the duration of the order were not read out for the benefit of Mr Brain in court, contrary to proper practice.

17 The Judge imposed the CBO for an indefinite period with the following nine prohibitions:

> "Mr Brain must not:
>
> i. Access or use any internet based dating or social networking sites. ("Prohibition 1")
>
> ii. Use any device capable of accessing the internet unless:
>
> > i. It has the capacity to retain and display the history of internet use, and.
> >
> > ii. He makes the device available on request for inspection by a police officer. ("Prohibition 2")
>
> iii. Delete such history using any programme that is capable of deleting and then be overwriting data on a computer hard drive or any other digital media capable of data storage in order to remove all traces of their activity. Includes, but not restricted to internet history, registry file usage and overwriting deleted files. ("Prohibition 3")
>
> iv. Be in possession of any uniform that he is not entitled to wear by dint of services. ("Prohibition 4")
>
> v. Wear any medals or other military paraphernalia to which he is not entitled as a result of his service. ("Prohibition 5")
>
> vi. Hold himself out to be a member of any service, regiment or corps that he has not served in. ("Prohibition 6")
>
> vii. Be in possession of any other person's bank card, chequebook or bank account details in any form (including electronically) unless expressly authorised by the person without duress. ("Prohibition 7")
>
> viii. Use another person’s bank card, chequebook or bank account for any transaction (including any electronic transfer) unless expressly authorised by the person without duress. ("Prohibition 8")

ix. Make any false claim in the submission of an application of employment or any other position of trust whether for payment or not. ("Prohibition 9")"

Events leading up to the 2019 sentence

18 Mr Brain was released from prison on 31 August 2018. In the very next month, effectively at the first opportunity, he set up new online profiles on Facebook and Instagram under a false name, in breach of Prohibition 1. Mr Brain then accessed these sites repeatedly on a daily basis thereafter. On his Instagram account Mr Brain described himself as:

> "A Single, hard-working guy, ex-Special Forces, two grown up kids, just become a granddad ... she is beautiful. Want to know more, ask me. X."

19 The holding out as an ex-Special Forces Serviceman was in breach of Prohibition 6. Mr Brain was accordingly charged with two breaches of the CBO.

The 2019 sentence

20 Mr Brain pleaded guilty to both counts before the Magistrates and was committed to the Crown Court where he was sentenced to two years' custody. The parties proceeded originally on the basis that this was Category A2 offending for the purpose of the Sentencing Council Guideline for Breach Offences ("the Guideline"). On reflection, however, the Judge placed the offending in Category A1 - very serious or persistent breach with an ongoing risk of serious criminal or antisocial behaviour - with a starting point of two years' custody. He elevated this to three years' custody, reflecting what he identified as the numerous aggravating features in the case, including the similarity of these convictions to the original offending, the fact that these offences were committed on licence almost immediately after release from prison and Mr Brain's previous offending. After full credit for guilty pleas, the final term of two years was reached.

Application to appeal the CBO

21 For Mr Brain, Mr Parkhill, who did not appear below and for whose submissions we are grateful, contends that the imposition of the CBO was wrong in principle. First, this was not an appropriate case for the imposition of a CBO as its term did not address the underlying behaviour and would not assist in preventing Mr Brain from engaging in such behaviour in the future.

22 Secondly, the information provided to and apparently relied on by the court was flawed in that it contained a vast quantity of information that should not have been presented in support of the application. The court was only permitted to take account of conduct occurring up to one year prior to the commencement dated of the 2014 Act. Thus, only Mr Brain’s previous convictions for fraud and theft arising from his actions in 2015 should have been relied upon. There should have been no reference to any convictions for violence or activities in areas outside Devon and Cornwall predating October 2013. Counts 2, 6, 7, 8, 9 and 12 should have played no part in the debate. Counts 1, 10 and 11 had the potential to be relevant, but there was no enquiry as to the timeline. Only Counts 3, 4, 5, 13 and 14 fell properly to be considered.

23 Thirdly and alternatively, the individual terms of the CBO were inappropriately drafted.

24 Fourthly, the CBO should have been made for a specific period of time, not least given the wide-ranging nature of the prohibitions.

25 For the respondent, Mr Faulkner, who also did not appear below, concedes that the court could only properly take into account conduct occurring up to one year prior to the commencement date of the 2014 Act, but he submits there was sufficient conduct in that period for the court to find that the conditions for imposing a CBO were met. The imposition of a CBO with strict prohibitions for an indefinite period was necessary in this case which involved a callous web of rehearsed, repeated and carefully honed deceit. The terms of the CBO, he submits, were appropriate and targeted Mr Brain's behaviour. Particularly in the light of his breaches, it is submitted that the order has been shown to be proportionate and targeted as indicated.

Analysis

26 The 2014 Act came into force on 20 October 2014. Section 22 provides materially that where a person is convicted of an offence the court may make a Criminal Behaviour Order against the offender if two conditions are satisfied: first, that the court is satisfied beyond reasonable doubt that the offender has engaged in behaviour that caused or was likely to cause harassment, alarm or distress to any person: see s.22(3) ("the first condition"); secondly:

> "...that the court considers that making the order will help in preventing the offender from engaging in such behaviour" see s.22(4) ("the second condition").

27 Section 33(5) of the 2014 Act states:

> "In deciding whether to make a criminal behaviour order a court may take account of conduct occurring up to 1 year before the commencement day."

28 Section 22(4) does not require the court to be satisfied beyond reasonable doubt that making the order will help in preventing the offender from engaging in the relevant behaviour: see *R v Browne-Morgan* [2016] EWCA Crim 1903. Prohibitions and requirements must, so far as practicable, avoid interference with work or educational commitments: see s.22(9). There is no requirement that the acts prohibited by the order should by themselves give rise to alarm, harassment or distress: see *R v McGrath* [2015] EWCA Crim 353, [2005] 2 Crim App R (S) 85. The court may consider evidence led by the prosecution and the offender and it does not matter whether the evidence would have been admissible in the proceedings in which the offender convicted: see s.23(1) and (2). By s.25(4) and (5) an order relating to an adult must be for a fixed period of at least two years and may be for an indefinite period and may specify periods for which particular prohibitions or requirements have effect.

29 CBOs replaced Antisocial Behaviour Orders under s.1(c) of the Crime and Disorder Act 1988. As the court in *R v Khan* [2018] EWCA Crim 1472, [2018] 1 WLR 5419 commented at [19], we are still in the early days of CBOs. The test under the 2014 Act is different to the test that existed for Antisocial Behaviour Orders, specifically in that the test is not one of necessity, but rather the court may make a CBO if it considers that it will help in preventing the behaviour in question. The authorities relating to Antisocial Behaviour Orders thus need to be approached with caution, though they may still provide useful guidance on certain matters, such as the need for sufficient specificity in an order. As with any order of a criminal court which has the characteristics of an injunction, it is essential that the guidance of this court in *R v Bones* [2005] EWCA Crim 2395, [2006] 1 Crim App R (S) 120 at [19] to [23] is followed.

30 In general terms, it is non-contentious that CBOs are aimed at prevention not punishment, should be proportionate and targeted at the relevant behaviour and capable of being complied with and clearly understood. They are not alternatives to custody.

31 When considering the legislation relating to CBOs and the correct approach on an appeal against a CBO, the court in *DPP v Bulmer* [2016] 1 Crim App R (s) 12 held so far as material here, at [35] to [41] and [44], first, that a CBO does not need to include a positive requirement. However, the fact that it does not may be taken into account in deciding whether to grant it. Secondly, s.22(4) does not impose any burden of proof on the prosecution. While the court hearing an application should proceed with circumspection, because such orders are not to be imposed lightly, satisfaction to the criminal standard was not required in an evaluative exercise. Thirdly, whether the condition in s.22(4) was met was not a matter of pure discretion. However, unless an appellate court concludes that the lower court plainly erred in some way, either in its assessment of the facts or in applying the wrong test or in leaving out of account matters that it was required to take into account, it should not interfere.

32 This court in *R v Khan* (supra) endorsed these comments, emphasising at [20] that CBOs are not lightly to be imposed or treated as a matter of "box ticking routine". 2017 Home Office Guidance on the 2014 Act states that CBOs were intended for tackling the most serious and persistent offenders where their behaviour has brought them before a criminal court. Prohibitions had to be reasonable and proportionate, realistic and practical, and in precise terms which were capable of being understood by the offender and which made it easy to determine and prosecute a breach: see [15].

33 Was the Judge right in principle here to grant a CBO? There is no question that the first condition was satisfied. The question is whether the Judge plainly erred in some way in concluding that the second condition was also met. This is to be assessed as matters stood at the time. The prosecution is wrong to point to the breaches in 2018 as justification for the CBO being imposed in the first place.

34 The Judge appears to have been lulled into the false belief that he could take directly into account conduct which predated October 2013. It is common ground that only conduct post 24 October 2013 should have been taken into account directly and it is fair to assume that the Judge (incorrectly) took into account directly all of the material that had been presented before him as relevant. There was no proper enquiry into which matters could and could not be properly taken directly into account.

35 However, he was clearly in our judgment entitled to conclude on the basis of the post October 2013 material that, assuming that appropriate prohibitions could be identified, it was appropriate in principle to make a CBO. We point to the offending in Counts 3, 4, 5, 13 and 14, all of which occurred in the relevant period, as did the offending underlying Mr Brain's previous convictions in Counts 12 and 13. Further, there was post October 2013 conduct involved in Counts 1 and 11.

36 Against that background, we uphold the decision in principle to impose the CBO. It is artificial in the context of criminal behaviour of the type in question simply to look at the individual dates of the offending. The conduct here was all part of an ongoing and continuous pattern. As Mr Parkhill fairly accepted, the court was always going to be entitled to take account of the broader historical background as context for assessing the direct conduct which took place in the relevant period postdating October 2013.

37 We turn then to the challenge to the terms of the CBO. Mr Parkhill submits that Prohibition 1 is too widely drafted. The use of social networking sites in particular is ingrained in

society and is a part of normal societal intercourse. The prohibition prevents healthy and positive interaction and potentially inhibits Mr Brain's employment prospects. He realistically concedes that the prohibition in relation to the use of internet dating sites is not one to which he could properly object.

38 In our judgment, there is some force in the challenge to the blanket prohibition on the use of social networking sites, in particular so far as that prohibition may inhibit Mr Brain's employment prospects. We consider, therefore, that, subject to the granting of leave and extension of time, a variation to Prohibition 1 is justified such that the use of social networking sites by Mr Brain will be permitted for employment-related purposes. We would therefore suggest that the drafting of Prohibition 1 is altered so that the prohibition reads now:

> "Access or use any internet based dating or social networking sites, the latter save for employment-related purposes."

39 For the avoidance of doubt, the ban on the use of internet-based dating sites is absolute.

40 We see no proper objection to Prohibitions 2 and 3, which seem to us to serve as a useful deterrent factor. Mr Brain's entrenched offending justifies the sort of monitoring that those prohibitions envisage. So far as Prohibitions 4 to 6 are concerned, again, we see no proper basis with which to interfere with those prohibitions. Mr Brain's purported ex-military background was a central part of his act, which helped him to beguile and deceive the women in question. These prohibitions would help to prevent him engaging in the same conduct in the future.

41 So far as prohibition 7, 8 and 9 are concerned, we accept the broad submission that these prohibitions essentially are adequately dealt with by the criminal law as it exists in relation to offences of fraud. As a matter of principle, prohibitions should not be imposed in relation to conduct which would constitute a criminal offence on its own merits. Therefore, we would quash those prohibitions.

42 So far as the duration of the CBO is concerned, we consider the Judge was fully entitled to make the order last for an indefinite period. Mr Brain poses a significant risk of committing identical fraud offences. He showed no remorse or understanding and, in short, remains a menace to women. Should there be a material change in his circumstances, it would always be open to him to apply for a variation or discharge of the CBO under s.27 of 2014 Act.

43 Standing back on the application in relation to the 2016 we conclude as follows: we grant leave together with the necessary extension of time. Albeit that the extension of time is a lengthy one, it is in the interests of justice to grant it. We dismiss the appeal against the imposition of the CBO in principle, but we allow the appeal to the limited extent identified; namely, we vary Prohibition 1 and we quash Prohibitions 7, 8 and 9.

Appeal against the 2019 sentence

44 For Mr Brain it is said that a sentence of two years' imprisonment was manifestly excessive as a result of double or even triple counting on the part of the Judge. Mr Parkhill submits that the Judge used the very features which provided the basis for placing the breaches in category A1 for the purpose of the Guideline and then treated them also as aggravating features to increase the sentence. He relies particularly on what he says was the double counting in relation to Mr Brain's previous convictions. It is rightly not suggested that a sentence of immediate custody was not justified.

Analysis

45 The judge was clearly entitled to categories this as A1 offending and, in our judgment, to do so without relying in any way on Mr Brain's previous convictions. The question is whether or not his decision to go above the starting point of two years to three years before credit for guilty plea was unjustified and resulted in a manifestly excessive sentence. We do not consider that it was. Without any double counting for factors behind the Judge's finding that this was category A1 offending, that Mr Brain's actions evidenced a continuing risk of serious antisocial behaviour and that there was here a serious or persistent breach. There were the following additional aggravating features: Mr Brain's previous convictions, the fact that the breaches were committed immediately after his release and his history of disobedience to court orders, for example his failure to comply with community orders in 2008 and 2011.

46 It is difficult in a case like this to separate out the factors behind the conclusion that Mr Brain's actions evidenced a continuing risk of serious antisocial behaviour and aggravating factors. A better approach may be to consider that there were so many concerning features evidencing a continuing risk of serious antisocial behaviour and very serious or persistent breach that it was necessary to go above the term of two years without more. Added to that, there were aggravating features identified above.

47 The resulting sentence of two years could be said to be severe, but we are not persuaded that it was manifestly excessive and the appeal against the 2019 sentence will be dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.