

Neutral Citation Number [2019] EWCA Crim 1460

No: 201902006/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday, 30 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

SIR JOHN ROYCE

R E G I N A

v

NATHANIEL BRICKNELL

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Mr D Patience appeared on behalf of the **Appellant**

Mr D Hewitt appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

1. LORD JUSTICE HOLROYDE: Nathaniel Bricknell appeals by leave of the single judge against sentences totalling 12 months' imprisonment, imposed following his guilty pleas to three offences of failing to comply with notification requirements, contrary to section 91 of the Sexual Offences Act 2003.
2. The appellant is now aged 35. He became subject indefinitely to the notification requirements in June 2009, when he was sentenced to an extended sentence, comprising a custodial term of 5 years and an extension period of 3 years, for an offence of rape to which he had pleaded guilty. Amongst other things the notification requirements obliged him to report to the police within 3 days if he stayed for 12 hours or more in a household which included someone under the age of 18, and to notify the police of any address at which he stayed for 7 days or more within a 12-month period. He was also obliged to notify the police of any new bank account.
3. In February 2017 the appellant was sentenced to 8 weeks' imprisonment, suspended for 12 months, for an offence of failing to comply with the notification requirements. He had formed a relationship with a woman who had two young children and during a period of about 3 weeks he had failed to notify the police that he had stayed with her at times when the children were also in the house.
4. The essential features of the present offences can be summarised briefly. They began in late November 2018, only about 9 months after the suspended sentence had expired. The appellant was working as a personal trainer and for that purpose was using the name "Nathan Peters". The police were aware of those facts and had advised the appellant to work only in a gym and not to have female clients.
5. Through one of his clients the appellant came into contact with Ms Flack who lived with her two children (then aged 10 and 1) and who is also the mother of an adult child. She began to use the appellant's services as a personal trainer and a relationship between them quickly developed. The appellant was not obliged to tell Ms Flack about his previous convictions and did not do so. He became in effect part of Ms Flack's family and got on well with the children. On one occasion he was briefly left alone in the house with the youngest child. Ms Flack made clear that she never witnessed or suspected anything untoward. She was however very distressed when she was alerted to the appellant's true identity and then learned, through internet research, of his rape conviction. She ended the relationship immediately. The appellant was very apologetic and made immediate admissions when questioned by the police.
6. Over a period of 3 months the appellant had stayed over at Ms Flack's house on 28 occasions, none of which was notified to the police. On all but three of those occasions the two younger children were also in the house. He was there continuously for 7 days over the Christmas period and of course his total number of visits to that house far exceeded the number at which he became obliged to notify the police.
7. The appellant told the police that he had opened a bank account into which he could pay

the fees which he earned as Nathan Peters. He knew he should have disclosed this but said he had forgotten to do so. That offence dated back to 4 August 2018, even closer in time to the expiration of the previous suspended sentence. As a result the various failures to notify had extended over a period of more than 6 months.

8. The appellant was charged, as we have said, with three offences of failing to notify. The first charge related to his staying on numerous occasions for more than 12 hours at an address where children were living. The second related to his staying at that address for more than 7 days. The third related to his failure to notify the bank account. The appellant pleaded guilty to these charges in the Magistrates' Court and he was committed for sentence to the Crown Court at Basildon.
9. At the sentencing hearing on 16 May 2019, a pre-sentence report was available. This recorded, but did not accept, the appellant's assertion that he had not appreciated the seriousness of his failures of notification. The reporting probation officer assessed the appellant as highly likely to commit further similar offences, with a high risk of causing sexual or emotional harm. He was however assessed as suitable for a community order with a number of requirements.
10. The judge considered the Sentencing Council's Definitive Guideline for sentencing offences of this nature. She assessed the offences as falling into category A culpability, because both of the factors mentioned in the guideline were, in her view, present, namely, "determined attempts to avoid detection" and "long period of non-compliance". She accepted that the appellant had neither caused nor risked very serious harm or distress and she therefore assessed the harm as falling into category 2. Accordingly, she put the case into category A2, for which the guideline indicates a starting point of 1 year and a sentencing range from 26 weeks to 2 years' imprisonment.
11. The judge rejected a submission that it should instead be categorised as a B2 offence, involving no more than a deliberate failure to comply with a requirement, for which the guideline indicates a starting point of 36 weeks' custody and a range from 26 weeks to 18 months. She referred to the fact that she was dealing with three offences but said she was mindful of totality. She also referred to the aggravating feature of the previous offending. She concluded that the appropriate sentence after trial would be a total of 18 months, which she reduced to 12 months, giving full credit for the prompt guilty pleas. She said that in all the circumstances she was unable to suspend the term of imprisonment. Thus concurrent sentences of 12 months' imprisonment were imposed on each charge.
12. Mr Patience, who represents the appellant here as he did below, submits in his helpful written and oral submissions that the judge was wrong to put the case into category A culpability. There was, he says, no evidential basis for finding that the appellant had made determined attempts to avoid detection. He further argues that the period of time over which the failures to notify occurred could not properly be regarded as a long period of non-compliance. In any event, he submits, the judge took too high a notional sentence after trial, because she failed to give sufficient weight to the substantial degree of overlap between the three offences. He emphasises that the offence lies in failing to notify

specified matters to the police, not in failing to tell everything to his new partner. He submits that notwithstanding the first offence in time (the failure to notify the new bank account), it would be artificial to treat the offending as having continued over a period in excess of 6 months. The real gravamen of the charges, he argues, is covered by the 3-month period when the appellant was repeatedly staying over at Ms Flack's house.

13. Mr Patience further submits that the judge gave insufficient attention to the fact that there had been a lengthy period of compliance with the requirements before the 2017 conviction and failed to give sufficient weight to the various matters of personal mitigation.
14. Mr Patience argues, by reference to the Sentencing Council's Imposition Guideline, that none of the factors pointing to an immediate sentence was applicable to this case, and that, on the contrary, a number of factors favouring a suspended sentence were applicable. He referred us to a number of cases decided before the guideline came into effect. We have not found these cases of particular assistance given that there is now a Definitive Guideline.
15. For the respondent, Mr Hewitt adds brief oral submissions to what is set out in writing in a respondent's notice. He confirms, very fairly, that the prosecution did not contend in the court below that this was a case of determined attempts to avoid detection. He submits that the phrase "long period of non-compliance" will require consideration of the facts and circumstances of each individual case.
16. We have reflected upon these submissions. We agree that this was not a case in which the appellant could be said to have made determined attempts to avoid detection. The fact that the prosecution had not put that factor forward as being applicable was not, of course, conclusive, but we note that the judge did not identify in her sentencing remarks any particular basis on which she made the finding.
17. As to whether there was a long period of non-compliance, we acknowledge Mr Patience's point that some offences coming before the courts involve non-compliance over much longer periods. However, in those circumstances the sentencer would be fully entitled to make an upward adjustment from the guideline starting point to reflect the particular length of the period of non-compliance. Here, the first failure to notify occurred in August and the series of more serious failures to notify occurred between November and February. We agree with the prosecution that the period of non-compliance is properly to be regarded as one of more than 6 months.
18. The first offence in point of time relating to the bank account was, we accept, not the most serious example of a failure to notify; but it does indicate an attitude on the part of the appellant towards compliance with the notification requirements, an attitude moreover which he has displayed despite the crystal clear warning given to him by the suspended sentence, imposed when he previously failed to comply with his requirements.
19. Without seeking to define the parameters of "a long period" in this context, we conclude that it was open to the judge to find that that factor was indeed present in the circumstances

of this case. However, even if the judge had not made that finding, we have no doubt that the period of time during which the appellant was failing to comply with the notification requirements would alternatively have been a serious aggravating feature of a category B offence, meriting a significant increase above the starting point.

20. We agree with Mr Patience's submission that there was a significant degree of overlap between the three offences and we agree, as we have said, that the offence relating to the bank account was a comparatively minor offence of its kind, bearing in mind that the police were already aware that the appellant was using a different name for the purposes of carrying on business as a personal trainer. We also accept that there were a number of matters of personal mitigation which the appellant was able to pray in aid.
21. All that said however, the seriousness of the offending after the first offence in August, lies in the continuation, over a period of about 3 months, of visits to the home in which children were living, extending over days at a time, none of which were notified to the police as they should have been.
22. This offending was significantly aggravated by the comparatively recent previous conviction for very similar offending. In all the circumstances, a total sentence of 18 months' imprisonment, before giving credit for guilty pleas, was within the range which was properly opened to the judge. Having regard in particular to the aggravating feature of the comparatively recent previous conviction, the judge was entitled to conclude that, in the circumstances of this case, appropriate punishment could only be achieved by immediate custody - that being one of the factors specifically identified in the Imposition Guideline.
23. For those reasons, we conclude that the total sentence imposed, albeit a stiff one and perhaps high in the range open to the judge, was not one which can be said to be manifestly excessive.
24. This appeal accordingly fails and is dismissed.

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