NCN: [2019] EWHC (Admin) 1110
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

No. CO/4833/2018
CO/4794/2018

Royal Courts of Justice
Thursday, 11 April 2019

Before:

LORD JUSTICE SIMON

MRS JUSTICE FARBEY

B E T W E E N :

GARY HILSON
TRACY MCCARTHY — Appellants

- and -

CROWN PROSECUTION SERVICE — Respondent

MR A. PRITCHARD-JONES (instructed by GT Stewart) appeared on behalf of the Appellants.

MR P. RATLIFF (instructed by the Crown Prosecution Service) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE SIMON:

1 This is the judgment of the court concerns an appeal by way of a case stated by the Crown Court sitting at Warwick on 16 October 2018: her Honour Judge Bertodano, Lady Thrift and Mr Fox. The appellants had been charged with an offence of harassment, contrary to sections 2(1) and (2) of the Protection from Harassment Act 1997. Following a trial before District Judge Ikram, sitting at the City of Westminster Magistrates' Court on 9 July 2018, they were both convicted. They appealed against conviction and their appeal was heard on 15 October 2018. On 16 October the Crown Court set out its reasons for dismissing the appeal and sentenced each appellant to a term of 16 weeks' imprisonment.

2 The appellants are domestic partners who have been involved in long and contentious litigation in the family courts. The judge who dealt with the family proceedings was Her Honour Judge Atkinson, the designated family judge for East London ("the judge"). The charge against the appellants was that between 14 September and 2 October 2017 they had pursued a course of conduct which amounted to harassment of the Judge.

The facts

3 The charge against the appellants related to five incidents.

4 Incident one (personal email address). On the evening of 13 September, the day before a court hearing on 14 September in which both appellants were involved, a number of documents were sent from Mr Hilson's email address to various people who had or might have had an interest in the proceedings. Two of these emails used the personal email address of the Judge, using her married name which was different to her name as a Judge. In addition, a court email address was used. It was common ground that the contents of the email were not relevant to the charge of harassment. What was alleged by the prosecution

to amount to harassment was the use of the Judge's personal email address in her married name.

Incident two (comments made in the presence of court security staff)

5 On the morning of 14 September on their way into court and while they were being searched by security staff in the court building the appellants said they knew the Judge's home address. Ms McCarthy was heard to repeat this remark as she walked away from the security area. The comments were immediately reported to the Judge.

Incident three (comments in court)

6 Towards the end of the hearing before the Judge there was an exchange about how documents would be served on the appellants. The transcript records the following remarks:

> Mr Hilson: All right you could always pop it (the document) like as you goes to the aquatic centre. We're right next to the Olympic Park.
>
> Ms McCarthy: She don't go. Her husband takes it.

This was a reference to the fact that the Judge has a daughter who attends sessions at the aquatic park. The appellants were correct in saying that it was the Judge's husband who took their daughter there.

7 As they left court, Mr Hilson wished the Judge a happy birthday. Ms McCarthy added the date. This was in fact the date of the Judge's birthday.

Incident four (the birthday card)

8 On September 30, the day after her birthday, the Judge received a birthday card at her home address with a message that read:

> Keep up the good work stealing for profit. Don't drink too much raspberry gin and stagger back to Sarf, London. Love Tony and Cheri. P.S. Send my regards to Christopher.

9 Incident five (a live video on Facebook)

On or about 2 October a live video was uploaded to Mr Hilson's Facebook account. It included the appellants, together with a third person, discussing a number of matters. It is unnecessary to set out the highly derogatory statements about the Judge. However, there were remarks about, "... dropping her off at the Aquatic Centre and going for coffee."

10 The video also included this:

> Ms McCarthy: Thing is, we did mention a few of this stuff in court. You've gave a few hints, subtle hints, over and she's clocked right on to us. She clocked right on.
>
> Mr Hilson: She locked her Facebook down. Her husband's is still open.
>
> Ms McCarthy: She's done that because we addressed her in our document in her actual name, both names, so she knew we had information on her.

11 The video was seen on 2 October by a social worker who was involved in the Family Court case. She uploaded it by a private link to YouTube and passed it on to the Judge, among others. The Judge did not watch the video at the time. However, it was watched by court staff, who informed her of some of the comments. The crown court heard evidence from the Judge and made findings as to effect upon her.

12 The appellants did not give evidence.

The findings in the Crown Court as set out in the case stated

13 Incident one (the use of personal email address). The appellants appeared to have found the Judge's personal email address by looking back through four years of Twitter activity on the

Judge's Twitter account where they found a Tweet in which she gave her home email address to a friend. The judge explained in her evidence that this had been a mistake as she thought that she had been messaging the friend directly at the time.

14 The findings of the Crown Court were that after two years of litigation, much of it in person, it would have been absolutely clear to the appellants that documents sent to court email address would be passed to the Judge in the usual way. The only possible reason for sending the email to the Judge's personal email address, which the appellants had gone to considerable trouble to find, was to let her know that they knew her married name and that they had her email address. It was disingenuous to suggest, as their counsel had done, that it was a misguided attempt to provide her with information that they considered important. The case stated concluded:

> We are sure that they were well aware that she would find the fact that they had uncovered this personal contact detail alarming and distressing and that the use of the email address did in fact cause her alarm and distress.

15 Incident two (the remarks outside court). The Crown Court concluded that the appellants' statement to court staff that they knew where the Judge lived were intended to be heard, and that the statement, "We know where the Judge lives", conveyed a threat. It was not credible that they were simply passing on a neutral piece of information.

16 The Court also concluded that it would be clear to any reasonable person that a threat to a judge made within the court building would be likely to be immediately reported to the Judge. The appellants were familiar with court procedure and intended the threat to be passed to her. The Court found that the appellant knew that she would view this as a threat and that it would cause alarm and distress, which fact it did.

17 Incident three (comments made in court on 14 September). The Court rejected the argument that these were no more than flippant observations. It also rejected the argument that repeating information which was in the public domain through an open Twitter account could not cause alarm and distress. In all cases of harassment the context must be taken into account. The Court was sure that the appellants' purpose when referring to the Aquatic Centre was to let the Judge know that they knew about the movements of the Judge and her family. If confirmation were needed, it was provided by the first of Ms McCarthy's observations in the Facebook video, to which reference has already been made. Again, the Court was sure that the appellants were well aware that the Judge would view this as a threat and would find it alarming and distressing, and that it did in fact cause her alarm and distress.

18 Incident four (the birthday card received on 30 September). The Crown Court found that the appellants were jointly responsible for the sending of the card. The contents, including the reference to raspberry gin, which was also referred to in the Facebook video a few days later, was so unusual and specific that it was fanciful to suggest any other litigant with a grudge might have sent it. There was ample evidence from the contents of the card for the Court to be sure that the appellants had sent it. The Court was also sure that the appellants were well aware that the recipient would find the card sent to her home address alarming and distressing, and that it did in fact cause her alarm and distress.

19 Incident five (the 2 October live video on Facebook). The Court had only viewed extracts. These showed the appellants referring to the Judge's married name and her movements. There were discussions about an extensive leaflet campaign outside the school of which she was a governor and there were implied threats.

20 The Court added:

> It provides compelling evidence as to their intention with regards to the earlier incidents of harassment detailed in incidents one to four.

21 However, the Court also made findings that the video was not specifically intended to be seen by the Judge and that it could not be sure that it was reasonably foreseeable that the contents would be transmitted to her, as they had in fact been. The case stated summarised the position:

> In those circumstances, while we are sure that the contents of the video did in fact cause Her Honour Judge Atkinson alarm and distress, we are not sure that the appellants knew or ought to have known that she would be aware of its contents.

22 In these circumstances, the Crown Court found that there were four incidents which met the criteria for conduct amounting to harassment. These incidents were all intended to show the Judge that the appellants had extensive knowledge of a part of her life, which if not quite private, since the information came principally from her own and her husband's social media posts, were nevertheless quite separate from her work as a judge. The incidents amounted to a course of conduct which was unacceptable and oppressive such that it should and did sustain criminal liability.

The question of law

23 The question of law on which the Crown Court sought the opinion of this court is whether it erred in determining that the acts of the appellants concerning which it made factual findings were capable of amounting to harassment.

The argument on the appeal

24 The appellants do not dispute that incident two, the comments to the security personnel at the Court, and incident four, the contents of the birthday card, were capable of amounting to harassment. However, they argue that incident one, the private email address, and incident

three, the comments in court, were not capable of amounting to an occasion of harassment. Mr Pritchard-Jones referred the Court to the decision of this court in *C v the Crown Prosecution Service* [2008] EWHC 148 (Admin). The issue in that case was very different to the issue that arises in the present case, but Mr Pritchard-Jones drew attention to a passage in the judgment of Thomas LJ at para.55. In that passage he referred to the decision of the House of Lords in *Majrowski v. Guy's and St Thomas' NHS Trust* [2007] 1 AC 224, in which the House of Lords recognised a distinction between conduct which was unattractive and even unreasonable, on the one hand, and contact amounting to harassment which involved unacceptable and oppressive conduct sufficient to sustain criminal liability, on the other hand.

25 His overriding submission was that incidents one and three were not of sufficient gravity to attract criminal liability. He referred to the decision of *Conn v. Sunderland City Council* [2007] EWCA Civ 1492, in which the Court considered individual incidents to see whether they were of sufficient gravity to cross the line of criminal liability, with the Court saying that it depended on the context. Mr Pritchard-Jones submitted that these incidents did not pass the minimum threshold of conduct.

26 In relation to incident one, the personnel email address, he observed that the Crown Court had found that the content did not contain any material capable of amounting to harassment. In these circumstances, he submitted, the mere sending of an email to a personal address which was related "in however misguided a way to current court cases before the Judge" did not have the potential to amount to conduct sufficient to be an occasion of harassment. He submitted that people receive unsolicited emails quite frequently and receiving such emails cannot constitute the relevant conduct.

27 In relation to issue three, the comments in court, he submitted that the Judge had put her personal information on Twitter, which thereby entered the public domain, and that by doing

so she lost the right to complain of harassment if a stranger mentioned that information. He argued that the Crown Court failed to recognise the changing nature of public discourse surrounding the levels of privacy that a person can reasonably expect once information is in the public domain. There is, he submitted, “an on-going, semi-permanent conversation with the world." He accepted that visiting a person's place of work or sending them private correspondence there might be capable of amounting to harassment, but submitted that the mentioning of publicly available information cannot.

28 Mr Ratliff for the respondent submitted the Crown Court was correct in its analysis, essentially for the reasons it gave. However, he added that the appellants' submissions rest on a false premise. It was not necessary to prove that the two incidents would have amounted to the offence of harassment. The legislative focus is on the effect of and intention behind the totality of the "course of conduct", not on individual occasions.

Conclusion

29 The case stated is clear and concise in setting out the facts and issues that arise. In some ways the reasoning answers the Court's own question. We take as the starting point the six elements of the offence that need to be proved as a matter of law in order to sustain a conviction for harassment. (1) There must be conduct which occurs on at least two occasions, (2) which is targeted at an individual who is foreseeably likely to be harmed by it, (3) which is calculated in an objective sense to cause alarm or distress, and (4) which is objectively judged to be oppressive and unacceptable. Five, what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs. (6) A line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been described in various ways: "torment" of the victim, "of an order which would sustain criminal liability". (See Archbold 2019, para.19—337; Clerk & Lindsell on

Torts, Second Edition, paras. 15—21; *Dowson and others v. Northumbria Police* [2010] EWHC 2612 (QB), and *Levi v Bates* [2016] QB 91 at 56).

30 It is these features of conduct which identify what is criminal and distinguish it from what may be legitimate self-expression, what is irritating unwelcome and provocative. The Crown Court plainly had in mind and applied these criteria. So far as incident one is concerned, one cannot separate the act of sending the email from the intent, the effect and the overall context in which it occurred. The Judge's personal address was an element of her private life, quite separate from her public life as a judge. As the Crown Court found, the only possible reason for sending the email to her personal email address, which the appellants had gone to considerable trouble to find, was to let her know that they knew her married name and that they had her email address. In our view, seen in its proper context, this incident was plainly capable of amounting to conduct which could properly be regarded as an element in a course of conduct amounting to harassment.

31 So far as incident three is concerned, in our judgment the Crown Court was right to reject the argument that once information is in the public domain a person loses the right not to be harassed by the use of that information. Mr Pritchard-Jones cited no principle of law which supported the proposition that mentioning publicly available information to somebody is incapable of amount to harassment. That is because there is no such general principle. The context is all-important. To give one example, the contents of full electoral register can be made available to any member of the public who wishes to consult it, but it does not follow that to tell someone that they know where they live cannot in its proper context constitute conduct which may amount to harassment. Nor does the giving out of information necessarily involve an implicit consent for the use of the information for the purpose of harassment. People do not put information into the public domain so that it can be used against them in this way.

32 The comments made in the course of the hearing were intended to let the Judge know that the appellants were aware of the domestic arrangements she made as part of her private life. As Ms McCarthy acknowledged in the live video, "She knew we have information on her." In our view, seen in its context, the incident was plainly capable of amounting to an element in a course of conduct amounting to harassment. It was oppressive and objectionable and it went beyond conduct which was merely unattractive and unreasonable.

33 The question in the case stated was whether the Crown Court erred in law in determining that the four incidents concerning which it made factual findings were capable of amounting to harassment. We answer that question "No, there was no error of law." It follows that the appeal will be dismissed.

34 We would add two final points. First, in examining the nature of the appellant's conduct, the Crown Court was entitled to take into account that it was directed against a judge performing an important public duty. The appellants had been parties to proceedings before the Judge for about two years. The proceedings had concerned the adoption of children and were in their nature sensitive. The appellants intended to show the Judge that they had extensive knowledge about parts of her life which were separate from her work as a judge. Their conduct was designed to harass and intimidate her in relation to her public duty to the prejudice of the proper administration of justice. The Crown Court was undoubtedly entitled to conclude that the gravity of the misconduct was of an order that satisfied the *Majrowski* test.

35 Second, although this case has focused on the public duty discharged by a judge, it might have been any other official carrying out a public duty, or indeed, any other citizen who is entitled to be protected from harassment by the operation of the criminal law.