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IN THE COURT OF APPEAL
CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LEWES
(Sitting at Hove)
MR RECORDER GERAINT JONES KC CP No: 47EE1188224

CASE NO: 2024 03717 B5
[2024] EWCA Crim 1672

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 20 November 2024

Before:
THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
LORD JUSTICE HOLROYDE

SIR STEPHEN IRWIN

MR JUSTICE HILLIARD

Prosecution application for leave to appeal against a terminating ruling under s.58 Criminal Justice Act 2003
REX
v
AVG

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
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MR TIMOTHY SLEIGH-JOHNSON appeared on behalf of the Applicant
MR RICHARD BODY appeared on behalf of the Respondent

J U D G M E N T

(Approved)

THE VICE-PRESIDENT:

1. The prosecution apply for leave to appeal, pursuant to section 58 of the Criminal Justice Act 2003, against a ruling that the defendant had no case to answer on charges of breaches of a non-molestation order.
2. Pursuant to section 71 of the Criminal Justice Act 2003, reporting restrictions apply to this case. We shall return to those restrictions at the end of this judgment.
3. For convenience, we shall refer to the applicant before this court as the prosecution and to the respondent as the defendant. We shall refer to the defendant's former partner as the complainant.

The facts

4. For present purposes, the relevant facts can be summarised briefly.
5. On 1 March 2024 the complainant ended her relationship with the defendant.
6. On 19 March 2024, in the Brighton Family Court, a deputy district judge heard an application made without notice to the defendant and granted the complainant a non-molestation order under section 42 of the Family Law Act 1996. The order prohibited the defendant from, amongst other things, communicating with the complainant by phone or text, or going to her home. The order bore a penal notice warning the defendant that he would commit a criminal offence, and would be liable to imprisonment, if without reasonable excuse he did anything which the order forbade him from doing.
7. The order further stated:

> "This order shall be effective against the [defendant] once it is personally served on him or once he is made aware of the terms of this order, whether by personal service or otherwise."

8. The prosecution case was that the order and other documents, including notice of a hearing on 29 April 2024, were served on the defendant on 22 April 2024. The defence case was that the defendant did not receive those documents. We shall return shortly to the details of the evidence on this point.

The criminal proceedings

9. The defendant was subsequently charged on indictment with six breaches of the non-molestation order: contacting the complainant by phone on 22 April 2024; contacting the complainant by text messages on 23 April and 24 April; and going to the complainant's home on 23 April and twice on 27 April. On the last of those occasions the defendant was arrested in the complainant's home. He was heavily intoxicated.
10. The defendant admitted two further offences charged on the indictment of common assault on the complainant and possession of a small quantity of cocaine, but he denied the alleged breaches of the non-molestation order.
11. His case was sent for trial at the Crown Court. He filed a defence statement in which he admitted some of the conduct alleged against him but denied having any knowledge of the existence of the non-molestation order.
12. At a plea and trial preparation hearing ("PTPH") in late May 2024, a judge noted that the prosecution may have problems proving service in any event. It does not appear that that point was addressed promptly.
13. The point was taken up by the recorder before whom the case was listed for trial in October 2024. After initial discussions with counsel, he accepted the submission of the prosecution that it was appropriate to hear the prosecution evidence and then consider the point on a submission of no case to answer. He did not, however, allow prosecution counsel even a few minutes to introduce himself to the complainant before calling her to give evidence.
14. We regret to say that in the course of his discussions with counsel the recorder displayed some impatience. Like the judge who had conducted the PTPH, he was understandably and rightly concerned to make best use of the time and other resources of the court. It is fair to say that this was by no means the most serious case waiting to be tried at that court centre. It was, however, inappropriate for the recorder to refer to it at one point as a "trivial" matter. It is, after all, alleged that the defendant deliberately breached a court order on six occasions in less than a week, culminating in a late-night drunken incursion into the complainant's

home which put her in fear.

The evidence at trial

15. The prosecution evidence included the following.

A. The complainant gave evidence that on 22 April the defendant contacted her by phone saying that she had made him out to be a monster and that he had "bail conditions" not to contact her. It appears to have been common ground that there were no relevant bail conditions in any other proceedings in place at the time. The prosecution therefore contended that the defendant was clearly referring to the provisions of the non-molestation order.

B. The complainant further testified that later on 22 April the defendant sent her a text saying, "I take it you're not going to do anything about Monday". The prosecution contended that that was plainly a reference to the hearing listed on 29 April.

C. A process server had made a statement of service dated 22 April 2024 stating that he had sent the order and other documents to the defendant on 22 April by a WhatsApp message sent to the defendant's phone. The process server further stated that after sending those documents he had telephoned the defendant, who had identified himself, and had informed the defendant that court documents had been sent and that there was a hearing on 29 April.

D. Telephone records confirm that the process server's phone had contacted the defendant's phone on 22 April.

E. On 14 August 2024 a civilian police investigator made a statement producing as exhibits a series of screenshots from the process server's phone showing his WhatsApp messages to the defendant. On some of those screenshots the image did not include the part of the screen which displayed the date and time, but on others it could be seen that they were taken on the evening of 22 April. However one of them recorded a message from the process server which included the words, "There is a court hearing tomorrow 29.04.24".

F. On the day before the trial the prosecution served a further statement by the process server (undated) which confirmed that his earlier statement of service documented the actions he had taken when serving the document by WhatsApp. This statement was accepted by the defence. The prosecution nonetheless wished to call the process server to give oral evidence. He was not, however, available that day. The recorder refused an application for an adjournment.

The submission of no case to answer

16. At the conclusion of the prosecution evidence, defence counsel made a submission of no case to answer. The recorder heard argument in the absence of the jury. He then stated that the submission would be upheld, for reasons which he would give in the presence of the jury. Prosecution counsel immediately indicated that he was instructed to request 24 hours to consider a possible appeal to this court, and pointed out that if an appeal were expedited the jury might continue to hear the case. The recorder nonetheless proceeded to give his reasons in the presence of the jury.
17. The recorder referred to the importance of the penal notice informing the defendant of the consequences of breach of the non-molestation order. He referred to the Family Procedure Rules 2010 as to service of court orders, noting that rule 6.19(3) required an order for substituted service to specify a particular method by which such service was permitted. He stated that the order made by the deputy district judge did not comply with those rules because it included the words "... or otherwise", which he said were not a permitted form of alternative service. The recorder went on to say that the prosecution had to prove service because the defendant was only prohibited from certain conduct if the order had been properly served upon him.
18. The recorder concluded that the evidence adduced by the prosecution could at best show that the defendant knew there were certain things he ought not to do, but not that he was aware of "the terms of the order". He therefore ruled that the prosecution failed on both limbs of the familiar test in *R v Galbraith*.

The appeal to this court

19. The prosecution thereafter gave notice of appeal. All necessary formalities for an appeal pursuant to section 58 of the 2003 Act have been complied with and the "acquittal undertaking" required by section 58(8) has been given. The appeal was not expedited and the jury was discharged. We observe that the surprising decision of the recorder to give the reasons for his ruling in the presence of the jury would in any event have precluded the trial continuing in front of that jury. That would not have been a problem if the recorder had followed the conventional course of giving his reasons in the absence of the jury and then explaining the effect of his ruling briefly to the jury.

20. The prosecution submit that the recorder was wrong in law to find that service was a prerequisite of criminal liability for breach of the order. Alternatively, even if service was a prerequisite, the recorder was wrong in law to find that the order made by the Family Court was defective and unenforceable. It is further submitted that the recorder's decision to allow the submission of no case to answer under both limbs of *Galbraith* was one which it was not reasonable for him to have made. There was, it is submitted, sufficient evidence for the case to go to the jury.

21. For the defendant, it is submitted that there was no error of law. It is conceded that personal service of the order was not a prerequisite for service to be effective for the purposes of the alleged offences of breach, but, it is argued, it was necessary for the defendant to be aware of the full terms of the order and of the penal notice. It is further submitted that the evidence as to service was contradictory, and at most could prove only that the process server had informed the defendant that "documents" had been sent and informed him of the return date. It is argued that the recorder was therefore correct to allow the submission of no case to answer on the basis of the second limb of *R v Galbraith*.

22. We have had the advantage of written and oral submissions by counsel, both of whom appeared in the court below. We are grateful to Mr Sleigh-Johnson for the prosecution and Mr Body for the defence. We have summarised their submissions very briefly but we have

all their points well in mind. We commend the manner in which each of them conducted the proceedings below and has conducted the hearing in this court.

The statutory framework

23. Section 42 of the Family Law Act 1996 empowers the Family Court to make a non-molestation order.

24. By section 45(1) the court may make such an order without notice to the respondent.

25. Section 42A, so far as is material for present purposes, provides:

> "42A **Offence of breaching non-molestation order**
>
> (1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence.
>
> (2) In the case of a non-molestation order made by virtue of section 45(1), a person can be guilty of an offence under this section only in respect of conduct engaged in at a time when he was aware of the existence of the order.
>
> ...
>
> (5) A person guilty of an offence under this section is liable—
>
> (a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both
>
> ..."

26. Summarising the effect of Part 6 of the Family Procedure Rules 2010, so far as is relevant for present purposes:

- By rule 6.1(b) the Part applies to the service of documents, except where the court directs otherwise.
- By rule 6.35, rule 6.19 applies to the relevant documents in this case.
- By rule 6.19:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may direct that service is effected by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may direct that steps

already taken to bring the application form to the attention of the respondent by an alternative method or at an alternative place is good service.

(3) A direction under this rule must specify –

(a) the method or place of service;
(b) the date on which the application form is deemed served; and
(c) the period for filing an acknowledgment of service or answer."

27. As to the appeal to this court, section 61 of the Criminal Justice Act 2003 gives this court the power to confirm, reverse or vary the recorder's ruling.

28. But by section 67, the ruling may not be reversed unless this court "... is satisfied (a) that the ruling was wrong in law, (b) that the ruling involved an error of law or principle, or (c) that the ruling was a ruling that it was not reasonable for the judge to have made."

Analysis

29. There was, in our view, ample evidence on which the jury could find that the non-molestation order and other documents were sent to the defendant via WhatsApp and received by him on 22 April 2024. True it is that in one of his messages the process server referred to the hearing on 29 April as taking place "tomorrow"; but in every other respect the agreed evidence of the process server showed that he had served the documents on 22 April, and the evidence of the complainant provided strong support for that. It was therefore open to the jury to find, on the basis of the prosecution evidence as a whole, that the reference to ″tomorrow″ was a mistake and that the order was served on 22 April. The decision of the recorder that the evidence was incapable of proving service on that date was one which it was not reasonable for him to make.

30. Sending the non-molestation order to the defendant via WhatsApp was a means of making the defendant aware of the terms of the order and it was permitted by the order of the Family Court. We do not agree with the recorder that the terms of the deputy district judge's order contravened the Family Procedure Rules. But even if they did, it was an order of the court which was valid and binding on the defendant unless and until it was set aside.

31. The long-established principle to that effect was summarised as follows in *R v Kirby* [2019] EWCA Crim 321; [2019] 4 WLR 131 at [13]:

> "In approaching this appeal, we remind ourselves that there is a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside. This is a crucial feature of a civilised society, which has respect for the rule of law. The authorities amply demonstrate that that is the long-standing principle of our legal system."

The court there went on to refer to some of those authorities dating back as far as 1846.

32. Returning to the present case, whether any suggested defect in the terms of the non-molestation order would have enabled the defendant to put forward a successful defence of reasonable excuse for contravening that order was an issue to be considered, if at all, at a later stage of the trial, in the light of any evidence adduced by the defendant. It was not a basis for saying that the defendant had no case to answer. The recorder therefore fell into error of law in basing his decision on his view that the non-molestation order did not comply with the Family Procedure Rules.

33. Pausing there, the evidence was capable of proving that the defendant was served with, and received, the order via WhatsApp on 22 April 2024, before any of the conduct charged in the indictment; and any possible defect in the wording of the order did not prevent it from being valid and binding on the defendant unless and until set aside.

34. It is then important to focus on the words of section 42A(2) of the 1996 Act, which requires the prosecution in a case such as this to prove that the relevant conduct by the accused occurred "when he was aware of the existence of the order". Those words, as it seems to us, were deliberately chosen by Parliament with a view to denying a defence to a person who was aware of the existence of the order but chose not to read it or otherwise to inform himself as to its terms. Once again, issues of whether ignorance of the precise terms of the order might in particular circumstances enable a particular accused to put forward a defence of reasonable excuse for engaging in prohibited conduct would have to be considered, if at all, in the light of any evidence adduced by the accused.

35. In the present case, the evidence of the complainant provided an ample basis for a jury to

find that the defendant was aware of the existence of the non-molestation order. In fact, although it was not necessary for the prosecution to rely on this in opposing the submission of no case to answer, the evidence of the complainant went further and could be accepted by the jury as proving that the defendant was aware of at least some of the specific prohibitions.

36. The recorder therefore fell into further error of law in ruling that there was no case to answer because the prosecution could not prove that the defendant was aware of the terms of the order.

37. For those reasons we are satisfied that the recorder's ruling cannot stand. We reverse it and direct that the proceedings in the Crown Court shall continue.

38. In practical terms that will require the trial to start again. In all the circumstances, we think it better for the trial to be held before a different judge at a different court centre. We shall ask the presiding judges of the circuit concerned to allocate it accordingly.

39. We must now return, as we said we would, to the issue of reporting restrictions.

(The court heard submissions from counsel, both of whom took a neutral stance)

THE VICE-PRESIDENT:

40. We are satisfied that it is appropriate in this case to discharge the reporting restrictions which would otherwise apply under section 71 of the 2003 Act.

41. Having listened to counsel's helpful observations, we do not make any order postponing publication of any report of these proceedings.

42. The practical effect is that the judgment just delivered, once it has been transcribed and approved, may be published and reported in the precise terms in which it has been given.

43. It must, however, be noted that the terms in which judgment have been given do not name any person involved in the proceedings as defendant, complainant or process server, and no report must contain any added information which would identify any of those persons.

(The Registrar in court referred to the defendant’s bail)

THE VICE-PRESIDENT: Yes, thank you very much. I am very grateful to the Registrar in court for reminding me.

Mr Sleigh-Johnson, I should have said, would you please take steps with those instructing you to ensure that as soon as the case is allocated to a different court centre, a hearing to mention and fix is listed?

MR SLEIGH-JOHNSON: Yes.

THE VICE-PRESIDENT: At that hearing any application by either side in relation to bail can of course be considered in the usual way.

MR SLEIGH-JOHNSON: Yes.

THE VICE-PRESIDENT: Are there, as a matter of fact, any conditions of bail at the moment?

MR SLEIGH-JOHNSON: There are.

THE VICE-PRESIDENT: There are. So if you want to vary them, Mr Body, you will be able to apply in the fairly near future. I am sure the presiding judges will allocate it to a venue very shortly.

Thank you both very much indeed for your help. Once again may we place on record, we thought you both coped with difficult circumstances extremely well.

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

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