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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/00902/A1
[2022] EWCA Crim 1474



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 28 October 2022

B e f o r e :

LADY JUSTICE SIMLER DBE

MR JUSTICE SWEENEY

MRS JUSTICE COCKERILL DBE

R E X

- v -

NICO PHILLIPS

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Non-Counsel Application

J U D G M E N T



Friday 28 October 2022

LADY JUSTICE SIMLER:

Introduction

1. This is a renewed application for an extension of time of 12 days in which to apply for leave to appeal against sentence and for a representation order, following refusal by the single judge.
2. On 8 April 2021, in the Crown Court at Isleworth, the applicant pleaded guilty to one count of acting in breach of a restraining order, contrary to section 5(5) of the Protection from Harassment Act 1997.
3. On 10 February 2022 he was sentenced by Mr Recorder Fugallo to a term of 20 months' imprisonment. A further restraining order for ten years was imposed. The Recorder took no action in respect of a community order that was breached by virtue of the applicant's offending.

The background

4. The facts underlying the offence are set out in the Criminal Appeal Office summary and the material provided by the applicant. It is sufficient for present purposes to indicate that in 2017 the applicant formed an attachment to a married woman, "JV". The circumstances which gave rise to that do not matter for present purposes, nor whether they met online. JV has a child. At some point she told the applicant that she no longer wished to have anything to do with him.
5. In 2019 the applicant embarked on a vendetta against her husband, "NE", the complainant in the offending. He made very serious allegations to NE's employer about NE's alleged behaviour, and he began a course of harassment against him. That formed the basis of the applicant's conviction on 22 May 2022, and led to the community order and the original restraining order prohibiting the applicant from contacting NE directly or indirectly.
6. Between 25 September and 16 November 2019 the applicant again contacted NE's

employer, his colleagues and a host of other agencies, including the NSPCC, the Probation Service, the police and other government departments. He did so by email. Those emails included various threats directed at NE and claims that he was an abuser. NE is a social worker, and this led to considerable difficulties for him at work.

7. On 15 November 2020, following a report made to the NSPCC by the applicant that NE was abusing his wife and 12 year old son, police conducted a welfare check at NE's home address. They spoke to each family member separately about the allegations. Attending officers determined that the report was malicious and that there were no concerns in fact for the welfare of any person in that property.

Sentence

8. The applicant had two convictions for four offences. In addition to his guilty plea tendered on 22 May 2020 at the Central London Magistrates' Court for two offences of sending malicious communications and one of harassment against NE, he had pleaded guilty to using threatening words and behaviour in December 2020 and had been fined.

9. In the period between December 2020 and the sentencing hearing on 10 February 2022, the applicant was seen by a number of consultant forensic psychiatrists. They included Dr Berman, Dr Hillier and Dr Farnham. We have read those reports, together with the other material relevant to this renewed application.

10. Having assessed the applicant, the outcome was agreed by all of the psychiatrists involved in his case. They excluded a psychotic illness, both at the time of and following the offending. They agreed a diagnosis of personality disorder, described by Dr Hillier on 24 November 2021, as a mixed personality disorder with narcissistic dependent and paranoid features. Dr Hillier continued:

"On the basis of the presentation whilst in hospital, here was no evidence during the assessment to indicate that [the applicant] suffered from a mental disorder of either a nature or a degree that would warrant detention in hospital under the Mental Health Act, and therefore this matter would not be suitable for a disposal under the Mental Health Act in a hospital setting or, in my opinion, the community."

11. In a report dated 21 January 2022, Dr Farnham agreed. He expressed concern about the risk that the applicant posed and remained of the view that there was a moderate risk of violence and a high risk of persistence. He remained concerned that the available evidence suggested that the applicant had struggled to utilise community treatment in the past and repeated that in his earlier reports he had said that he was unable to recommend community treatment, as he did not think that the applicant would be able to engage.

12. There was also a letter from Sadhbh Moran, the Liaison and Diversion Practitioner, dated 7 February 2022. He referred to Dr Hillier's reports and continued:

"I also contacted the in-reach team at HMP Wormwood Scrubs regarding the suitability of [an] MHTR for [the applicant] and received the following response from Dr Jaleel Mohammed, who recently assessed [the applicant] on 10th January 2022;

'I am in agreement with Dr Hillier's views on the case. I found no evidence of mental illness. He has a personality disorder.

He appears to be functioning well. He stated to me that he was studying law at university which he will continue upon his release and he is arranging a civil claim against his landlord which he believes is likely to result in him being awarded significant damages.

I am not sure why he was transferred to hospital under section 48, the plan was for an admission under section 38 for an assessment. I found no reason for him to be under the care of MHIRT in prison after his return. Similarly I see no benefit in [an] MHTR.

Offender PD pathway and STAC involvement may be helpful depending on his willingness to engage.'

..."

13. The Recorder had a Victim Personal Statement from NE, dated 4 January 2021, which we have read. The Recorder also had a pre-sentence report and addendum report from the Probation Service. The pre-sentence report described the index offence as being part of an

established pattern of offending behaviour involving threatening, harassing and malicious behaviour by the applicant to get his own way or if he felt that he was not getting his own way. The applicant had threatened others in a similar way and had not been deterred by previous prosecutions, or measures put in place to protect the complainants. The applicant was assessed as a high risk of re-offending and as posing a high risk of serious harm to members of the public. His response to previous supervision was poor. Given those features, the author of the pre-sentence report expressed the view that there was a high likelihood that the applicant would continue to offend in the manner he had already displayed.

15. The addendum report, dated 7 February 2022, was prepared expressly in order to consider whether the applicant was suitable for a community disposal. The report concluded that this option could not be supported in light of the applicant's risk, the issues identified previously, together with other matters such as housing and immigration status.

16. In passing sentence, the Recorder concluded that culpability was high in this case because the breach of the restraining order was serious and persistent. There were many emails sent to multiple agencies. They included highly malicious and defamatory content. The Recorder assessed this as culpability A. He also found higher harm category 1, because the cumulative effect of the conduct caused NE very serious harm and distress. That meant a starting point of two years' custody, with a range of up to four years.

17. There were aggravating features in the applicant's relevant previous convictions, both for harassing NE and others. He had breached the restraining order within months of it being imposed. Moreover, his behaviour had an impact on other family members, including NE's son.

18. The Recorder identified as the main factor in mitigation the applicant's mental health. He found that had a bearing on the applicant's culpability. The Recorder also took into account other difficulties in the applicant's life, and the delays in the period leading to the sentencing hearing that were mainly the result of the preparation of various medical reports.

19. Balancing all those factors, the Recorder said that he would have imposed a sentence of

30 months' imprisonment, but giving full credit for the guilty plea, the sentence was reduced to 20 months' imprisonment.

20. The Recorder dealt with suspension but concluded that the history of non-compliance with court orders meant that, despite the applicant's personal mitigation, he could not suspend the sentence. Moreover, the applicant was a risk to the public and a risk to NE.

The proposed appeal

21. There are three overlapping grounds of appeal advanced by the applicant who contends that the sentence was manifestly excessive. The points have been developed in a large number of letters he has sent to the court, and in the comments he makes on many of the documents. In summary, he contends:

- (1) all of the medical records and assessments indicated that the issue in this case was one of health care rather than criminal culpability. The Recorder did not give sufficient consideration to the health issues when identifying culpability and sentence;
- (2) the length of sentence failed to take account of the mental health issues;
- (3) the Recorder should have had a Mental Health Act disposal in mind and should have imposed such a disposal.

In addition, the applicant complains that on recall he has been given no assistance and that his health has deteriorated.

22. We deal with the grounds in reverse order. The third ground raised is wrong as a matter of fact. We have already set out in summary the final conclusions reached by the psychiatrists in this case. It is clear from their conclusions that the medical assessments ruled out a disposal under Part 2 of the Mental Health Act 1983. In those circumstances, it is unsurprising that the defence note on sentencing at the sentencing hearing indicated quite properly, that counsel did not seek a hospital order. Instead, the court was invited to impose a community based sentence as the appropriate disposal. A community based disposal was, of course, ruled out by the author of the pre-sentence report. Ground 3 is therefore wrong and

unarguable.

23. The second ground is also wrong as a matter of fact. The applicant's mental health condition was expressly considered and taken into account by the Recorder. At page four of the transcript of the sentencing remarks, the Recorder expressly addressed the mental health picture and submissions made by Ms Waddoup on the applicant's behalf. He also had extensive material that had been uploaded to the digital case system which gave a clear picture of the applicant's mental health. The Recorder expressly accepted that picture had some bearing on culpability and that there was personal mitigation arising from it.

24. Finally, as to the categorisation of the offending, a mental health impairment can reduce an offender's culpability in an appropriate case. The Sentencing Council guidelines make clear that sentencers in such cases should make an initial assessment of culpability in the ordinary way, and then consider whether and to what extent culpability is reduced by reason of any such impairment. That is precisely what happened here. The Recorder found that both culpability and harm were high. There can be no justifiable criticism of those conclusions in light of the circumstances we have already described.

25. The applicant asserts that harm should not have been assessed as category A because no homicidal acts were confirmed or attempted. However, that is to misunderstand the harm assessment. The breach of a restraining order is determined by an assessment of the harm and distress caused. Here the Recorder understandably found very serious harm and distress caused by the applicant's actions. NE was investigated as a result of the false allegations. Police attended his home. Not only was all of that distressing for him and harmful in particular to his career as a social worker, but it also caused his family distress, especially his young son. The Recorder was undoubtedly right to categorise harm as category 1.

26. Having reached those conclusions, the Recorder rightly identified additional aggravating features that warranted a significant upward adjustment beyond the two year starting point. That would, in our judgment, have justified a sentence in excess of 36 months' imprisonment. It was at that point that the Recorder correctly turned to mitigating features and, as we have

already said, identified the applicant's poor mental health issues as the main mitigating factor. He linked them to the offence and concluded that they had some bearing on culpability.

27. Entirely in accordance with the proper approach, as reflected by the Sentencing Council guidelines, the Recorder therefore reduced the notional sentence that he would otherwise have passed to one of 30 months' imprisonment, before giving credit for the applicant's guilty plea.

28. In those circumstances, and in agreement with the single judge, we are in no doubt that the sentence imposed by the Recorder was not arguably wrong in principle or manifestly excessive.

29. Since that is our conclusion, and no purpose would be served in extending time we therefore refuse to do so.

30. Finally, as regards the wider issues raised by the applicant in his many letters to the court about his recall to prison and whether he should be in hospital or prison, these are administrative matters for the prison authorities and not matters for this court.

31. The renewed applications are accordingly refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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