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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 38



No. 202302854 A2

Royal Courts of Justice

Tuesday, 16 January 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE CHOUDHURY
HER HONOUR JUDGE ANGELA RAFFERTY KC

REX

V

GARY CUSHEN

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Ms A. Nurse appeared on behalf of the Appellant.
The Crown were not represented.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

- 1 On 27 July 2023 the appellant, then aged 37, was sentenced by Mr Recorder King in the Crown Court at Basildon to three years' imprisonment for breach of a restraining order. He appeals against sentence with leave of the single judge.
- 2 The restraining order was imposed on 10 June 2023 and the breach in question occurred by Facebook messages which were exchanged on 21 to 22 November 2023, but the relevant history goes back further than that.
- 3 The restraining order arose out of a relationship between the appellant and Ms Mance which began in 2020. She bore his son in June 2021, but by that time the Family Court sitting at Southend had already issued a non-molestation order on 29 October 2020 prohibiting the appellant from contacting Ms Mance for one year.
- 4 That non-molestation order arose out of three offences which had been committed against her, two offences of battery and one of harassment putting her in fear of violence. He was subsequently convicted of those offences on 21 December 2020. The first battery offence occurred on 3 October 2020 when he attended Ms Mance's address and, when asked to leave, pushed her into a bin causing her stomach to be pressed up against the bin. On that occasion he made threats towards her and the unborn baby. The second battery occurred on 20 October 2020 when the appellant grabbed Ms Mance by the arm and shouted in her face, making threats of violence towards her. Ms Mance's daughter was with her at the time and witnessed what happened. The harassment offence commenced on 2 October 2020 and lasted until 14 November 2020, that is to say continuing after the imposition of the non-molestation order. During that period the appellant had tried to call Ms Mance between 20 and 30 times a day as well as sending multiple text messages. The calls and messages involved making threats of violence towards her, threats to damage her property and other distressing comments such as that he hoped that their unborn baby died.
- 5 He was sentenced to a total of 10 months' imprisonment on 21 December 2020 for those offences and additionally for breaching the non-molestation order by continuing the harassment which had commenced on 2 October after the non-molestation order was in place. He was also on that occasion sentenced for a conviction comprising a breach of the non-molestation order by activity between 8 and 11 December when he attended Ms Mance's address and tried to call her on two occasions. At that time a restraining order was imposed.
- 6 On 30 April 2022, some 18 months after those offences, he committed further offences against Ms Mance in breach of the restraining order. On that occasion he attended Ms Mance's address unannounced and kicked the door down, causing the door frame to fall off the wall. Ms Mance attempted to call the police in an effort to get the appellant to leave, but he grabbed her around the arm and tried to take her telephone. As a result, she suffered bruising to her forearm and bicep.
- 7 On 10 June 2022 he was sentenced to 20 months' imprisonment for those offences and a fresh restraining order was made, to continue until further order, which, amongst other things, included a prohibition on contacting Ms Mance directly or indirectly, save via solicitors by order of the Family Court, or via social services for the purposes of child contact.
- 8 This was the restraining order which he breached in the instant offence which occurred about three weeks after he had been released from custody on licence.

- 9 At about 5 pm on 21 November 2022 he contacted Ms Mance via Facebook Messenger. The messages began with him saying that he knew it was a risk to message her. He continued by saying that he wanted closure and he apologised for messaging her. The conversation continued with the appellant asking Ms Mance to make sure that their son did not forget him, and then making a request not to tell anybody that he had messaged her. The messages on that day ended with the appellant asking her to give their son a big kiss, which she said she would. That he was missing his son had been a theme throughout those exchanges.
- 10 She then initiated a further exchange the following day by contacting him and saying: "You've further messed with my head messaging me." Those exchanges became more argumentative and antagonistic, with the appellant asking her to facilitate child contact and to drop the order against him. Ms Mance made repeated requests that the appellant stop contacting her and go through the proper channels in order to see his son. The appellant eventually agreed, stating that she would not hear from him again.
- 11 Ms Mance described herself as feeling caught off guard, shocked and confused when he contacted her, as she had not been made aware that he had been released. The fact of release had caused her mental health to deteriorate. She said that he made no threats of violence and had purely contacted her in remorse, but she did not believe anything he said. She remained scared that he would turn up at her address and inflict violence, given his complete disregard for the court order forbidding contact.
- 12 The appellant had previous convictions for 62 offences. Apart from the previous offending against Ms Mance, these also included instances of domestic abuse of another ex-partner, committed in breach of a non-molestation order.
- 13 There was no pre-sentence report. The recorder had said that no such report was necessary, and the appellant did not seek an adjournment for one to be prepared. That was understandable. His sentencing had been delayed, and having been in custody on remand for seven and a half months, he was anxious to be sentenced without further delay.
- 14 In sentencing, the Recorder said that if the offending were looked at in isolation, it fell within Category 2B of the Sentencing Council Guideline which has a starting point of 12 weeks and a range from a community order up to 12 months. However, the previous history of non-compliance with court orders, he said, elevated it to a Category 1A offence which has a starting point of two years and a range of one to four years. He identified as aggravating features the previous convictions, a proven history of violence and threats towards Ms Mance, the use of contact arrangements with a child on this occasion as an excuse for making contact, the effect on the victim, and the offence having been committed when on licence. In the context of aggravating features he referred again to breaches of previous orders. He said it was a case that came very close to requiring the maximum sentence because of the appellant's history of offending and his manipulative behaviour. Having said that he would give a full one-third credit for the early guilty plea, he said that the least sentence which was appropriate was one of three years.
- 15 On the appellant's behalf, Ms Nurse, in attractive submissions, argues that a sentence (after a trial) of four and a-half years, which is what the Recorder must have taken, was manifestly excessive. It involved double counting in taking the same factors into account in elevating the offence into Category 1A, and then, as further aggravation, so as to increase the sentence from the starting point in that category. Further, she submitted, and, in any event, it was much too high a figure, being beyond the top of the range for a Category 1A offence.
- 16 We agree. This was the last chapter in persistent and deliberate disregard for court orders,

which is serious. It was that aspect which constituted the gravamen of the offence, and that was the chief aggravating feature of the previous offending, which we would agree was such as to justify moving it into Category 1A. However, the previous history of offending did not justify any further significant uplift having been taken into account in this way. This breach offence did not involve any substantive offence committed against Ms Mance. It did not involve the use or threat of violence, and it was she who initiated the contact on the second day. The impact was real, but in so far as it amounted to a fear of violence, that arose largely, although not wholly, out of his previous conduct and the fact of his release from prison, not from this further contact by way of messaging. It was, in our view, a long way from the kind of conduct which would justify a sentence near the maximum for the offence.

- 17 Taking into account the other aggravating features, and the very limited mitigation, we consider that an appropriate sentence after a trial would have been one of two and a half years' imprisonment, which after full discount for the early plea becomes one of 20 months' imprisonment.
- 18 We will, accordingly, reduce the sentence to one of 20 months' imprisonment. To that extent the appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.