IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NOS 202202575/B5 & 202202577/B5

NCN: [2023] EWCA Crim 761

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 15 June 2023

Before:

LORD JUSTICE EDIS
MR JUSTICE JACOBS
THE RECORDER OF LONDON
HIS HONOUR JUDGE LUCRAFT KC
(Sitting as a Judge of the CACD)

REX
V
RACHEL BARNES

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MISS C KELLEHER appeared on behalf of the Applicant
MR C WING appeared on behalf of the Crown

J U D G M E N T

MR JUSTICE JACOBS:

1. On 10 December 2021 in the Crown Court at Swindon, His Honour Judge Taylor KC presiding, the applicant, then aged 27, pleaded guilty to a number of stalking offences. The most serious of the charges to which she pleaded guilty was count 2, stalking involving serious alarm or distress, contrary to section 4A of the Protection from Harassment Act 1997. She had originally been charged with similar offences in counts 1 and 3 of the indictment but the applicant pleaded guilty to the lesser offence of stalking, contrary to section 2A of that Act in respect of both counts. Those pleas were acceptable to the prosecution.

2. On 31 January 2022 the applicant was sentenced by His Honour Judge Crabtree OBE to 18 months' imprisonment in respect of count 2 and concurrent sentences of two months and one month in respect of counts 1 and 3 respectively, so that the total sentence was 18 months. The judge declined to suspend the sentence. That sentence has now largely been served with the applicant having been released from custody in late 2022.

3. The applicant now applies for an extension of time (227 days on conviction and 175 days on sentence) for permission to appeal against conviction and sentence. Those applications have been referred to the full court by the single judge. The applications have been listed today with the substantive appeals to follow immediately if leave is granted. The prosecution has therefore been represented and we are grateful for the submissions made by counsel for the applicant (Miss Kelleher, who did not appear in the proceedings below) and for the prosecution (Mr Wing, who did appear below at the sentencing hearing).

4. The applicant also applies to adduce fresh evidence comprising a report from a clinical psychologist and a witness statement which she made in August 2022.

5. No application for leave to appeal was made immediately after conviction or sentence since the applicant had been advised by her trial solicitors that there were no grounds of appeal.

<u>The facts of the offences</u>

6. The three counts in the indictment related to three different individuals, each of whom was a serving police officer in Wiltshire based at the Gablecross Police Station in Swindon. Count 1 concerned William Saunders with whom the applicant had a brief relationship in late 2020. Count 2 concerned Catherine Baird with whom Mr Saunders began a relationship subsequent to the end of his brief relationship with the applicant. Count 3 concerned Sophie Rogers with whom Catherine Baird shared a house and who by coincidence was known to the applicant because they had been at university together.

7. The details of the prosecution case were contained in a schedule to the indictment, particularising the applicant's conduct over the period 1 January 2021 to 2 April 2021. That conduct included attending at the home address of Miss Baird and Miss Rogers on two occasions pretending to be a lost delivery driver, making false reports of breaches by

Mr Saunders and Miss Baird of lockdown rules and using an anonymous and false name to do so, contacting Miss Rogers and falsely telling her that the applicant was about to start work at her police station, creating a false Instagram account which was used to contact both Mr Saunders and Miss Rogers, going to the area where they lived or worked on numerous occasions, including in breach of bail conditions. Indeed, on one of those occasions, when the applicant was at Gablecross Police Station in contravention of her bail conditions, she was arrested in the visitor car park and was above the legal limit for driving. This was her second drink driving offence committed during the period of the course of conduct relied upon.

Arrests and court hearings

8. These events gave rise to a sequence of arrests and court appearances in the period February to November 2021, prior to the applicant pleading guilty in December 2021. The hearings included a Magistrates' Court hearing in August 2021 when an Interim Stalking Prevention Order was made. The applicant had indicated a not guilty plea to the present charges and the matter was sent to the Crown Court.

9. A plea and trial preparation hearing ("PTPH") was held on 10 December 2021. The applicant was represented at the hearing by Mr Gareth James who worked for her solicitors, Hine's Solicitors ("Hine"). Discussions between Mr James and the applicant and prosecution counsel had taken place in the morning of that day and the court adjourned to allow the discussions to continue.

10. In the afternoon the applicant pleaded to lesser offences under counts 1 and 3, as well as the section 4A offence under count 2. The case was then adjourned for a pre-sentence report. The judge made it clear that the offending was serious and that all sentencing options were open. The applicant clearly understood therefore that there was a risk of a sentence of immediate imprisonment. This was a point made in the Pre-Sentence Report ("PSR") prepared a few weeks later.

11. In that detailed PSR the author recommended a community order with various requirements, or alternatively a suspended sentence with similar requirements. Important points emerging from the PSR were that the applicant was genuinely remorseful for what she had done and recognised that her behaviour was unacceptable, and that the majority of actions were carried out when under the influence of alcohol. There is no suggestion in the report that she denied any of the wrongdoing alleged or had in any way been forced or misled into pleading guilty.

12. The sentencing hearing took place on 28 January 2022 before His Honour Judge Crabtree. On the evening before the hearing the judge had been provided with a written sentencing note. He also had victim personal statements from the three complainants, as well as the PSR. He also had character references from the applicant's father and godfather, the latter being a practicing psychiatrist. Those references explained the applicant's background and that her behaviour had been out of character, and suggested reasons why it had occurred. The hearing lasted approximately an hour and the judge then adjourned until Monday 31 January 2022 in order to reflect over the weekend on his

decision.

13. It has not been possible to obtain a transcript of the judge's sentencing remarks but the applicant's former solicitors have prepared a note and there is no reason to think that it is anything other than broadly accurate.

14. The judge considered that the section 4A offence in count 2 fell within Category 1 Culpability B in the relevant guidelines. In relation to culpability he said that the conduct was over a long period and involved significant planning. It was also consistent with an intention to cause very real distress and it continued in breach of bail conditions. In relation to harm the judge said that he was mindful of the need for caution when considering the victim personal statements, but he was left in no doubt that by April 2021 the conduct had a significant impact on the complainant under count 2, leading to serious distress. He therefore concluded that it was a Category 1B case which under the guideline has a starting point of two years six months and a range of one to four years. The judge said that the offending was aggravated by its continuation, the presence of a child (Miss Baird had a two-year-old), the fact that the victims were public service employees and that it was committed in drink. It was mitigated by good character, remorse and the steps taken by the applicant to address concerns. There were some mental health issues and the judge referred to the applicant's diagnosis of PTSD. He referred to her hearing difficulties, although said that she coped, as well as to personal mitigation, the pandemic and the pre-sentence report.

15. The judge's sentence on count 2 was two years prior to a 25 per cent credit for plea. This resulted in the 18 month sentence on count 2. The other two offences under section 2A fell into Category A1 of the relevant guidelines and the judge imposed the concurrent sentences to which we have referred. He said that whilst there was a realistic prospect of rehabilitation, and so the sentences could be suspended, the three victims (particularly Miss Baird) had suffered enduring impact. He concluded that only immediate custody could be justified. The judge also imposed a Restraining Order.

The grounds of appeal

16. In her skeleton argument in support of the applications, the applicant's grounds of appeal can be summarised as follows. The ground of appeal against conviction is that it is unsafe because the applicant entered an equivocal plea. It is alleged that the applicant was not properly advised in various respects: her solicitor incorrectly advised her to plead guilty, failed to advise her of a defence, advised her that she would not go to prison and failed to challenge any of the prosecution evidence despite inherent weaknesses. It was also alleged that the conduct of the police during the investigation fell below the standard expected of an independent investigation authority.

17. The grounds of appeal against sentence are that it was manifestly excessive in all the circumstances, that it was wrongly categorised under the guidelines and in any event failed properly to take into account the applicant's mitigation. The judge also should have suspended any sentence and this was the principal point which Miss Kelleher developed in her oral submissions this morning. It was also alleged that the Restraining

Order was unnecessary and disproportionately prohibited to private life and rehabilitation.

18. The substance of these grounds had originally been set out in grounds of appeal and in an advice of appeal dated 30 June 2022. Since those grounds contained criticism of the applicant's legal advisers, Hine, they were asked to comment and did so in a full response, disputing the key aspects of the applicant's case that she had not been properly advised. Hine said that the guilty pleas were based on the applicant's instructions that she accepted the majority of the conduct alleged. Specifically, she accepted attending the address of Catherine Baird twice disguised as a delivery driver, monitoring the location of Mr Saunders and on one occasion reporting Mr Saunders and Miss Baird to the police for breaching Covid-19 regulations, creating an Instagram name and contacting the parties under a false identity.

19. We have considered all of the grounds and arguments advanced by Miss Kelleher on behalf of the applicant, together with the Respondent's Notice and Mr Wing's submissions and we can move straight to our conclusions.

The proposed conviction appeal

20. There are very limited circumstances in which the Court of Appeal will quash a conviction where a defendant has pleaded guilty. This reflects the fact that a guilty plea is a public admission of the facts which constitute the offence and that ordinarily a public admission of the facts establishes the safety of the conviction. Where incorrect legal advice has been given, this can result in a conviction being quashed or treated as a nullity. This means that the plea of guilty was not a true acknowledgment of guilt. Even if not a nullity, incorrect legal advice can result in the conviction being quashed where its effect was to deprive the defendant of a defence which would probably have succeeded. It is the latter point which Miss Kelleher emphasised in her oral submissions.

21. The relevant legal principles are discussed in detail in the recent decision of R v Tredget [2022] 4 WLR 62, in particular in the context of incorrect legal advice paragraphs 157 to 159.

22. We do not consider it arguable that the applicant's pleas of guilty in the present case were not a true acknowledgment of guilt and therefore a nullity. Hine has said in his letter dated 27 July 2022 that the applicant accepted the majority of the conduct alleged. This is in our view corroborated both by the guilty plea itself and by evidence independent of Hine. It is clear from the PSR as a whole that in her interview with the author of that report the applicant expressed remorse for what she had done. There is nothing in that report which suggests that she did not understand the case to which she had pleaded guilty or the facts which she was admitting or that the case had in some way been exaggerated or was untrue in any material respects. The same picture is apparent from the report of the clinical psychologist which the applicant seeks to adduce as fresh evidence. In that report there are further acknowledgments of the facts which were relied upon by the prosecution. It is also apparent from both reports that there was alcohol misuse by the applicant and that this contributed to the conduct which formed the basis of

the charges against her. The character references relied upon by the applicant, which we have read, similarly acknowledge, at least implicitly, the applicant's wrongdoing and seek to provide context in order to explain it.

23. One of the points emphasised in the ***Tredget*** decision is that a defendant is the person who knows what actually happened and that a plea of guilty must be seen in that light. This applies with particular force here, where the applicant's expressions of remorse are only explicable on the basis that she accepted that she was responsible for the conduct on which the prosecution relied and that this conduct had indeed taken place. This also fully explains why there guilty pleas on a "full facts" basis. The applicant knew what she had done and knew that her drinking had contributed to it.

24. The applicant's present argument seeks to rely upon an allegation, which is disputed by Hine, that the prosecution materials were not made available to her. Even if the applicant's case in this respect were to be accepted, it does not assist her. It serves to reinforce the conclusion that the applicant knew what she had done and did not need the prosecution papers in order to know the conduct on her part which was being relied upon.

25. There is also, in our view, some considerable difficulty in identifying any defence which actually existed and which the solicitors negligently failed to advise her to pursue. A number of points have been made in the applicant's papers and argument. In the applicant's recent skeleton argument the applicant identifies a defence that the Covid complaints, in other words the allegation of breach of lockdown rules, were well-founded. However, even if that point had any force – and it factually it is a matter which would no doubt have been the subject of a dispute at any trial – the Covid complaints were only one part of the course of conduct which the prosecution alleged. There were many other aspects to that course of conduct. Furthermore, in discussion with the author of the PSR the applicant did not suggest that she had been motivated to report the alleged breaches of lockdown rules because of a genuine concern that they had happened. The author states that the applicant had simply failed to consider at the time that her false accusations regarding breaches of the Covid rules could have adversely affected the careers of Mr Saunders and Miss Baird.

26. In counsel's original advice on appeal it was suggested that the conduct relied upon did not amount to a course of conduct. That argument does not appear to be pursued but we would regard it as a hopeless point. The conduct relied upon in the schedule to the indictment was very plainly a course of conduct for the purposes of the stalking charges.

27. It was submitted in counsel's original advice that it was not apparent that the applicant ought to have known that her course of conduct would cause others to fear violence or cause alarm and distress. This point, with the focus being on alarm and distress rather than violence, is maintained in Miss Kelleher's argument today. However, the offence under section 4A does not require actual knowledge. It is sufficient if a person knows or ought to know, based on what a reasonable person would think, that the conduct would cause serious alarm or distress.

28. In the present case, once the relevant course of conduct has been proved, it seems to us to be very difficult indeed to see how an argument could succeed which asserted that the applicant neither knew nor ought to have known of the consequences of the conduct relied upon. The sentencing judge referred to the long period over which the conduct persisted and the significant planning that went into it. He said, rightly in our view, that this was consistent with an intention to cause very real distress. The applicant could have argued the contrary before a jury but we would regard the prospect of that defence succeeding as remote and certainly highly unlikely.

29. In our view the reality is that the prosecution had a strong factual case and the applicant had very real problems in meeting it. No defence case statement was served, no doubt because the need to do so was obviated by the guilty pleas. The expressions of remorse and other statements made to the authors of the reports indicate that the applicant could not, if she had given honest evidence, deny what she was alleged to have done. The guilty pleas in the present case seem to us to reflect a recognition of the strength of the charges that the applicant was facing and the fact that she knew what she had done. In our view the present case gets nowhere near the threshold of showing facts so strong that the plea of guilty was not a true acknowledgment of guilt.

30. For similar reasons this is not a case where the advice deprived the applicant of a defence which would probably have succeeded. Much of the conduct relied on was not challenged. It involved deception of various kinds, for example pretending on two occasions to be a lost delivery driver, false social media accounts and lying to Miss Rogers about the applicant having obtained a job at her police station. There were also admitted breaches of a court order, as well as drink driving which is serious in itself. The latter also provided evidence of the applicant's abuse of alcohol. Once those matters came out at any trial it would have been difficult, to say the least, for the applicant to be believed on other aspects of the factual case which she now seeks to advance: for example, the argument that her presence at the police station in apparent breach of the bail conditions was explicable by certain traffic or road works problems.

31. We do not need to express any view on the facts as to the strength of any advice to plead guilty that may or may not have been given by Mr James of Hine. However, it does seem to us that if robust advice was given to plead guilty then this was sensible. Mr James negotiated with the prosecution so that the two more serious charges were not pursued by reason of pleas to a lesser offence. Whilst this left a plea of guilty on the more serious offence in count 2, the overall result was that there would be a possibility of the applicant receiving a sentence less than two years and with it the possibility of suspension. The alternative course of contesting the trial on all counts would, in the event of a conviction on one or more charges, inevitably have destroyed that possibility.

32. Overall, we consider that the applicant's argument pays insufficient regard to the significance of the admissions which are inherent in a guilty plea, as explained in *Tredget*. Once the relevant criteria for quashing a conviction resulting in the guilty plea havw been identified, it is clear those criteria are not met. We do not consider that any of the other matters relied upon by the applicant, such as criticism of the police investigation, addresses this fundamental point.

33. Accordingly, since there is no merit in the proposed appeal against conviction we decline to extend time and decline to grant permission to appeal.

34. In reaching those conclusions we have read and taken into account the materials in the fresh evidence on which the applicant seeks to rely, but since we decline to extend time or grant permission the application to adduce fresh evidence does not need to be addressed.

The proposed appeal against the sentence of imprisonment

35. We do not consider it arguable that the judge's sentence was manifestly excessive and we therefore refuse to extend time or to grant permission in respect of that aspect of the case. Although a full transcript of the judge's sentencing remarks is not available, it is obvious from the transcript of the argument on 28 January and the notes of the judgment and his adjournment over the weekend prior to passing sentence, that he gave very careful consideration to the appropriate sentence in this case. We find no fault in the judge's categorisation of this offence as Category 1B. There were, in our view, three Category B culpability factors: persistent action over a long period, a high degree of planning (for example in the use of a fake social media account) and conduct intended to maximise fear and distress. We also think that the victim personal statement of Miss Baird demonstrates that each of the category 1 harm factors were present. Miss Baird read her statement at the sentencing hearing and some questions were asked of her by Mr James. The judge approached the victim personal statements cautiously but they provided a clear and in our view satisfactory foundation for the conclusions that there was Category 1 harm here. Moreover, this was not a case where the victim personal statements were only provided at the conclusion of the case. The offences themselves required the prosecution to prove that the complainants were caused serious alarm or distress, which had a substantial effect on their day-to-day activities. This meant that each complainant had made a number of statements in real time in the January to April 2021 period or shortly thereafter.

36. In those circumstances, the starting point was two years six months with a range of one to four years. Despite the aggravating factors to which the judge rightly referred, he gave a considerable reduction for mitigating factors so that his sentence prior to credit for plea was two years, in other words six months below the starting point under the guideline.

37. We do not consider that his decision can arguably be criticised. On the contrary, it was well within the scope of his sentencing discretion and was in accordance with the guideline. It is also important to note that the judge was also sentencing for two other offences involving other victims and the two year sentence (or 18 months after credit for plea) should reflect the overall criminality, not simply the criminality on count 2.

38. The judge properly considered suspension. He was fully entitled in our view to take the view that in the circumstances of this case only immediate custody could be justified. He could also have referred to the fact that court orders had in the past been disobeyed, as evidenced for example by the applicant's conviction in the Magistrates' Court for breaches of the order which had been made very shortly before it was breached. But in

any event the judge's decision not to suspend was arrived at properly, was well within the scope of his sentencing discretion and cannot be criticised as manifestly excessive.

39. Finally, we come to the terms of the Restraining Order and the arguments which have been made in that regard. We consider, as Mr Wing has to some extent acknowledged in the course of his submissions, that there are some matters here which can reasonably be criticised and which reasonably ought to be changed in order to meet the requirements of the decision in *Debnath* [2005] EWCA Crim 3472.

40. Accordingly, we do propose to grant leave to appeal against this aspect of the judge's sentence and we will make the following changes to the Restraining Order. There should be a finite period for the order, which currently lasts until further order. We consider that a period of five years should be substituted.

41. In paragraph 2 the word "reasonably" should be deleted.

42. Paragraph 3 should be amended to read as follows, in order to provide clarity:

    i. "Engaging in any form of surveillance by any means, including following William Saunders, Catherine Baird or Sophie Rogers on social media."

43. Paragraph 5 (which should be re-numbered 4) should read as follows:

    i. "Making any complaint or report that she knows or believes to be false against ... "

44. The order can then continue as currently drafted.

45. Save to the extent that we have indicated in relation to the Restraining Order (where we grant leave and make the above amendments), all applications made by the applicant are refused.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk