Neutral Citation Number: [2021] EWCA Crim 703

Case No: 202002635 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NEWCASTLE CROWN COURT
His Honour Judge Bindloss
Ind. No. T20190223

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE HOLGATE
and
HIS HONOUR JUDGE DICKINSON QC, RECORDER OF NOTTINGHAM

- -

Between :

Christopher John Baldwin	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Penny Hall via CVP (instructed by **The Registrar of Criminal Appeals**) for the **Appellant**
Paul Jarvis via CVP (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date : 11 May 2021

- -

Approved Judgment

Lord Justice Dingemans :

Introduction

1. This appeal raises the issue of whether a post acquittal restraining order made under section 5A of the Protection from Harassment Act 1997 ("the 1997 Act") was properly made against the Appellant Mr Baldwin, after he had been acquitted of offences of making threats to kill, assault occasioning actual bodily harm, theft and criminal damage.

2. On 16th September 2020, at the Crown Court at Newcastle Mr Baldwin's trial was listed before His Honour Judge Bindloss ("the judge") and a jury. The complainant did not attend the trial of Mr Baldwin to give evidence. An application to adjourn the trial was refused and in the event no evidence was offered against Mr Baldwin (then aged 34). Not guilty verdicts were then entered against Mr Baldwin.

3. The judge raised the issue of making a restraining order against Mr Baldwin. On the same day the Judge imposed a restraining order on acquittal on Mr Baldwin, pursuant to section 5A of the 1997 Act. The order prohibited Mr Baldwin from "contacting directly or indirectly" the complainant. The order, which was completed on the standard form, recorded that it was made "to protect" [the complainant] "from harassment by the defendant".

The factual circumstances

4. The complainant made a witness statement in which she recorded that she had been in a relationship with the appellant. On 8 March 2019, they went to a restaurant before returning to her home. In the early hours of 9 March 2019, an argument started.

5. The complainant alleged in her statement that: the argument escalated; Mr Baldwin threatened to kill her; she told him that she would call the police; Mr Baldwin responded by pushing her onto the bed and choking her; the complainant freed herself and fled the room, but he followed and threw her over the staircase bannister; the complainant landed on the staircase and he grabbed her hair and choked her again before going to the kitchen; Mr Baldwin returned with two kitchen knives, pinned her down and held a knife to the back of her head before punching her and striking her with various objects, including a bin and an ironing board; Mr Baldwin then returned upstairs; whilst he was upstairs, the complainant fled the house and ran to a neighbour, where she called the police. When the complainant returned, she stated that she discovered her television was damaged and her phone had been taken.

6. There was body worn footage which had been recorded by the police officers who attended. There were statements from PC Blaney and PC Cockroft. PC Cockroft said that she attended Burwell Avenue at 0511 hours on 9 March 2019 with PC Hudspith. PC Cockroft spoke with the complainant and activated the body worn camera. This footage showed dried blood to the complainant's right cheek, upper right chest and left wrist. There was a large scratch to her right upper arm with several bruises around it. The officers saw signs of a disturbance. There was blood staining on the ground floor wall, clothes were strewn across the room, a tv had a smashed screen and there was a butter knife with blood stains on it. Exhibits were body worn footage, photographs of the injuries and scene, and a photograph of the butter knife.

7. At 0510 hours PC Blaney was tasked with locating Mr Baldwin. He was detained near to the complainant's house. PC Blaney stated that Mr Baldwin was drunk and uncooperative. PC Blaney arrested Mr Baldwin.

8. PC Main interviewed Mr Baldwin in the presence of a solicitor on 9 March 2019 at 1618 to 1656 hours. Mr Baldwin gave an interview in which he denied any offences. Mr Baldwin said he had taken the complainant out for a meal and they had had some drinks. They had gone back to the complainant's house but the complainant had continued drinking and Mr Baldwin had asked her to stop. Mr Baldwin alleged that the complainant had started throwing knives around, started ripping his clothes, she had held a knife to his face and cut him. When shown photographs of the complainant's injuries he said that she had done this to herself. He accepted that there had been no damage at the property earlier that evening but denied being the one responsible for the damage which was shown in the photographs.

The trial and acquittal

9. Mr Baldwin was charged and pleaded not guilty to the offences. He was remanded on conditional bail with a condition, among other conditions, preventing him from contacting the complainant.

10. Preparations were made for trial. Mr Baldwin made a defence case statement for the purpose of the proceedings which mirrored what he had said in police interview. He stated that this was a malicious allegation, he had been assaulted and had used limited force in self-defence. It was the complainant who had shouted at him, made threats to kill him and slashed him with a knife. Mr Baldwin said he had cuts to the left side of his head and nose and his jumper was ripped. The defence case statement referred to a relationship between Mr Baldwin and the complainant which had lasted from 2003 to 2017. Mr Baldwin alleged that the relationship was volatile and the complainant had assaulted him on numerous occasions in the past. In the defence case statement there was a request for the attendance at the trial of the complainant, the investigating officer who was at the material time PC Blaney, and PC Cockroft.

11. It is apparent that there were issues for the trial judge to determine about the admissibility of the bad character evidence relied on by both sides. Mr Baldwin had 9 previous convictions for 19 separate offences. There were two convictions for offences of battery which had occurred on 26 August 2018. Mr Baldwin had been convicted on his guilty plea on 8 February 2019 at North Northumbria Magistrates' Court and sentenced to a community order. The victims were the complainant and her friend. The agreed basis of plea reflected that Mr Baldwin had spat at the complainant and her friend.

12. The complainant had a conviction in 2003 for assaulting a female using a handbag to her face. In 2010 the complainant had made a complaint of assault against Mr Baldwin. The CCTV footage of the incident was obtained which showed that no assault had taken place and that it was the complainant who had been shouting at Mr Baldwin. Mr Baldwin also claimed that the complainant had stabbed him in 2013 and that the complainant had been arrested. He had not assisted with the complaint and the matter had not been pursued.

13. It seems that there must have been contact between the complainant and the police about the trial because the Crown Prosecution Service recorded that the complainant had submitted a special measures request. Clarification of the reason for the request had been sought but there had been no response and a delay was sought before a formal application was made. An application was made, but it was opposed. An order for special measures was granted on 20 July 2020 recording "vulnerability of the witness".

14. An application was made just before the trial date for a witness summons for the attendance of the complainant. We were told during the course of the hearing that this was only processed and dealt with on the day of the trial. The complainant did not attend at court and the witness summons was issued. It also seems that no police officers had attended at the start of the trial, even though PC Cockroft and the officer in the case had been requested. It appears that it was intended that they would attend during the course of the trial. The prosecution applied for an adjournment of the trial, which was refused by the judge, although we do not have a transcript of that application or ruling. We were told that the judge found that the complainant was not absent through fear, but had decided not to support the prosecution, although it was not clear on what information the judge had based that ruling.

15. After the ruling refusing the adjournment, the prosecution offered no evidence and formal verdicts of not guilty were entered against Mr Baldwin.

The restraining order

16. After Mr Baldwin's acquittal, the judge indicated that he was considering making a restraining order on acquittal. We were told that Ms Hall asked for an adjournment to take instructions from Mr Baldwin. There was then a short adjournment.

17. The matter was called on again before the judge. It seems that neither the prosecution nor the defence sought an adjournment to obtain further evidence or secure the attendance of any witnesses. It also appears that neither the prosecution nor the defence called any evidence in support of or in opposition to the making of the restraining order. Submissions were made in support of a restraining order by the prosecution, and submissions were made against the imposition of the order on behalf of Mr Baldwin.

The judge's ruling imposing a restraining order

18. The judge concluded that there was sufficient evidence to permit him to make a restraining order on acquittal. The judge said "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant in March 2019. Now, that can't be proved to the criminal standard because of the complainant's absence" before noting that this was a civil restraining order and that the civil standard of proof applied.

19. The Judge stated that "the test for a court to apply is: is an order necessary for the purpose of protecting the person mentioned in the order from conduct which amounts to harassment or will cause fear of violence". The judge recorded that the relationship between the complainant and defendant had come to an end in 2017, that they had not seen each other for a while and the complainant had invited the defendant to come to her house, which he did and there was no problem. There was then the common assault

against the complainant and her friend by Mr Baldwin in the street in August 2018 leading to the community order in January 2019.

20. The judge said that he made no findings about what had occurred on the evening save that it was common ground that both the complainant and Mr Baldwin were injured "both blamed each other for the other's injuries and both asserted that … the other had faked their own injuries to make it worse for the other".

21. The judge concluded that "the evidence before me is clear that [the complainant] needs protection from the threat of violence. It is insufficient evidence to convict on a particular charge before the court but in my judgment it is necessary to make the order to protect her from fear of violence from him under s5A of the Protection from Harassment Act 1997".

22. The judge referred to *DPP v Christou* [2015] EWHC 4157; [2016] 2 Cr App R 16 which confirmed that a court could impose a restraining order even where the prosecution had offered no evidence. The judge recorded the submission on behalf of Mr Baldwin, which was that his case was that the complainant had faked her own injuries, that she had also made a false complaint in 2010, and she might abuse the restraining order to make a false allegation. The judge said that if that occurred the complainant might be investigated and prosecuted for perverting the course of justice. The judge concluded that the test was met "it is necessary to make it and I am going to make an order under the Act …".

The issues on the appeal

23. Ms Hall submitted on behalf of Mr Baldwin that the judge was wrong to make a restraining order on acquittal. First it was said that the judge failed to hear evidence on the issue of whether the complainant required protection from the appellant. Secondly it was said that the judge's decision was inconsistent with the judge's earlier finding that the complainant had chosen to avoid court and was not in fear of the appellant, which had led him to refuse to adjourn the matter. Thirdly it was submitted that the complainant's evidence was too dated to justify a finding that a restraining order was necessary, even when combined with the appellant's previous conviction.

24. Mr Jarvis, who did not appear below, submitted on behalf of the respondent that restraining orders on acquittal were intended to deal with those cases where there is clear evidence that the victim needs protection but there was insufficient evidence to convict of the particular charges before the court. The respondent noted that a judge is entitled to make a restraining order on his or her own initiative. A judge is entitled to conclude that a restraining order is necessary based on written evidence. However, where the evidence is contested and the witnesses are available to be called to give evidence, the court should generally hear the oral evidence before making any factual findings. It was said that despite being entitled to call evidence, the appellant did not seek to challenge the judge's decision to proceed without hearing from the complainant and did not seek an adjournment in order to obtain further material. Mr Jarvis submitted that the complainant's evidence, supported by the additional evidence of the attending police officers, was sufficient to prove, to the civil standard, that the complainant had been the victim of an assault and was at risk of future violence from the appellant. There was therefore a proper evidential basis upon which to conclude that the conditions for making a restraining order were met and the appellant had not sought to

argue that the statutory test was not met, but rather that the restraining order could be misused by the complainant. The judge was entitled to reject this submission.

25. We are very grateful to Ms Hall and Mr Jarvis for their helpful written and excellent oral submissions (made via CVP).

The relevant statutory provisions

26. Section 5A of the 1997 Act was inserted by the Domestic Violence, Crime and Victims Act 2004. Section 5A permits a court before which a person has been acquitted to impose a restraining order if it concludes that it is necessary to protect a person from harassment by the defendant. The relevant provision is:

> 5A(1) A court before which a person ('the defendant') is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.
>
> ….
>
> (2A) In proceedings under this section both the prosecution and the defence may lead, as further evidence, any evidence that would be admissible in proceedings for an injunction under section 3.

27. Section 3 of the 1997 Act is headed "civil remedy" and provides for civil claims for an injunction and damages for harassment contrary to section 1 of the 1997 Act. Witness statements, as well as oral evidence, are generally admissible in proceedings for a civil injunction to restrain harassment as well as oral evidence.

28. Section 5A(5) of the Act states that a person made subject to an order on acquittal has the same right of appeal as if he had been convicted of the offence in question before the court which made the order, and the order had been made on conviction.

29. It might be noted that restraining orders on conviction are now included in the Sentencing Act 2020 ("the Sentencing Code"). Restraining orders on acquittal, however, are still contained in the 1997 Act and were not included in the Sentencing Code.

30. Part 31 of the Criminal Procedure Rules 2020 now governs the procedure for "Behaviour Orders". This includes an order under section 5A of the 1997 Act.

31. Rule 31.2 provides that:

> "The court must not make a behaviour order unless the person to whom it is directed has had an opportunity – (a) to consider what order is proposed and why, and (b) the evidence in support."

32. Rule 31.3 identifies that where a prosecutor seeks a section 5A order the prosecutor must serve a notice of intention to apply for an order on the defendant which must "summarise the relevant facts; identify the evidence on which the prosecutor relies in

support; attach any witness statement that the prosecutor has not already served". Rule 31.6 provides that "a party who wants to introduce hearsay evidence" must serve a notice and identify the hearsay evidence. Provision is then made for a party to apply for permission to cross-examine a person who made a statement under Rule 31.7 or to serve a notice challenging the credibility and consistency of the maker of the hearsay statement under Rule 31.8.

Relevant legal principles

33. The relevant legal principles applicable to section 5A of the 1997 Act have been addressed in a number of decisions of this Court including: *R v Major* [2010] EWCA Crim 3016; [2011] 1 Cr App R 25; *R v Smith* [2012] EWCA Civ 2566; [2013] 1 WLR 1399; and *R v Taylor* [2017] EWCA Crim 2209; [2018] 1 Cr App R (S) 39. It is not necessary for us to summarise all the relevant principles but we do need to identify some principles relevant to the fair disposal of this appeal.

34. As the terms of section 5A of the 1997 Act make clear this is an order which is imposed after an acquittal. It may be imposed even where the prosecution has offered no evidence. A restraining order is a civil order and does not reflect on the guilt of the appellant. The civil standard of proof applies, see *R v Major* at paragraph 15. Section 5A of the 1997 Act addresses a future risk of behaviour by the appellant which might amount to harassment.

35. An order can only be imposed if the statutory conditions are met and fairly explained. There has to be a course of conduct which might alarm a person or cause distress. There has to be an identification of the victim. This is because the order is for the protection of a particular vulnerable person or possibly an identifiable group of vulnerable persons, see *R v Smith* at paragraph 27. The legislation was aimed at protecting victims of domestic violence, but was not limited to such circumstances. The order must be "necessary ... to protect a person from harassment" and the word necessary must not be ignored, see *R v Smith* at paragraph 28.

36. Although an order may be made after acquittal it must be made on the evidence. Rule 31.2 of the Criminal Procedure Rules requires the person to whom the order is directed to have had an opportunity to consider "the evidence in support". If a prosecutor applies for a restraining order on acquittal, the prosecutor is required to identify, under Rule 31.3, what evidence is relied on to justify the making of the order. If hearsay is relied upon the parties are required to serve hearsay notices and counter-notices under Rules 31.6, 31.7 and 31.8.

37. In circumstances where a judge decides to consider imposing a restraining order after an acquittal where no evidence was offered, natural justice and the Criminal Procedure Rules require that the person against whom an order may be made, must be given the opportunity to consider what order is proposed and why, to consider the evidence in support, and to adduce evidence against the making of the order. Proceedings for a restraining order under section 5A of the 1997 Act are civil in nature, but in civil proceedings it is still necessary to identify what evidence is admissible in support of an application for an order. It is right to record that in civil proceedings an application for an interim injunction to restrain a person from harassing another the order is likely to be obtained on witness evidence alone. A contested application for a final injunction

to restrain harassment, however, is likely to require the hearing of oral evidence where there is a relevant contested issue of fact to be determined.

The judge was wrong to impose a restraining order

38. In our judgment the judge was right to consider whether to make a restraining order against Mr Baldwin, after he had been acquitted when the complainant did not appear to give evidence. This is because it is not unknown for victims of domestic violence to change their minds about supporting a prosecution against their former partner but still to be in need of the protection of a restraining order and, as Mr Jarvis submitted, section 5A was enacted so that such protection might be given. In this case it is apparent that: Mr Baldwin and the complainant had been in a relationship; after the end of the relationship there had been contact between Mr Baldwin and the complainant; Mr Baldwin had been convicted of spitting at the complainant in 2018; the body worn camera evidence and police statements show that the complainant (and it should be noted Mr Baldwin) had suffered injuries; and there was evidence that Mr Baldwin appeared to be under the influence of alcohol when he was arrested.

39. Further we do not consider that the judge's findings that there was a risk that Mr Baldwin might harass the complainant were inconsistent with his earlier ruling that the prosecution should not have an adjournment because the complainant was not in fear. It seems that one difficulty was that the judge did not have up to date information about the complainant's situation so that he could not make a finding that she was in fear. The decision to impose a restraining order, however, was on the balance of probabilities and the judge was entitled to consider whether the complainant might still need the protection of a restraining order.

40. However, on the materials before us, it does not appear that there was any clear identification of the evidence on which the judge was relying in order to consider making the restraining order. It is right to note that some of the evidence, such as the body worn footage, would have been real evidence and it is apparent from the terms of the ruling that the judge took that evidence into account. It was, in our judgment, necessary to know on what evidence reliance would be placed, because it would affect what evidence Mr Baldwin might want to adduce. For example the issue of the status of the witness statements made by the police officers does not seem to have been addressed or considered. This is important because there was evidence from PC Blaney to the effect that Mr Baldwin was drunk. Mr Baldwin might have wanted to question that evidence, and it seems from the fact that the officer in charge was required to attend for the criminal trial that some of PC Blaney's evidence was contested.

41. Further it is not apparent whether the judge was relying on the witness statement of the complainant. If the judge was relying on the witness statement it is apparent that the judge did not refer to any of the consistencies and inconsistencies in the evidence of the complainant, for example relating to the descriptions of Mr Baldwin's actions and the injuries suffered.

42. The failure to identify what was the evidential status of the materials before the judge did affect the findings made by the judge. In the judgment the judge stated that "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant …". This appears to be a finding that the complainant was assaulted, but later in the judgment the judge said of the altercation between Mr

Baldwin and the complainant "I make no finding of fact in relation to that incident apart from to observe as follows: it is common ground that both the complainant and the defendant were injured …". The apparently inconsistent statements are, in our judgment, an illustration of the difficulties caused for the parties and the judge by a failure to identify what evidence was being relied on and a failure to consider whether that evidence was proved. The failure to identify the evidence on which the application was being made, and the consequential inconsistent findings of fact which were made, means that the restraining order was wrongly imposed.

43. In our judgment if a judge is considering making a restraining order of his or her own motion in a case where there has been no trial and no evidence has been offered, it will be necessary for the judge to consider carefully what evidence is relevant to the issue of the making of the restraining order, and consider which parts of that evidence are agreed or disputed. This needs to be identified fairly so that the defendant may respond to the proposed order. Witness statements are admissible in support of an order, but as this will be final order for a restraining order (whether for a limited period of time or without limit of time), then a judge is likely to need to hear oral evidence to resolve any relevant dispute of facts.

44. Once the relevant facts have been proved, in giving judgment about why it has been necessary to make a restraining order, the judge will need to identify in the judgment the evidence justifying the necessity for making the order, see *R v Major*. We agree with Ms Hall's submission that it is not clear from the judgment in this case on what evidence the judge relied to consider that the restraining order was necessary. It was wrong in this case to make a restraining order without having identified the evidence on which reliance was to be placed and without having shown why that necessitated the making of a restraining order.

45. Finally we note that the incident happened some 18 months before the order was imposed by the judge. In our judgment in order to assess fairly the need to protect the complainant against the risk of future conduct by Mr Baldwin it was necessary to know more about the complainant's current situation, but there was no evidence about this. It is right to record that Mr Baldwin had been prevented by bail conditions from contacting the complainant either directly or indirectly for a period of 18 months, but details of the complainant's current situation (for example employment, family and relationships) were not known. This would have been relevant to the issue of whether it was necessary to make a restraining order and, if so, its duration.

Conclusion

46. For the detailed reasons set out above we allow the appeal against the restraining order and set it aside. As discussed at the hearing of the appeal if there is current evidence showing a risk of harassment of the complainant by Mr Baldwin, then an application may be made, supported by evidence, to the appropriate court to obtain an appropriate order against Mr Baldwin. We were told that attempts to contact the complainant had been made from 10 March 2021 to discuss these issues but those attempts had not, as at the time of the hearing on 11 May 2021, been successful.

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Introduction

1. This appeal raises the issue of whether a post acquittal restraining order made under section 5A of the Protection from Harassment Act 1997 ("the 1997 Act") was properly made against the Appellant Mr Baldwin, after he had been acquitted of offences of making threats to kill, assault occasioning actual bodily harm, theft and criminal damage.

2. On 16th September 2020, at the Crown Court at Newcastle Mr Baldwin's trial was listed before His Honour Judge Bindloss ("the judge") and a jury. The complainant did not attend the trial of Mr Baldwin to give evidence. An application to adjourn the trial was refused and in the event no evidence was offered against Mr Baldwin (then aged 34). Not guilty verdicts were then entered against Mr Baldwin.

3. The judge raised the issue of making a restraining order against Mr Baldwin. On the same day the Judge imposed a restraining order on acquittal on Mr Baldwin, pursuant to section 5A of the 1997 Act. The order prohibited Mr Baldwin from "contacting directly or indirectly" the complainant. The order, which was completed on the standard form, recorded that it was made "to protect" [the complainant] "from harassment by the defendant".

The factual circumstances

4. The complainant made a witness statement in which she recorded that she had been in a relationship with the appellant. On 8 March 2019, they went to a restaurant before returning to her home. In the early hours of 9 March 2019, an argument started.

5. The complainant alleged in her statement that: the argument escalated; Mr Baldwin threatened to kill her; she told him that she would call the police; Mr Baldwin responded by pushing her onto the bed and choking her; the complainant freed herself and fled the room, but he followed and threw her over the staircase bannister; the complainant landed on the staircase and he grabbed her hair and choked her again before going to the kitchen; Mr Baldwin returned with two kitchen knives, pinned her down and held a knife to the back of her head before punching her and striking her with various objects, including a bin and an ironing board; Mr Baldwin then returned upstairs; whilst he was upstairs, the complainant fled the house and ran to a neighbour, where she called the police. When the complainant returned, she stated that she discovered her television was damaged and her phone had been taken.

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17. The matter was called on again before the judge. It seems that neither the prosecution nor the defence sought an adjournment to obtain further evidence or secure the attendance of any witnesses. It also appears that neither the prosecution nor the defence called any evidence in support of or in opposition to the making of the restraining order. Submissions were made in support of a restraining order by the prosecution, and submissions were made against the imposition of the order on behalf of Mr Baldwin.

The judge's ruling imposing a restraining order

18. The judge concluded that there was sufficient evidence to permit him to make a restraining order on acquittal. The judge said "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant in March 2019. Now, that can't be proved to the criminal standard because of the complainant's absence" before noting that this was a civil restraining order and that the civil standard of proof applied.

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22. The judge referred to *DPP v Christou* [2015] EWHC 4157; [2016] 2 Cr App R 16 which confirmed that a court could impose a restraining order even where the prosecution had offered no evidence. The judge recorded the submission on behalf of Mr Baldwin, which was that his case was that the complainant had faked her own injuries, that she had also made a false complaint in 2010, and she might abuse the restraining order to make a false allegation. The judge said that if that occurred the complainant might be investigated and prosecuted for perverting the course of justice. The judge concluded that the test was met "it is necessary to make it and I am going to make an order under the Act …".

The issues on the appeal

23. Ms Hall submitted on behalf of Mr Baldwin that the judge was wrong to make a restraining order on acquittal. First it was said that the judge failed to hear evidence on the issue of whether the complainant required protection from the appellant. Secondly it was said that the judge's decision was inconsistent with the judge's earlier finding that the complainant had chosen to avoid court and was not in fear of the appellant, which had led him to refuse to adjourn the matter. Thirdly it was submitted that the complainant's evidence was too dated to justify a finding that a restraining order was necessary, even when combined with the appellant's previous conviction.

24. Mr Jarvis, who did not appear below, submitted on behalf of the respondent that restraining orders on acquittal were intended to deal with those cases where there is clear evidence that the victim needs protection but there was insufficient evidence to convict of the particular charges before the court. The respondent noted that a judge is entitled to make a restraining order on his or her own initiative. A judge is entitled to conclude that a restraining order is necessary based on written evidence. However, where the evidence is contested and the witnesses are available to be called to give evidence, the court should generally hear the oral evidence before making any factual findings. It was said that despite being entitled to call evidence, the appellant did not seek to challenge the judge's decision to proceed without hearing from the complainant and did not seek an adjournment in order to obtain further material. Mr Jarvis submitted that the complainant's evidence, supported by the additional evidence of the attending police officers, was sufficient to prove, to the civil standard, that the complainant had been the victim of an assault and was at risk of future violence from the appellant. There was therefore a proper evidential basis upon which to conclude that the conditions for making a restraining order were met and the appellant had not sought to

argue that the statutory test was not met, but rather that the restraining order could be misused by the complainant. The judge was entitled to reject this submission.

25. We are very grateful to Ms Hall and Mr Jarvis for their helpful written and excellent oral submissions (made via CVP).

The relevant statutory provisions

26. Section 5A of the 1997 Act was inserted by the Domestic Violence, Crime and Victims Act 2004. Section 5A permits a court before which a person has been acquitted to impose a restraining order if it concludes that it is necessary to protect a person from harassment by the defendant. The relevant provision is:

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27. Section 3 of the 1997 Act is headed "civil remedy" and provides for civil claims for an injunction and damages for harassment contrary to section 1 of the 1997 Act. Witness statements, as well as oral evidence, are generally admissible in proceedings for a civil injunction to restrain harassment as well as oral evidence.

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29. It might be noted that restraining orders on conviction are now included in the Sentencing Act 2020 ("the Sentencing Code"). Restraining orders on acquittal, however, are still contained in the 1997 Act and were not included in the Sentencing Code.

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Relevant legal principles

33. The relevant legal principles applicable to section 5A of the 1997 Act have been addressed in a number of decisions of this Court including: *R v Major* [2010] EWCA Crim 3016; [2011] 1 Cr App R 25; *R v Smith* [2012] EWCA Civ 2566; [2013] 1 WLR 1399; and *R v Taylor* [2017] EWCA Crim 2209; [2018] 1 Cr App R (S) 39. It is not necessary for us to summarise all the relevant principles but we do need to identify some principles relevant to the fair disposal of this appeal.

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36. Although an order may be made after acquittal it must be made on the evidence. Rule 31.2 of the Criminal Procedure Rules requires the person to whom the order is directed to have had an opportunity to consider "the evidence in support". If a prosecutor applies for a restraining order on acquittal, the prosecutor is required to identify, under Rule 31.3, what evidence is relied on to justify the making of the order. If hearsay is relied upon the parties are required to serve hearsay notices and counter-notices under Rules 31.6, 31.7 and 31.8.

37. In circumstances where a judge decides to consider imposing a restraining order after an acquittal where no evidence was offered, natural justice and the Criminal Procedure Rules require that the person against whom an order may be made, must be given the opportunity to consider what order is proposed and why, to consider the evidence in support, and to adduce evidence against the making of the order. Proceedings for a restraining order under section 5A of the 1997 Act are civil in nature, but in civil proceedings it is still necessary to identify what evidence is admissible in support of an application for an order. It is right to record that in civil proceedings an application for an interim injunction to restrain a person from harassing another the order is likely to be obtained on witness evidence alone. A contested application for a final injunction

to restrain harassment, however, is likely to require the hearing of oral evidence where there is a relevant contested issue of fact to be determined.

The judge was wrong to impose a restraining order

38. In our judgment the judge was right to consider whether to make a restraining order against Mr Baldwin, after he had been acquitted when the complainant did not appear to give evidence. This is because it is not unknown for victims of domestic violence to change their minds about supporting a prosecution against their former partner but still to be in need of the protection of a restraining order and, as Mr Jarvis submitted, section 5A was enacted so that such protection might be given. In this case it is apparent that: Mr Baldwin and the complainant had been in a relationship; after the end of the relationship there had been contact between Mr Baldwin and the complainant; Mr Baldwin had been convicted of spitting at the complainant in 2018; the body worn camera evidence and police statements show that the complainant (and it should be noted Mr Baldwin) had suffered injuries; and there was evidence that Mr Baldwin appeared to be under the influence of alcohol when he was arrested.

39. Further we do not consider that the judge's findings that there was a risk that Mr Baldwin might harass the complainant were inconsistent with his earlier ruling that the prosecution should not have an adjournment because the complainant was not in fear. It seems that one difficulty was that the judge did not have up to date information about the complainant's situation so that he could not make a finding that she was in fear. The decision to impose a restraining order, however, was on the balance of probabilities and the judge was entitled to consider whether the complainant might still need the protection of a restraining order.

40. However, on the materials before us, it does not appear that there was any clear identification of the evidence on which the judge was relying in order to consider making the restraining order. It is right to note that some of the evidence, such as the body worn footage, would have been real evidence and it is apparent from the terms of the ruling that the judge took that evidence into account. It was, in our judgment, necessary to know on what evidence reliance would be placed, because it would affect what evidence Mr Baldwin might want to adduce. For example the issue of the status of the witness statements made by the police officers does not seem to have been addressed or considered. This is important because there was evidence from PC Blaney to the effect that Mr Baldwin was drunk. Mr Baldwin might have wanted to question that evidence, and it seems from the fact that the officer in charge was required to attend for the criminal trial that some of PC Blaney's evidence was contested.

41. Further it is not apparent whether the judge was relying on the witness statement of the complainant. If the judge was relying on the witness statement it is apparent that the judge did not refer to any of the consistencies and inconsistencies in the evidence of the complainant, for example relating to the descriptions of Mr Baldwin's actions and the injuries suffered.

42. The failure to identify what was the evidential status of the materials before the judge did affect the findings made by the judge. In the judgment the judge stated that "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant …". This appears to be a finding that the complainant was assaulted, but later in the judgment the judge said of the altercation between Mr

Baldwin and the complainant "I make no finding of fact in relation to that incident apart from to observe as follows: it is common ground that both the complainant and the defendant were injured …". The apparently inconsistent statements are, in our judgment, an illustration of the difficulties caused for the parties and the judge by a failure to identify what evidence was being relied on and a failure to consider whether that evidence was proved. The failure to identify the evidence on which the application was being made, and the consequential inconsistent findings of fact which were made, means that the restraining order was wrongly imposed.

43. In our judgment if a judge is considering making a restraining order of his or her own motion in a case where there has been no trial and no evidence has been offered, it will be necessary for the judge to consider carefully what evidence is relevant to the issue of the making of the restraining order, and consider which parts of that evidence are agreed or disputed. This needs to be identified fairly so that the defendant may respond to the proposed order. Witness statements are admissible in support of an order, but as this will be final order for a restraining order (whether for a limited period of time or without limit of time), then a judge is likely to need to hear oral evidence to resolve any relevant dispute of facts.

44. Once the relevant facts have been proved, in giving judgment about why it has been necessary to make a restraining order, the judge will need to identify in the judgment the evidence justifying the necessity for making the order, see *R v Major*. We agree with Ms Hall's submission that it is not clear from the judgment in this case on what evidence the judge relied to consider that the restraining order was necessary. It was wrong in this case to make a restraining order without having identified the evidence on which reliance was to be placed and without having shown why that necessitated the making of a restraining order.

45. Finally we note that the incident happened some 18 months before the order was imposed by the judge. In our judgment in order to assess fairly the need to protect the complainant against the risk of future conduct by Mr Baldwin it was necessary to know more about the complainant's current situation, but there was no evidence about this. It is right to record that Mr Baldwin had been prevented by bail conditions from contacting the complainant either directly or indirectly for a period of 18 months, but details of the complainant's current situation (for example employment, family and relationships) were not known. This would have been relevant to the issue of whether it was necessary to make a restraining order and, if so, its duration.

Conclusion

46. For the detailed reasons set out above we allow the appeal against the restraining order and set it aside. As discussed at the hearing of the appeal if there is current evidence showing a risk of harassment of the complainant by Mr Baldwin, then an application may be made, supported by evidence, to the appropriate court to obtain an appropriate order against Mr Baldwin. We were told that attempts to contact the complainant had been made from 10 March 2021 to discuss these issues but those attempts had not, as at the time of the hearing on 11 May 2021, been successful.

Neutral Citation Number: [2021] EWCA Crim 703

Case No: 202002635 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM NEWCASTLE CROWN COURT
His Honour Judge Bindloss
Ind. No. T20190223

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2021

Before :

LORD JUSTICE DINGEMANS
MR JUSTICE HOLGATE
and
HIS HONOUR JUDGE DICKINSON QC, RECORDER OF NOTTINGHAM

- -

Between :

Christopher John Baldwin	**Appellant**
- and -	
Regina	**Respondent**

- -
- -

Penny Hall via CVP (instructed by **The Registrar of Criminal Appeals**) for the **Appellant**
Paul Jarvis via CVP (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date : 11 May 2021

- -

Approved Judgment

Lord Justice Dingemans :

Introduction

1. This appeal raises the issue of whether a post acquittal restraining order made under section 5A of the Protection from Harassment Act 1997 ("the 1997 Act") was properly made against the Appellant Mr Baldwin, after he had been acquitted of offences of making threats to kill, assault occasioning actual bodily harm, theft and criminal damage.

2. On 16th September 2020, at the Crown Court at Newcastle Mr Baldwin's trial was listed before His Honour Judge Bindloss ("the judge") and a jury. The complainant did not attend the trial of Mr Baldwin to give evidence. An application to adjourn the trial was refused and in the event no evidence was offered against Mr Baldwin (then aged 34). Not guilty verdicts were then entered against Mr Baldwin.

3. The judge raised the issue of making a restraining order against Mr Baldwin. On the same day the Judge imposed a restraining order on acquittal on Mr Baldwin, pursuant to section 5A of the 1997 Act. The order prohibited Mr Baldwin from "contacting directly or indirectly" the complainant. The order, which was completed on the standard form, recorded that it was made "to protect" [the complainant] "from harassment by the defendant".

The factual circumstances

4. The complainant made a witness statement in which she recorded that she had been in a relationship with the appellant. On 8 March 2019, they went to a restaurant before returning to her home. In the early hours of 9 March 2019, an argument started.

5. The complainant alleged in her statement that: the argument escalated; Mr Baldwin threatened to kill her; she told him that she would call the police; Mr Baldwin responded by pushing her onto the bed and choking her; the complainant freed herself and fled the room, but he followed and threw her over the staircase bannister; the complainant landed on the staircase and he grabbed her hair and choked her again before going to the kitchen; Mr Baldwin returned with two kitchen knives, pinned her down and held a knife to the back of her head before punching her and striking her with various objects, including a bin and an ironing board; Mr Baldwin then returned upstairs; whilst he was upstairs, the complainant fled the house and ran to a neighbour, where she called the police. When the complainant returned, she stated that she discovered her television was damaged and her phone had been taken.

6. There was body worn footage which had been recorded by the police officers who attended. There were statements from PC Blaney and PC Cockroft. PC Cockroft said that she attended Burwell Avenue at 0511 hours on 9 March 2019 with PC Hudspith. PC Cockroft spoke with the complainant and activated the body worn camera. This footage showed dried blood to the complainant's right cheek, upper right chest and left wrist. There was a large scratch to her right upper arm with several bruises around it. The officers saw signs of a disturbance. There was blood staining on the ground floor wall, clothes were strewn across the room, a tv had a smashed screen and there was a butter knife with blood stains on it. Exhibits were body worn footage, photographs of the injuries and scene, and a photograph of the butter knife.

7. At 0510 hours PC Blaney was tasked with locating Mr Baldwin. He was detained near to the complainant's house. PC Blaney stated that Mr Baldwin was drunk and uncooperative. PC Blaney arrested Mr Baldwin.

8. PC Main interviewed Mr Baldwin in the presence of a solicitor on 9 March 2019 at 1618 to 1656 hours. Mr Baldwin gave an interview in which he denied any offences. Mr Baldwin said he had taken the complainant out for a meal and they had had some drinks. They had gone back to the complainant's house but the complainant had continued drinking and Mr Baldwin had asked her to stop. Mr Baldwin alleged that the complainant had started throwing knives around, started ripping his clothes, she had held a knife to his face and cut him. When shown photographs of the complainant's injuries he said that she had done this to herself. He accepted that there had been no damage at the property earlier that evening but denied being the one responsible for the damage which was shown in the photographs.

The trial and acquittal

9. Mr Baldwin was charged and pleaded not guilty to the offences. He was remanded on conditional bail with a condition, among other conditions, preventing him from contacting the complainant.

10. Preparations were made for trial. Mr Baldwin made a defence case statement for the purpose of the proceedings which mirrored what he had said in police interview. He stated that this was a malicious allegation, he had been assaulted and had used limited force in self-defence. It was the complainant who had shouted at him, made threats to kill him and slashed him with a knife. Mr Baldwin said he had cuts to the left side of his head and nose and his jumper was ripped. The defence case statement referred to a relationship between Mr Baldwin and the complainant which had lasted from 2003 to 2017. Mr Baldwin alleged that the relationship was volatile and the complainant had assaulted him on numerous occasions in the past. In the defence case statement there was a request for the attendance at the trial of the complainant, the investigating officer who was at the material time PC Blaney, and PC Cockroft.

11. It is apparent that there were issues for the trial judge to determine about the admissibility of the bad character evidence relied on by both sides. Mr Baldwin had 9 previous convictions for 19 separate offences. There were two convictions for offences of battery which had occurred on 26 August 2018. Mr Baldwin had been convicted on his guilty plea on 8 February 2019 at North Northumbria Magistrates' Court and sentenced to a community order. The victims were the complainant and her friend. The agreed basis of plea reflected that Mr Baldwin had spat at the complainant and her friend.

12. The complainant had a conviction in 2003 for assaulting a female using a handbag to her face. In 2010 the complainant had made a complaint of assault against Mr Baldwin. The CCTV footage of the incident was obtained which showed that no assault had taken place and that it was the complainant who had been shouting at Mr Baldwin. Mr Baldwin also claimed that the complainant had stabbed him in 2013 and that the complainant had been arrested. He had not assisted with the complaint and the matter had not been pursued.

13. It seems that there must have been contact between the complainant and the police about the trial because the Crown Prosecution Service recorded that the complainant had submitted a special measures request. Clarification of the reason for the request had been sought but there had been no response and a delay was sought before a formal application was made. An application was made, but it was opposed. An order for special measures was granted on 20 July 2020 recording "vulnerability of the witness".

14. An application was made just before the trial date for a witness summons for the attendance of the complainant. We were told during the course of the hearing that this was only processed and dealt with on the day of the trial. The complainant did not attend at court and the witness summons was issued. It also seems that no police officers had attended at the start of the trial, even though PC Cockroft and the officer in the case had been requested. It appears that it was intended that they would attend during the course of the trial. The prosecution applied for an adjournment of the trial, which was refused by the judge, although we do not have a transcript of that application or ruling. We were told that the judge found that the complainant was not absent through fear, but had decided not to support the prosecution, although it was not clear on what information the judge had based that ruling.

15. After the ruling refusing the adjournment, the prosecution offered no evidence and formal verdicts of not guilty were entered against Mr Baldwin.

The restraining order

16. After Mr Baldwin's acquittal, the judge indicated that he was considering making a restraining order on acquittal. We were told that Ms Hall asked for an adjournment to take instructions from Mr Baldwin. There was then a short adjournment.

17. The matter was called on again before the judge. It seems that neither the prosecution nor the defence sought an adjournment to obtain further evidence or secure the attendance of any witnesses. It also appears that neither the prosecution nor the defence called any evidence in support of or in opposition to the making of the restraining order. Submissions were made in support of a restraining order by the prosecution, and submissions were made against the imposition of the order on behalf of Mr Baldwin.

The judge's ruling imposing a restraining order

18. The judge concluded that there was sufficient evidence to permit him to make a restraining order on acquittal. The judge said "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant in March 2019. Now, that can't be proved to the criminal standard because of the complainant's absence" before noting that this was a civil restraining order and that the civil standard of proof applied.

19. The Judge stated that "the test for a court to apply is: is an order necessary for the purpose of protecting the person mentioned in the order from conduct which amounts to harassment or will cause fear of violence". The judge recorded that the relationship between the complainant and defendant had come to an end in 2017, that they had not seen each other for a while and the complainant had invited the defendant to come to her house, which he did and there was no problem. There was then the common assault

against the complainant and her friend by Mr Baldwin in the street in August 2018 leading to the community order in January 2019.

20. The judge said that he made no findings about what had occurred on the evening save that it was common ground that both the complainant and Mr Baldwin were injured "both blamed each other for the other's injuries and both asserted that … the other had faked their own injuries to make it worse for the other".

21. The judge concluded that "the evidence before me is clear that [the complainant] needs protection from the threat of violence. It is insufficient evidence to convict on a particular charge before the court but in my judgment it is necessary to make the order to protect her from fear of violence from him under s5A of the Protection from Harassment Act 1997".

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38. In our judgment the judge was right to consider whether to make a restraining order against Mr Baldwin, after he had been acquitted when the complainant did not appear to give evidence. This is because it is not unknown for victims of domestic violence to change their minds about supporting a prosecution against their former partner but still to be in need of the protection of a restraining order and, as Mr Jarvis submitted, section 5A was enacted so that such protection might be given. In this case it is apparent that: Mr Baldwin and the complainant had been in a relationship; after the end of the relationship there had been contact between Mr Baldwin and the complainant; Mr Baldwin had been convicted of spitting at the complainant in 2018; the body worn camera evidence and police statements show that the complainant (and it should be noted Mr Baldwin) had suffered injuries; and there was evidence that Mr Baldwin appeared to be under the influence of alcohol when he was arrested.

39. Further we do not consider that the judge's findings that there was a risk that Mr Baldwin might harass the complainant were inconsistent with his earlier ruling that the prosecution should not have an adjournment because the complainant was not in fear. It seems that one difficulty was that the judge did not have up to date information about the complainant's situation so that he could not make a finding that she was in fear. The decision to impose a restraining order, however, was on the balance of probabilities and the judge was entitled to consider whether the complainant might still need the protection of a restraining order.

40. However, on the materials before us, it does not appear that there was any clear identification of the evidence on which the judge was relying in order to consider making the restraining order. It is right to note that some of the evidence, such as the body worn footage, would have been real evidence and it is apparent from the terms of the ruling that the judge took that evidence into account. It was, in our judgment, necessary to know on what evidence reliance would be placed, because it would affect what evidence Mr Baldwin might want to adduce. For example the issue of the status of the witness statements made by the police officers does not seem to have been addressed or considered. This is important because there was evidence from PC Blaney to the effect that Mr Baldwin was drunk. Mr Baldwin might have wanted to question that evidence, and it seems from the fact that the officer in charge was required to attend for the criminal trial that some of PC Blaney's evidence was contested.

41. Further it is not apparent whether the judge was relying on the witness statement of the complainant. If the judge was relying on the witness statement it is apparent that the judge did not refer to any of the consistencies and inconsistencies in the evidence of the complainant, for example relating to the descriptions of Mr Baldwin's actions and the injuries suffered.

42. The failure to identify what was the evidential status of the materials before the judge did affect the findings made by the judge. In the judgment the judge stated that "the evidence on the papers and indeed in the body worn footage is that the defendant assaulted the complainant …". This appears to be a finding that the complainant was assaulted, but later in the judgment the judge said of the altercation between Mr

Baldwin and the complainant "I make no finding of fact in relation to that incident apart from to observe as follows: it is common ground that both the complainant and the defendant were injured …". The apparently inconsistent statements are, in our judgment, an illustration of the difficulties caused for the parties and the judge by a failure to identify what evidence was being relied on and a failure to consider whether that evidence was proved. The failure to identify the evidence on which the application was being made, and the consequential inconsistent findings of fact which were made, means that the restraining order was wrongly imposed.

43. In our judgment if a judge is considering making a restraining order of his or her own motion in a case where there has been no trial and no evidence has been offered, it will be necessary for the judge to consider carefully what evidence is relevant to the issue of the making of the restraining order, and consider which parts of that evidence are agreed or disputed. This needs to be identified fairly so that the defendant may respond to the proposed order. Witness statements are admissible in support of an order, but as this will be final order for a restraining order (whether for a limited period of time or without limit of time), then a judge is likely to need to hear oral evidence to resolve any relevant dispute of facts.

44. Once the relevant facts have been proved, in giving judgment about why it has been necessary to make a restraining order, the judge will need to identify in the judgment the evidence justifying the necessity for making the order, see *R v Major*. We agree with Ms Hall's submission that it is not clear from the judgment in this case on what evidence the judge relied to consider that the restraining order was necessary. It was wrong in this case to make a restraining order without having identified the evidence on which reliance was to be placed and without having shown why that necessitated the making of a restraining order.

45. Finally we note that the incident happened some 18 months before the order was imposed by the judge. In our judgment in order to assess fairly the need to protect the complainant against the risk of future conduct by Mr Baldwin it was necessary to know more about the complainant's current situation, but there was no evidence about this. It is right to record that Mr Baldwin had been prevented by bail conditions from contacting the complainant either directly or indirectly for a period of 18 months, but details of the complainant's current situation (for example employment, family and relationships) were not known. This would have been relevant to the issue of whether it was necessary to make a restraining order and, if so, its duration.

Conclusion

46. For the detailed reasons set out above we allow the appeal against the restraining order and set it aside. As discussed at the hearing of the appeal if there is current evidence showing a risk of harassment of the complainant by Mr Baldwin, then an application may be made, supported by evidence, to the appropriate court to obtain an appropriate order against Mr Baldwin. We were told that attempts to contact the complainant had been made from 10 March 2021 to discuss these issues but those attempts had not, as at the time of the hearing on 11 May 2021, been successful.