IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 1794

No. 202200437 A4

Royal Courts of Justice

Tuesday, 13 September 2022

Before:

LORD JUSTICE SINGH
MR JUSTICE FRASER
MR JUSTICE HENSHAW

REX
V
BABAJIDE ORIYOMI OSHOSANYA

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DR P FIELDS appeared on behalf of the Appellant.

MS S QUINTON-CARTER appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE HENSHAW:

1 This is an appeal from the imposition of a restraining order following acquittal pursuant to s.5A of the Protection from Harassment Act 1997.

2 The appellant, who is 38 years old, was acquitted on 14 January 2022 in the Crown Court at St Albans of one count of stalking involving fear of violence or serious alarm or distress, contrary s.4A of the Act, the prosecution having on the fourth day of the trial decided to offer no evidence.

3 After hearing submissions, the judge imposed a five-year restraining order prohibiting the appellant from contacting his wife, the complainant, directly or indirectly, save via solicitors or social services for the purposes of child contact; going to any location where he believed or suspected her to be; contacting directly or indirectly the complainant's sister or her husband; and going to the sister's address in Letchworth.

4 The complainant's evidence was that she and the appellant had been in a relationship for ten years and had been married for five of those. They had two children together, now aged six and two. On 8 December 2019 she fled the family home with their children because she had experienced aggressive behaviour and violence from the appellant. The complainant said that on one occasion the appellant had threatened to kill her, on another he threatened to murder her family in front of her, and on another occasion he told her that if she called the police they would let him go and he would come after her.

5 The week before she left, the complainant and the appellant had had an argument, during which she said he hit her on the head while she was carrying their young baby. During the same week the appellant got angry during an argument, when the complainant slammed the bathroom door in frustration. He threatened, she said, to break her neck if she broke anything in the house, and said he would kill all of her family, repeatedly banging on the door trying to get into the room where she had locked herself and her young son.

6 The complainant said that on 7 December 2019 the appellant became angry when the complainant told him he was not welcome to spend Christmas with her family, because of things he had said. The complainant then took their son and went downstairs into the kitchen, and the complainant called the police. The appellant returned and took the complainant's phone from her, at this point carrying a knife or meat cleaver in his hand, although that evidence was contested. The appellant prevented the complainant from calling the police and told her to leave the house. When she refused to leave, the appellant pushed her on the head with an open palm and blocked her from entering the living room where the children were. The complainant drove to the police station. She was able to return home, but the police advised her to leave for her safety. The complainant followed this advice, moving to live with her sister in Hertfordshire.

7 There was evidence from the complainant's nephew that two or three weeks later the appellant went to his mother-in-law's address looking for the complainant and their children. He was said to have been not violent or threatening but persistent and determined to find where his wife and children were.

8 On 13 December 2019 the complainant received an email from an email address with no identifying name, but evidently from the appellant, although he was at the time on police bail, one condition of which was not to contact her.

9 In April 2020, now living in a woman's refuge, the complainant received a call from a private number, which turned out to be from the appellant, asking after her and the

children. She told the appellant not to call her again. Thereafter, the complainant received daily calls from a private number. She was anxious because she did not want to answer calls from private numbers, but knew her support workers called every day to check her welfare. On the occasions when she answered these calls, it was the appellant speaking about how the children needed both their parents.

10 The complainant said she changed her phone number, but then received a series of six emails from the appellant between 5 May and 20 June 2020. She was distressed by receiving the emails and their religious tone, which she felt to be manipulative. It appears that the police bail condition had fallen away by this point.

11 On 23 June 2020 the appellant visited the complainant's sister's home, saying he wanted to see his children. The sister eventually persuaded the appellant to leave. She accepted that he had been calm on this occasion.

12 On 3 July 2020 the appellant approached the complainant while she was with her non-verbal autistic daughter, visiting a specialist school in Stevenage that was being considered for the daughter. The appellant picked the daughter up and gave the children presents. (The appellant's case is that this visit occurred at the school's invitation.)

13 On 5 August 2020 the complainant's sister was at home when the appellant suddenly banged on the window at the side of their house and beckoned her and her husband to come out. Her evidence was that they also heard him banging hard on the door, almost as if he were trying to break it down. The husband eventually did go outside and a heated argument seems to have occurred, of which the sister took a video recording.

14 In September 2020 the complainant received documentation from the Family Court about child arrangements, which we understand remain pending.

15 The trial began on Tuesday, 11 January 2022. There was discussion between the parties on the first day about the possibility of resolving the case by means of a restraining order, which at that stage the defence indicated they would not contest. During the course of the evidence, the judge expressed concerns in the absence of the jury about whether the prosecution case of stalking could be made out. Thereafter, on Thursday, 13 January, the Crown put the court on notice that a restraining order would be sought if the Crown decided to offer no evidence, and the defence indicated that that would be contested.

16 On Friday, 14 January 2022, shortly before the lunch break, the Crown indicated that it would offer no evidence, having put the defence during the morning on notice of that proposed course and of the intention to seek a restraining order. The judge proceeded to hear argument and to make the restraining order. It is common ground that the defence did not request an adjournment or time to take further instructions, nor apply for the court to hear evidence from the appellant.

17 In deciding to impose the order, the judge referred to the complainant's evidence about events that had occurred before their marriage ended and led her to leave the appellant and the family home; the appellant's visit to his mother-in-law's address; his emails to the complainant and attempts to contact her by phone and the distress that this caused her; and his two visits to the home of the complainant's sister and her husband. The judge noted that whatever the appellant's thoughts might be, he was clearly a volatile character, matching the complainant's statement that he could change and become aggressive. The judge considered that the appellant's actions amounted to harassment, and the evidence as a whole satisfied him that it was necessary to protect the complainant, her sister and her brother-in-law. The restraining order would be for a period of five years, although if no

problems occurred then the appellant would be able to apply to vary the order or have it lifted.

18 The appellant appeals, by leave of the single judge, on the grounds that:

(i) There was no course of conduct, involving at least two events, amounting to harassment of the complainant's sister or brother-in-law (see *Caurti v DPP* [2001] EWHC (Admin) 867); no evidence of aggression directed at the sister, as opposed to her husband; and no evidence that either of them feared that a future event would occur.

(ii) There was no evidence that the complainant feared that an event would definitely occur: a restraining order could not be made to protect a person from an event they only feared *might* happen.

(iii) In order to ensure equality of arms and a fair trial, the judge should have allowed the appellant to give oral evidence pursuant to s.5A(2A) of the Act before considering making a restraining order. Sufficient notice of any such order needed to be given to the defendant: see *R v K* [2011] EWCA Crim 1843 para.14 and *R v Trott, Peter* [2011] EWCA Crim 2395 para.11. For example, Dr Fields noted in oral submissions today that the appellant might have given evidence that he was now in a relationship with someone else, thus, he submitted, making it less likely that he would seek in future to make contact with the complainant.

(iv) The sentence imposed was manifestly excessive in that the scope and duration of the order did not bear any relation to the circumstances of the original alleged offence.

19 We have heard oral submissions from counsel, Dr Peter Fields for the appellant and Sophie Quinton-Carter for the Crown, both of whom appeared below, for which submissions we are most grateful.

20 We consider the first two grounds of appeal together. Under s.1(1) of the Act read with s.7(3), the substantive offence of harassment requires a course of conduct amounting to harassment on at least two occasions in relation to the relevant person. However, a restraining order under s.5A(1) of the Act does not require proof that the substantive offence has occurred. It requires only that the court considers it necessary to make an order "to protect a person from harassment by the defendant".

21 The appellant cites *R v Qosja, Robert* [2016] EWCA Crim 1543 para.35 where it was held that an offence of stalking under s.4A(1)(b) (i) of the Act requires proof of conduct that causes a person to fear on at least two occasions that violence "will" not "might" be used against them. The appellant submits that the same must apply when considering whether there fear of alarm and distress has been caused, that being pursuant to s.7(2) a form of harassment, such as to justify a restraining order.

22 In our view, however, the question under s.5A does not directly concern the nature of the subjective fears of the person or persons whom the proposed restraining order is to protect, or require proof of actual fear of harassment on their part. Rather, it requires the court on the evidence to consider the restraining order necessary for their protection.

23 The relevant question is thus, simply, whether the evidence establishes a risk of future harassment, making it necessary to impose a restraining order. That is the question the judge addressed, and in doing so he made, in our judgment, no error of principle.

24 For completeness, we note that in the present case the evidence of the complainant, her sister and her brother-in-law in any event made clear that the appellant's conduct had in fact

led them to fear harassment. The complainant, for example, said in her oral evidence that she felt scared to go anywhere in case she bumped into the appellant, whom she regarded as unpredictable, and that she had fled from him because he was violent towards her. Her evidence also included the points that she had concerns about the appellant knowing where she was living, and, of course, that she had ultimately ended up going to a women's refuge. Similarly, the oral evidence given by the complainant's sister made clear her own concerns about the appellant's aggression, that being reflected also in her and her husband's written statements, albeit those were not adduced at trial.

25 As to the third ground, s.5A(2A) of the Act provides that in proceedings under that section, both the prosecution and the defence may use as further evidence any evidence that would be admissible in pursuit of an injunction under s.3, i.e. an injunction to prevent a defendant from pursuing any conduct that amounts to harassment. The course of events at trial in the present case, which we outlined earlier, indicates that the defence had the opportunity to take instructions and to lead evidence from the appellant, but did not apply to adduce any such evidence. As the Crown points out, the judge nonetheless had the benefit of knowing the appellant's position from his careful cross-examination of the three witnesses who gave evidence, his three full comment police interviews and a full defence statement, albeit those matters were not evidence as such. In all the circumstances, we do not consider that the judge erred in any way by making a restraining order without having oral evidence from the appellant.

26 Finally, as to the length of the restraining order, on the evidence before the judge we feel unable say that the five-year duration was manifestly excessive or involved any error of principle. The question of child contact will no doubt be resolved in the Family Court proceedings; and the appellant will have the opportunity to apply to vary or discharge the restraining order should events make that appropriate.

27 For these reasons, we do not consider any of the grounds advanced to have merit, and therefore we will dismiss the appeal.

CERTIFICATE

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