

NCN: [2019] EWCA (Crim) 2105  
No: 201901949 A2  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 6 November 2019

**B e f o r e:**

**LORD JUSTICE SIMON**

**MR JUSTICE WARBY**

**HIS HONOUR THOMAS QC**  
(Sitting as a Judge of the CACD)

**R E G I N A**

v

**DANIEL SWALLOW**

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**Non-Counsel Application**

**J U D G M E N T**

**LORD JUSTICE SIMON:**

1. On 8 February 2019 in the Crown Court at Swindon the applicant pleaded guilty on re-arraignment to offences charged under two indictments. On 2 April, having pleaded guilty before the magistrates to three offences, he was committed for sentence to the Crown Court under section 3 of the Powers of Criminal Courts (Sentencing) Act 2002 under a reference S20190021. On 7 May 2019 he was sentenced by His Honour Judge Pawson to an overall term of 40 months' imprisonment: three years and four months. The sentence was made up as follows. Count 1, breach of a non-molestation order, contrary to section 42A of the Family Law Act 1996, two years' imprisonment. Count 2, assault by beating, contrary to section 39 of the Criminal Justice Act 1988, four months concurrent. Count 3, a further breach of the non-molestation order, 16 months' imprisonment consecutive. Count 4, witness intimidation, contrary to section 51(1) of the Criminal Justice and Public Order Act 1994, six months concurrent. For the offences sent by the magistrates, (dishonest failings to notify changes of circumstances affecting entitlement to employment support allowance, housing benefit and disability living allowance), the applicant was sentenced to concurrent terms of four months' imprisonment.
2. He renews his application for permission to appeal against the sentence of 40 months' imprisonment following refusal by the single judge.
3. At the beginning of December 2016 the applicant started working as a call centre supervisor for a car company. He failed to notify the authorities of his change in circumstances. Between December 2016 and November 2017 he was in receipt of an

overpayment of more than £15,600 in respect of employment support allowance, housing benefit and disability living allowance.

4. The applicant had been in a three-and-a-half year relationship with Kerry-Anne Lepage which ended in September 2016. A non-molestation order was made on 15 March 2018 for one year which prevented the applicant from contacting the victim or attending at her home address. On 8 June 2018 he was sentenced to a suspended sentence order of three months' imprisonment suspended for 12 months following two breaches of that order.
5. On 27 July 2018, following a third breach of the non-molestation order during the operational period of the suspended sentence, the suspended sentence order was activated in full.
6. On 2 December 2018, in further breach of the non-molestation order the applicant went to Miss Lepage's house. He knocked on the door and she opened it. He then forced his way in, so that her left hand became trapped in the door. He then barged her so that she fell back and landed on the floor. He entered the house and said he would have all her children taken off her. He picked up a wrapped Christmas present from the stairs and threw it at her, hitting her on the shoulder and causing her pain and reddening. She ran out of the house to the nearest telephone box in order to call the police. He chased after her, but ran away when he realised that she was speaking to the police.
7. On 6 December 2018, he appeared before the magistrates and was released on bail with a condition not to contact the victim. On 28 December 2018, from late afternoon until late

at night, she received 29 telephone calls from the applicant. She answered on three occasions. On the second of which she dialled 101 and put her handset on loud speaker so that the operator could hear what the applicant was saying. He called her "a dirty little grass" and said "you had better not turn up at court or I'll put my car through your house". She found this threat particularly threatening because earlier in the summer he had threatened to drive his car into one of her friend's cars and had done so.

8. There was a victim personal statement before the sentencing judge to which he referred in his sentencing remarks.
9. The applicant was aged 31 at the date of sentence and had 25 recorded convictions from May 2006 to July 2018. These included offences of violence and breaches of court orders, most recently in June and July 2018 the suspended sentence which had been activated for the breaches of the non-molestation order.
10. In passing sentence, the judge set out the applicant's previous convictions which included breaches of court orders, offending on bail and offences during the course of court orders. It was a record which showed a complete disregard for court orders and the safety and happiness of others. The applicant's letter and the submissions on his behalf had been taken into consideration, but he had been given repeated opportunities to engage with probation and other bodies to affect his rehabilitation and he had been given repeated warnings about his behaviour from the courts.
11. So far as count 1 was concerned the offending was culpability A in the guidelines. It was

a persistent and serious breach. It was Category 1 harm because it caused very serious distress. The victim personal statement referred to her feeling that she could not be in a relationship again. She felt she would never be the same person again. She was living in constant fear. The judge acknowledged that there had been some wavering since then, but that was often the way in these sorts of cases. The starting point was a term of two years with a range of one to four years. The matter was aggravated by the applicant's previous convictions and by the fact that there was an assault. Had the applicant fought the matter the starting point would have been increased to two-and-a-half years. There was a reduction of 20 per cent for the plea entered after the matter had been listed for trial, giving a sentence of two years. There was a four-month sentence for common assault (count 2) which was concurrent because it was taken into consideration as a significant aggravating feature on count 1. The victim was particularly vulnerable which was a higher harm factor. The applicant used a weapon of sorts and had deliberately targeted the victim which was higher culpability. The starting point was a community order and the range was a community order up to six months. It was aggravated by the fact that it was premeditated, that the applicant had previous convictions, that he was on bail and that it was domestic violence. Had the applicant fought the matter the sentence would have been six months. It was reduced and rounded up in the applicant's favour to four months concurrent.

12. On count 3, the further breach of the non-molestation order on 28 December, the categorisation was 1A. It was the fourth breach of the order. The applicant's previous convictions and the intimidation on count 4 aggravated the matter such that had there been a trial the sentence would have been two years and 10 months. That was reduced by

20 per cent to 26 months. The sentence had to be consecutive. Allowing for totality it was reduced to 16 months, giving a total of 40 months. On count 4, witness intimidation, the sentence would have been in the region of eight months. It was reduced to six months but would be ordered to be served concurrently as it was an aggravating feature of count 3.

13. The benefit fraud was Category 4B with a starting point of nine months based on £30,000. The applicant's fraud resulted in a dishonest receipt of £15,000. He would have been sentenced to six months. That was reduced by one-third to four months to reflect totality. It would be ordered to be served concurrently, giving a total sentence of 40 months.

14. In the grounds of appeal the complaint is that the sentence imposed was too long either because of the way in which the judge applied the guidelines or because there was an insufficient reduction for totality and personal mitigation. In a recent communication with the Court of Appeal Office, the applicant submitted that the offences fell within Category 2A as the prosecution accepted and that the sentences on counts 1 and 3 should have been passed concurrently.

15. In our view the judge's sentencing remarks were clear and persuasive, and the approach was a model of sentencing in such cases. We have set them out in detail for that reason. The judge was fully entitled to find that count 1 was Category 1A offending for the reasons he gave: the breaches were persistent; the count 1 offence was the third breach and was aggravated by the battery which was met with a concurrent sentence. The count

3 breach, the threatening calls on 28 December was the fourth such offence, committed while on bail, and would have attracted a higher sentence than 16 months consecutive but for the judge's reduction applying the principle of totality. That breach was heavily aggravated by the threats made (count 4) which again was dealt with by a concurrent sentence, but which might well have been marked with a consecutive sentence.

16. The single judge explained why the appeal had no prospect of success and the applicant has persisted in a futile application which has consumed the limited resources of the Criminal Justice System in dealing with it. Accordingly, we will make a 28-day loss of time order on this application.