IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00038/A5
[2024] EWCA Crim 318

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 14th February 2024

**B e f o r e:**

**THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION**
**(Lord Justice Holroyde)**

**MR JUSTICE TURNER**

**MR JUSTICE BRYAN**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v –**

**JENNIFER BLACKADDER**

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**Miss C Pattison** appeared on behalf of the Attorney General

**Mr D Hughes** appeared on behalf of the Offender

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**J U D G M E N T**
**(Approved)**

Wednesday 14th February 2024

**LORD JUSTICE HOLROYDE:**

1. Miss Blackadder, to whom we shall refer as "the offender", appeared before the Crown Court at Sheffield on 7th December 2023 to be sentenced following her guilty pleas to offences of breach of a restraining order, assault by beating, stalking involving fear of violence and intimidating a witness. The judge (Mr Recorder Myerson KC) deferred sentence for three months.

2. His Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

3. The offender was formerly the partner of Ezekiel Roberts. They have two children, one now a young adult, the other aged about 10. There appear to have been a number of issues between them, and they separated in 2014. Mr Roberts has subsequently formed a relationship with Megan Harris. They have now been together for several years and have a young child.

4. Since the separation, there have been repeated incidents which have brought the offender, who was previously of good character, before the criminal courts. There have also been proceedings in the Family Court.

5. It is necessary to summarise in chronological order the key features of the offender's conduct towards Mr Roberts and Miss Harris.

6. On 24th May 2016, the offender pleaded guilty before a magistrates' court to an offence of

harassment of Mr Roberts. She was conditionally discharged for 12 months, and a restraining order was made against her.

7. Four months later, in breach of the conditional discharge and in breach of the restraining order, she committed a further offence of harassment, for which she was fined by a magistrates' court. The restraining order remained in force. Within the next few months the offender twice breached it by further harassment. On 19th May 2017, a magistrates' court imposed a community order for 12 months, with a rehabilitation activity requirement.

8. Within months, and whilst subject to that community order, the offender committed five further offences: breach of the restraining order by harassment and criminal damage in November 2017; breach of the restraining order by harassment in March 2018; and less than a fortnight later, a further breach of the restraining order by harassment and a Public Order Act offence. All of those matters were dealt with by a magistrates' court on 29th May 2018, when a new community order for 12 months, with a rehabilitation activity requirement, and a new restraining order for 12 months were imposed.

9. No further offences were committed whilst those orders were in force. In January and February 2020, however, the offender was again before a magistrates' court for offences committed in November 2019 of damage and breach of a non-molestation order made by the Family Court, and for further offences in January 2020 of damage and breach of the non-molestation order. On 2nd March 2020, she was sentenced for those offences to a total of 12 weeks' imprisonment, suspended for 12 months.

10. On 17th May 2020, and again on 19th May 2020, the offender acted in breach of the non-molestation order, thereby putting herself in breach of the suspended sentence order which had been imposed less than three months previously. On 22nd May 2020, a magistrates' court

dealing with those latest offences deferred sentence to 21st August 2020, on which date it imposed suspended sentences totalling 15 weeks' imprisonment, suspended for 12 months, with a rehabilitation activity requirement.

11. A similar sentence was imposed for another breach of a non-molestation order committed on 20th August 2020, which was the day before the offender was due to come before the court to be sentenced for her earlier offences.

12. Further offences followed a few months later, whilst the offender was subject to the suspended sentence order. In September 2020, she breached a restraining order by harassment. In March 2021, whilst on bail, she committed a further breach of the restraining order by harassment and an offence of dangerous driving. Her conduct on that occasion involved driving her car at a car driven by Mr Roberts, in which their older child was a passenger. She was committed to the Crown Court for sentence.

13. On 6th July 2021, the judge deferred sentence for six months. In his sentencing remarks he said that the offender had breached orders requiring her to leave Mr Roberts alone, and in these recent offences had taken matters to a different level by involving the children. He noted that the offender had spent three months remanded in custody and observed that it might just be possible for him to suspend the sentence of imprisonment. But, he said, all the evidence suggested that a suspended sentence meant nothing to the offender, so he would not take that course immediately. Instead, he deferred sentence on conditions that the offender committed no further offending of any kind and complied with the restraining order. The judge indicated that if she complied with those conditions, and with any directions the Family Court might give, he would be prepared to suspend the sentence at the next hearing.

14. The judge, in those sentencing remarks, had made clear that the offender faced a stark

choice as to her future. Nonetheless, on 23rd August 2021, she again breached the restraining order by harassment. She went on to do so again on two further occasions in November 2021.

15. The offender again came before the judge on 27th January 2022, to be sentenced for the offences in respect of which the sentence had been deferred and for the subsequent offences. Her total sentence on this occasion was 24 months' imprisonment, suspended for 24 months, with a curfew requirement and a rehabilitation activity requirement. A fresh restraining order was imposed. The judge in his sentencing remarks on that occasion noted that the medical evidence which had been obtained showed that the offender did not suffer from any specific mental disorder. He very clearly warned her that any breach of the suspended sentence order, even if it were committed at the very end of the two year operational period, would put her at risk of having to serve the full two year term.

16. We now turn to the facts of the present offences. On 24th October 2023, some nine months after the suspended sentence order was made, there was a hearing in the Family Court concerning contact between the offender and her younger child. The decision of the Family Court was adverse to the offender. As Mr Roberts and Miss Harris were leaving the court building, the offender shouted abuse at Mr Roberts. She followed them to their parked car. As the car approached the exit of the car park, the offender came towards the car in a manner which made Mr Roberts think that she was going to attack Miss Harris. He got out of the car. The offender then hit him in the face several times with her umbrella, causing bruising.

17. The offender was subsequently arrested. She appeared before a magistrates' court on 28th October 2023 and was bailed, subject to conditions which included a prohibition on contacting either Mr Roberts or Miss Harris. She was, of course, still subject to the suspended sentence order.

18. Over the next three weeks, however, she stalked and intimidated Miss Harris, calling her phone up to 100 times, including in the early hours of the morning, and sending approximately 200 text messages. The contents of the messages caused Miss Harris fear and distress. They included threats of harm, upsetting personal abuse, and references to places where Miss Harris had been, of which the offender should not have been aware.

19. On 27th November 2023, the offender pleaded guilty at a plea and trial preparation hearing to counts on an indictment charging her with assault by beating of Mr Roberts, and breach of the restraining order. One of the counts to which she pleaded guilty was incorrectly drafted and referred to the wrong statutory provision; but we are satisfied that the error does not invalidate the conviction and we need say no more about it. Also on 27th November 2023, before a magistrates' court, the offender admitted offences of stalking Miss Harris involving fear of violence, and intimidating a witness. She was committed to the Crown Court for sentence.

20. All those matters came before the judge for sentence on 7th December 2023. There was no up to date pre-sentence report, but one had been prepared at an earlier hearing.

21. Each of the victims of the offending had provided a Victim Personal Statement. Mr Roberts said that he had experienced constant harassment since 2014 which had affected his mental health. Miss Harris expressed her concern that the offender had discovered personal details which she had tried to keep confidential, such as the home address of Miss Harris' parents and the address of the school then attended by the offender's younger child.

22. The judge indicated that he regarded the stalking offence as the most serious. It has been intended to cause Miss Harris to fear violence and it had done so. The witness intimidation,

though also serious, related to the same offending. Taking the appropriate guideline starting points, and adjusting them upwards because of the previous convictions and breach of bail conditions, the judge said that the appropriate sentences for those offences were three years six months and two years' imprisonment respectively, reduced by giving full credit for the guilty pleas to concurrent sentences of 28 months and 24 months' imprisonment. The judge went on to say that the offences against Mr Roberts involved a different victim and merited consecutive sentences of 18 months' imprisonment for the breach of the restraining order and four months' imprisonment for the assault which marked an escalation in the offender's previous behaviour. Credit for the guilty pleas, he said, reduced those sentences to 12 months and three months' imprisonment respectively.

23. As to the commission of those offences during the suspended sentence order, the judge acknowledged that the offender had kept away from her victims for some 20 months, but referred to the warning he had given her when the suspended sentence order was imposed. He concluded that the full two year term should be activated consecutively.

24. The judge said that those sentences added up to six years and one month's imprisonment, subject to a reduction for totality. He recognised that a sentence of that order would be, as he put it, an enormous relief to the victims of the offending, but he feared that the offender would leave prison a "broken woman". He reflected on whether there was any alternative which would avoid a long sentence, whilst also protecting the victims. He recognised that to reduce all the sentences he had identified as appropriate to a total term of two years and then to suspend that total term would likely result in an application for leave to review the sentencing as unduly lenient.

25. The judge concluded that he would take "a very limited chance" with the offender by deferring sentence for three months. He imposed no conditions, but said that if the offender

contacted Mr Roberts or Miss Harris during that period, he expected her to be locked up. He added that he expected that at the next hearing the offender would provide evidence that she had deleted all contact details for Mr Roberts and Miss Harris from all her devices. He told the offender that at the next hearing, even if she had kept away from her victims, he would still have to consider whether he could justify a non-custodial sentence. It seems to us that by that phrase the judge must in fact have meant a suspended sentence. Certainly if he was referring to an entirely non-custodial sentence, he said nothing to explain how he could reach such a sentence from what he had identified as appropriate sentences totalling more than six years' imprisonment. The judge ordered an updating psychiatric report directed in particular to the offender's motivation to avoid further offending.

26. We turn to the relevant statutory provisions. By section 3 of the Sentencing Code introduced by the Sentencing Act 2020, deferment of sentence means deferring passing sentence until a specified date in order to enable the court, when dealing with an offender, to have regard to the offender's conduct after conviction and to any change in the offender's circumstances.

27. By section 5(1), a court may made a deferment order only if, amongst other things, the offender consents and undertakes to comply with any deferment requirements the court proposes to impose and "the court is satisfied, having regard to the nature of the offence and the character and circumstances of the offender that it would be in the interests of justice to make the order". Deferment of sentence is a "sentence" for the purposes of sections 35 and 36 of the Criminal Justice Act 1988 and may therefore be the subject of an application to this court for leave to review such a sentence as unduly lenient.

28. For His Majesty's Solicitor General, Miss Pattison submits that the judge's decision was unreasonable and the deferment of sentence unduly lenient. Under the relevant sentencing

guideline, the stalking offence alone merited a sentence outside the range of imprisonment which could be suspended. The appropriate total sentence was well outside that range. Furthermore, Miss Pattison submits that the offender had continued to commit offences against the same victims during the period of the suspended sentence order, which merited activation of that sentence in full. Deferment did not constitute a real test of the offender's current motivation, she submits, and the judge had given no specific reasons why deferment was appropriate.

29. For the offender, Mr Hughes submits that the judge did not, in reality, defer sentence, but rather adjourned sentence for three months so that a further psychiatric report and further pre-sentence report could be obtained. In any event, Mr Hughes submits, the judge was in the best possible position to consider all relevant factors and it was reasonable in all the circumstances for him to take the step of adjourning sentence with a view ultimately to imposing a non-custodial sentence.

30. We are grateful to both counsel for their written and oral submissions. We are also grateful to the offender's probation officer, who has prepared a pre-appeal report for the assistance of this court.

31. We say at once that we are unable to accept Mr Hughes' submission that the judge merely adjourned sentence. The terms in which he expressed himself in his sentencing remarks, including a discussion with counsel as to what orders might properly be combined with a deferment of sentence, makes it abundantly plain that he was intending to, and did, defer sentence. Mr Hughes' invitation to us to "look behind the label" is not an invitation which we can accept. This is not simply a matter of putting an inappropriate label on an adjournment; it was a form of sentencing. In any event, there was no basis, in our view, on which the judge could properly have adjourned sentence, and we are satisfied that he did not

purport to do so. We must therefore consider the principles applicable to deferment of sentence.

32. The use of deferred sentence is a topic of current interest to academic lawyers. In July 2022 the Sentencing Academy published a thoughtful review of the law, guidance and research on that topic. The learned authors of that review, emphasising the need for further research, concluded that greater use should be made of deferment and put forward a number of proposals as to how best that should be done. We must, however, focus on the law as it presently stands.

33. There is at present no Sentencing Council guideline in relation to deferment of sentence in the Crown Court. In that respect, the Sentencing Guidelines Council's guideline: "New Sentences – Criminal Justice Act 2003", published in December 2004, remains in force. At paragraph 1.2.7 that guideline states that the use of deferred sentences should be predominantly for a small group of cases close to a significant threshold where, should the defendant be prepared to adapt his behaviour in a way specified by the sentencer, the court may be prepared to impose a lesser sentence.

34. Similar language is used by the Sentencing Council in explanatory materials which it provides for the assistance of magistrates.

35. The effect of that guidance, and the principles well established by case law, were considered by this court in July 2023 in *R v Swinbourne* [2023] EWCA Crim 906, [2024] 1 Cr App R(S) 8 – a case regrettably not cited either to the judge or to this court. The court there emphasised that deferment should be sparingly used. At [21] of the judgment of the court, William Davis LJ said that the guideline provides that sentence should be deferred

> " … in a small group of cases, at either the custody threshold or the community sentence threshold, where the court may be prepared to impose a lesser sentence provided the defendant is prepared to adapt his behaviour in a way clearly specified by the court. When passing sentence, the court should indicate the type of sentence it would be minded to impose if the defendant does not comply. Deferment can only be appropriate if a sentence other than one of immediate custody will follow in the event of compliance."

At [22], William Davis LJ went on to say:

> "… Deferment of sentence is not to be used where the court cannot state in clear terms what the sentence will be if the defendant complies. …"

36. We respectfully agree with and endorse that statement of the applicable principles. We would add that in order to give effect to them, the judge who defers sentence should, save in exceptional circumstances, also conduct the sentencing hearing at the end of the deferment period, even if that involves practical and listing difficulties.

37. In their commentary on *Swinbourne*, the learned authors of Harris and Walker's Sentencing Principles, Procedure and Practice 2024 suggest that in the light of that decision it is vital for sentencers to consider whether the lesser sentence, which is expressly or implicitly offered as an alternative disposal, is in fact a realistic possibility. They suggest, accordingly, that if a custodial sentence of two years or less could never be justified for the offending, and the sentence therefore could not be suspended, a decision to impose a deferred sentence will always be improper. We respectfully agree, and endorse those observations.

38. We recognise that the judge here was faced with a difficult sentencing decision. Having sentenced the offender on previous occasions, he was, as Mr Hughes submits, particularly well placed to judge how best to deal with this further offending. We understand why he felt

that a disposal which would promote the rehabilitation of the offender would provide the best prospect of putting an end to her conduct and thereby assisting the victims, and we commend the transparency with which he stated his views. The failure to alert him to the recent decision in *Swinbourne* added to the difficulty which he faced.

39. We are, however, in no doubt that deferment of sentence was not a course which was properly open to the judge in the circumstances of this case. His decision was unduly lenient. We can state our reasons briefly.

40. The lengthy history of previous court orders and sentences and the offender's repeated breaches and further offences were significant aggravating features. Against that long background, it was unavoidably necessary, when dealing with the latest offending, to give much greater weight to punishment and to the protection of the victims than to the rehabilitation of the offender. The judge rightly approached sentencing on the basis that nothing less than a custodial sentence could be sufficient to mark the seriousness of the latest offending. He was also right to conclude that even making a generous reduction for totality, the overall sentence would inevitably be well in excess of the range which would permit consideration of suspension. With respect to him, it was therefore unrealistic to suggest that there could ever be consideration of a suspended sentence, however well the offender might behave during the period of deferment. If a suspended sentence order ever were imposed in the circumstances of this case, that would in itself be an unduly lenient sentence.

41. It follows that this case is far beyond the custody threshold and therefore well outside the category of case in which deferment might be appropriate in accordance with the principles in *Swinbourne*.

42. Further, the three month period of deferment could not in reality achieve anything which

might significantly affect the eventual sentencing decision. The judge did not impose any specific requirement, the fulfilment of which would materially inform the court's assessment of the realistic sentencing options. The offender was simply being given a chance to refrain from acting in further breach of the restraining order and the suspended sentence order. In any event, a period of three months of compliance with those orders could not provide any reliable guide to her future behaviour, given the many times when she had re-offended after short periods of good behaviour in the past.

43. In addition, it does not appear from the transcript that the offender was ever asked whether she consented to the deferment of sentence. By section 5(1)(a) of the Sentencing Code, the consent of the offender is a necessary condition of deferment. Had she been asked to consent, that would have provided an opportunity for reflection on why that course was being proposed and what were the precise requirements with which, by section 5(1)(b), she must undertake to comply.

44. We should add that there is nothing in the pre-appeal report which can assist the offender.

45. For all those reasons, deferment was not a course which could properly be taken. It was necessary to grasp the nettle. There was, in reality, no realistic alternative to a significant custodial term, difficult though that would undoubtedly be for the offender.

46. As for the length of that term, we take the view that the judge correctly categorised the several offences under the relevant guidelines. We do, however, feel that we can properly adjust the appropriate individual sentences to achieve a lesser total than that provisionally reached by the judge. We do that for three reasons: first, because we give some weight to the contents of the psychiatric reports, which somewhat reduce the offender's culpability for

her actions; secondly, because this will be the offender's longest experience of custody; and thirdly, because, as the judge recognised, there must be an appropriate reduction for totality. We conclude that the least total sentence which can be imposed is one of four years and six months' imprisonment.

47. For those reasons we grant leave to refer. We quash the deferment of sentence as unduly lenient. We substitute the following sentences of imprisonment: on count 1 of the indictment, breach of the restraining order, 12 months' imprisonment; on count 2 of the indictment, assault by beating, three months' imprisonment concurrent; on the first charge committed for sentence (stalking) and the second charge (witness intimidation), two years' imprisonment on each charge, concurrent with each other but consecutive to the sentences on indictment. We reduce the suspended sentence of 27th January 2022 to a total term of 18 months' imprisonment, and we activate it consecutively to the other sentences. Thus, the total sentence is one of four years and six months' imprisonment. The offender will serve up to half of that term in custody before being released to serve the remainder on licence.

48. We direct that the offender must surrender to Shepcote Lane Police Station, Tinsley, Sheffield by 3 pm today. Four days shall count as served by reason of her having been on a qualifying curfew.

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