IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 162

CASE NO 202203601/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 2 February 2023

Before:

LORD JUSTICE COULSON

MRS JUSTICE CUTTS DBE

HER HONOUR JUDGE MUNRO KC
(Sitting as a Judge of the Court of Appeal Criminal Division)

REX
V
SCOTT COWELL

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Ms O'Kane appeared on behalf of the Appellant

J U D G M E N T

1. **LORD JUSTICE COULSON:**

This is another appeal primarily concerned with the guideline on the imposition of community and custodial sentences ("the relevant guideline") and whether or not the sentence imposed on the appellant should have been suspended.

2. The appellant is now 33. On 27 July 2020 he pleaded guilty to one count of breach of a non-molestation order and one count of assault by beating. There were delays because, amongst other things, the appellant served a term of imprisonment for a separate offence and was also involved in another trial on another matter.

3. On 9 November 2022 in the Crown Court at Luton, before Ms Recorder Powell KC ("the judge") the appellant was sentenced to 12 months' imprisonment for breach of the non-molestation order, with no separate penalty for the assault. That was a term of immediate imprisonment. He appeals against that sentence with leave of the single judge. The appeal is based on the submission that either there should have been a community order, or that any term of imprisonment should have been suspended.

4. The complainant Ms Patel is the appellant's ex-partner. Their relationship began in 2018 and a daughter was born in August 2019. Thereafter the relationship deteriorated quickly and on 12 November 2019, a non-molestation order was imposed by Watford Family Court. That order prohibited the appellant from using or threatening violence against Ms Patel, sending threatening communications to Ms Patel, or from going within 100 metres of an address where the appellant knew Ms Patel was residing.

5. Just as the first pandemic lockdown began in March 2020, the judge found that the appellant had unilaterally decided to move back in with Ms Patel. The judge said she had no doubt that the appellant put pressure on Ms Patel to give him her address and to allow him to visit her there and to stay. The judge also said that she was "entirely satisfied that she [Ms Patel] did not freely consent to you being there."

6. The appellant went to her address in mid-March 2020 and then again on 27 March when he stayed for a number of days. All that of course was in breach of the non-molestation order, which was count 1.

7. The events surrounding count 2 are these. On 2 April 2020 the appellant became furious that Ms Patel had not done the washing up. He shouted at her, which caused her to cry. She went into her bedroom to lie on the bed. The appellant followed her in and was clearly angry. He lifted the bed frame off the ground so that she was tipped out of bed and fell on the floor. It appears that she was so frightened that she did not move from where she lay. The appellant's reaction was to laugh at her.

8. Unsurprisingly Ms Patel then wanted the appellant to leave the property but he did not leave. Therefore on the following day Ms Patel messaged a friend with a pre-agreed codeword to indicate that the friend should call the police. The police arrived at the address and the appellant was arrested.

9. The judge when sentencing the appellant noted that he had no insight into the seriousness of his behaviour. She said:

> "Compliance with court orders is not optional. Tipping a woman out of her own bed in anger and frustration at her not doing, in your eyes, sufficient housework in her own home is not nice; it's not a joke. It is abusive, it is controlling and it is an assault."

10. The judge had regard to the sentencing guidelines for breach of the non-molestation order and the over-arching guidelines on domestic abuse. The judge found that the culpability was high because this was a persistent and repeated breach of the non-molestation order. The appellant had not only attended Ms Patel's address and stayed, but he had continued to stay even after he had assaulted Ms Patel and she had made clear that she wanted him to leave. The judge said that harm was in Category 2. She noted that even two years later Ms Patel's distress was "absolutely clear".

11. The judge found that this was a Category 2A case in accordance with the guidelines, with a starting point of one year's custody and a range of a high level community order to two years' custody.

12. The judge identified the factors which increased the seriousness of the failure to comply with the non-molestation order, in particular that the appellant had used contact arrangements in respect of the child to instigate the offence. Furthermore, because the judge considered the breach of the non-molestation order as the primary offence, she took the assault by beating into account as an aggravating factor in respect of the offence of breach. As the judge said, there were no factors reducing seriousness.

13. The judge said that after a trial the notional determinate term in respect of these offences

was 16 months. Because of his guilty plea at the PTPH that was reduced by 25 per cent to a term of 12 months' imprisonment.

14. The judge expressly referred to what we have called the relevant guideline. She said that she had carefully considered the proposal in the pre-sentence report that a community order be imposed, but she concluded that the custody threshold was passed. As to whether or not it should be suspended, the judge said: "This matter is so serious that only an immediate custodial sentence can be justified."

15. We shall come back to the issue of suspension in a moment, but it is as well to start with some of the other criticisms of the judge's sentence at the outset.

16. In her careful submissions to this court, Ms O'Kane maintained that the correct category in respect of the breach was Category 2B, namely a deliberate but not a persistent breach. We do not accept that submission. The non-molestation order was repeatedly ignored by the appellant throughout the second half of March and into April 2020. That was therefore much more serious than a deliberate one-off breach. Court orders must be complied with.

17. That also explains why, in our view, the judge was right to conclude that the custody threshold had been passed. It was simply not appropriate to deal with persistent breach of the court's order by way of a community sentence.

18. There was a suggestion that the judge had no proper reason to set the starting point at 16

months, given that the guideline suggested a starting point of 12 months. We do not agree with that. The judge indicated the reasons why she went four months higher than the recommended starting point. One was because of the misuse of the contact with the child. The other was, as she explained, that she was taking the assault into account as an aggravating factor so as to arrive at one composite sentence which reflected all the appellant's offending. In this way therefore we consider that the uplift from 12 to 16 months in respect of the breach was entirely justified.

19. Ms O'Kane focused her submissions this morning on that aspect of the judge's sentencing exercise which led her to conclude that only immediate custody was appropriate. Ms O'Kane said that the judge should have had express regard to the table in the relevant guideline which, on the left, lists the three factors indicating that it would not be appropriate to suspend a custodial sentence and, on the right, the three factors indicating that it may be appropriate to suspend the sentence. The guideline states that those six factors "should be weighed in considering whether it is possible to suspend the sentence."

20. The factors indicating that it may be appropriate to suspend are a realistic prospect of rehabilitation, strong personal mitigation and that immediate custody will result in significant harmful impact upon others. Factors indicating that it would not be appropriate to suspend are that the offender presents a risk or danger to the public, that appropriate punishment can only be achieved by custody and that there is a history of poor compliance with court orders.

21. We accept Ms O'Kane's criticism of the judge that she only referred expressly to one of

these six factors: her conclusion that appropriate punishment could only be achieved by a sentence of immediate custody. In our view it is always appropriate for a sentencing judge to go through these six factors as part of the sentencing exercise. That is not, we stress, a mindless box-ticking exercise. On the contrary, it is a good discipline for a sentencing judge to have these factors in mind and to consider each expressly to see whether or not this is a case where, on balance, immediate custody can be avoided.

22. Moreover, in this case, Ms O'Kane raised, at the end of the sentencing hearing, a subsequent question with the judge as to whether or not she had had regard to the factors in the table. The judge said that:

> "... there are no exceptional circumstances that mean that suspension would be appropriate in this case."

23. To the extent that the judge thought that that was the right test - a need to show exceptional circumstances to justify suspension - then the judge was wrong. What matters is the weighing up of the factors in the table in the relevant guideline, to which we have already referred.

24. In those circumstances, it seems to us appropriate for this court to redo the exercise having regard to the factors in the table. We start with those factors indicating that suspension may be appropriate. Given the judge's findings during her sentencing remarks, particularly that relating to the appellant's lack of insight, it is not easy to say that this is a case where there was a realistic prospect of rehabilitation. We note however the optimistic note sounded in the pre-sentence report. As to other factors, there is no

strong personal mitigation in this case. Moreover, immediate custody would not result in significant harmful impact upon others. Therefore none, or perhaps one (namely rehabilitation), of those factors indicating that it may be appropriate to suspend the sentence were in place here.

25. On the other side of the balance sheet, it is clear that the appellant presented a risk, at least to Ms Patel. Moreover, there was a history poor compliance with court orders. The whole point of the non-molestation order was to protect Ms Patel from the appellant, and he ignored it.

26. Finally, of course, the factor that the judge did rely on, namely that immediate custody was the only appropriate punishment in this case, is very much in play. That can often be the critical factor in cases like this, even if one or more of the factors on the other side of the equation are also present: see for example *R v Ross John Middleton* [2019] EWCA Crim 663 and *R v S* [2022] EWCA Crim 1362. On the facts of this case, the judge concluded that appropriate punishment could only be achieved by a term of immediate imprisonment. In all the circumstances, and having expressly carried out the necessary balancing exercise, we agree with that assessment.

27. The issue in this case, like the issue in so many of these cases, is not, as Ms O'Kane's written submissions has it, as to whether the sentence "could and should have been suspended". All sentences below two years *could* be suspended. The only question is whether they *should* be. That question must be answered by the application of the table in the relevant guideline to the facts of each case. In our view, when doing that exercise

in this case, the result points unequivocally to the term of immediate custody imposed by the judge.

28. For those reasons, whilst acknowledging Ms O'Kane's helpful submissions this morning, we dismiss this appeal.

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

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