



Neutral Citation Number: [2023] EWCA Crim 1233

Case No: 202300466 A2

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)**  
**ON APPEAL FROM THE CROWN COURT AT PRESTON**  
**HER HONOUR JUDGE H. LLOYD**  
**T20220149**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 6 October 2023

**Before:**

**LORD JUSTICE STUART-SMITH**  
**MR JUSTICE CHOUDHURY**  
and  
**HER HONOUR JUDGE SHANT KC**

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**Between:**

**REX**

**Respondent**

**- and -**

**ROBERT McCARREN**

**Appellant**

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**Mr A Johnson** appeared on behalf of the **Appellant**

**Mr I Harris** appeared on behalf of the **Crown**

Hearing dates: 6 October 2023

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**Approved Judgment**

## **Lord Justice Stuart-Smith:**

### **Introduction**

1. On 18<sup>th</sup> January 2023, in the Crown Court at Preston before Her Honour Judge Heather Lloyd, no evidence was offered against the appellant (who was then aged 49) on an indictment containing three counts of breaching a non-molestation order, contrary to section 42A of the Family Law Act 1996. A not guilty verdict was entered, pursuant to section 17 of the Criminal Justice Act 1967.
2. On the same day, with the consent of the appellant, a restraining order on acquittal was imposed.
3. The appellant now appeals against the imposition of that restraining order with the leave of the single judge.
4. The background may be shortly stated. The appellant was in a relationship with Rebecca Dawber-McCarren for five years. They married in 2014 and together they have a son. The relationship ended in 2017.
5. Various protective orders have been made in proceedings between the appellant and his ex-wife of which it is only necessary to mention two. First, on 23<sup>rd</sup> December 2019, following a number of unwanted messages being sent by the appellant to his ex-wife, an undertaking was given by him to the court in which he agreed to a number of conditions which stopped all contact with his ex-wife. That undertaking expired on 22<sup>nd</sup> December 2020. The appellant continued to have contact with his son.
6. Second, a non-molestation order was obtained by the appellant's ex-wife, *ex parte*, on 7<sup>th</sup> January 2021, initially for 12 months. The conditions of the order prohibited the appellant from communicating, directly or indirectly, with his ex-wife, save for the purpose of a medical emergency. It also required him not to threaten, intimidate, harm or pester her, directly or indirectly.
7. On 9<sup>th</sup> February 2021, a Family Court order was obtained. The child was to reside with the mother and the appellant was to have supervised contact only.
8. On 8<sup>th</sup> March 2021 the appellant sent a message and video recording relating to their son through a mobile app called "APPCLOSE". There had been no medical emergency. Further messages were sent by the appellant on 2<sup>nd</sup> May and 21<sup>st</sup> June 2021, using the same App, to communicate a message to his son thanking him for a Father's Day card that had been made for him. He also took a present for his son to his ex-mother-in-law's house, which he left on the doorstep.
9. On 3<sup>rd</sup> September 2021, the appellant was voluntarily interviewed for breach of the non-molestation order. He provided a prepared statement and thereafter declined to comment to all questions asked.
10. There was no dispute that the appellant had sent the messages on 8<sup>th</sup> March, 2<sup>nd</sup> May and 21<sup>st</sup> June 2021. The issue was whether he had a reasonable excuse to send the messages using a Court Approved Contact application. The messages had been

directed to his son, whom he had not seen for a number of months.

11. The appellant was summonsed for three offences of breaching the non-molestation order imposed on 7<sup>th</sup> January 2021. He was to appear before the Preston Crown Court on 18<sup>th</sup> January 2023 for trial. In due course the indictment charged the appellant with three offences of breaching the non-molestation order imposed on 7<sup>th</sup> January 2021.
12. The defence case was that the appellant believed that the non-molestation order obtained on 7<sup>th</sup> January 2021 was unlawful. The court had been misled and there had been no proper consideration of the available evidence. The appellant had not had the opportunity to attend or make representations; a return date for the hearing, on notice, was not arranged. The appellant believed that he had a right to maintain contact with his son and had a reasonable excuse for sending the messages. He denied that he had refused to return his son following contact. Instead, he wanted to ensure that appropriate arrangements were in place for the care of his son whilst his ex-wife was working from home during the Covid pandemic. There had been no distress caused to his ex-wife; to the contrary, she continued to have contact with him.
13. On the date fixed for trial, 18<sup>th</sup> January 2023, the prosecution proposed that no evidence would be offered on the charges against the appellant, but that he should agree to a restraining order on acquittal. The appellant was represented by counsel. There is a difference in the accounts provided by counsel, Mr Peter Gotch, on the one hand, and the appellant and each of his parents, on the other. The end result was that the case was called on before the judge late in the afternoon. What happened then is central to the appellant's appeal and appears from a transcript of the entire hearing.
14. Prosecuting counsel first told the judge that the appellant faced a three count indictment alleging three breaches of the non-molestation order that had been imposed on 7<sup>th</sup> January 2021. Prosecuting counsel confirmed that the charges related solely to the three messages and that they had been sent via a co-parenting App. Counsel then continued:

"The messages themselves are not vexatious in nature or harassing in nature. They relate to the [appellant's] son. He maintained in his police interview the messages were directed towards his son and he was using a court approved application. In those circumstances the decision has been made by the Crown to offer no evidence with respect to the indictment. That decision has been made following a consideration of whether it is in the public interest to pursue this matter to trial and a pragmatic resolution, I would suggest, has been reached by the parties with the [appellant] consenting to be made subject to a restraining order on acquittal, subject to any views of the court, of course."
15. The judge then asked if the application for a restraining order had been uploaded, and was told that it was at Q8 on the Digital Case System. That document was, in fact, a draft restraining order. It did not include any indication at all of the evidence upon which the application for a restraining order was being or would be brought.

16. The judge read the document and then asked how it differed from the non-molestation order that was already in place. Prosecuting counsel replied:

"Well, your Honour, the non-molestation order is there – there is one that runs out in January 2022 ... There is a further non-molestation order in place until July 2024. There [are] non-contact conditions with that. However, having spoken to the complainant this morning at length, she expressed to me that she would feel better protected if the restraining order was to go beyond the expiry of the current non-molestation order in order to offer her further protection once that child arrangements order and non-molestation order come to an end, and the [appellant] can apply again, as I am sure he intends to, for a further child arrangements order come July 2024."

17. It will immediately be noticed that prosecuting counsel's answer did not identify any material difference between the terms of the non-molestation order, which was due to continue for more than a year to July 2024, and the proposed restraining order. The only further information provided by prosecuting counsel was that the appellant's ex-wife would feel "better protected" if the restraining order was to extend beyond the expiry of the non-molestation order in July 2024.
18. The judge then asked Mr Gotch if the information she had been given was correct and whether the appellant was prepared to be subject to the restraining order, to which Mr Gotch replied that the appellant had no objections. Without more, the judge then said:

"Thank you. Stand up please. In respect of the trial the prosecution have offered no evidence and so not guilty verdicts will be entered. However, you will now be subject to a restraining order and the terms of that restraining order are that you do not contact, directly or indirectly, Rebecca Louise Dawber-McCarren, save for via a solicitor regarding the Family Court proceedings and for no other reason – and I have to warn you that should you fail to comply with this order, you will be committing a separate criminal offence for which you can be arrested and imprisoned for a term of up to five years. I make the restraining order for a period of five years and with that, therefore, you may leave the dock. Thank you."

### **The Grounds of Appeal**

19. The appellant initially drafted his own grounds of appeal. After a representation order was made, perfected grounds were submitted by Mr Andrew Johnson of counsel, who has represented the appellant before us today but did not represent him in the court below.
20. There are three main issues:
- (1) Was it necessary to impose a restraining order?

- (2) Were there procedural errors in relation to the application for and granting of the restraining order that require it to be set aside?
  - (3) Did the appellant give informed consent after being fully and properly advised so that he understood: (a) the basis upon which a court may impose a restraining order on acquittal; and (b) the nature and terms of the order to which he instructed his counsel to consent?
21. For the reasons that follow, we do not consider that it is necessary to resolve the third issue.

### **The Principles to be applied**

22. Section 5A(1) of the Protection from Harassment Act 1997 provides:

"A court before which a person ... 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."

25. The principles to be applied are clear and well established by consistent decisions of this court, including *R v Major* [2010] EWCA Crim 3016, *R v Trott* [2011] EWCA Crim 2395, *R v Smith* [2012] EWCA Crim 2566, *R v Dennis* [2014] EWCA Crim 2332, and *R v Baldwin* [2021] EWCA Crim 703. It is not necessary to embark on a comprehensive re-statement of these principles as that has been done more than once before. The leading cases are *Major* and *Baldwin*, which should be familiar to anyone involved with a prospective restraining order after acquittal. For present purposes, it is sufficient to re-state the following:

- (1) The first and most important criterion for making an order under section 5A(1) is that the court must consider it to be **necessary** to do so to protect a person from harassment by the defendant.
- (2) Section 5A addresses a future risk. The evidential basis for such an assessment is the conduct of the defendant: see *Major* at [16].
- (3) The prosecutor seeking a section 5A order must serve a notice of intention to apply which summarises the relevant facts, identifies the evidence on which the prosecutor relies in support, attaches any written statement that the prosecutor has not already served, and specifies the order that the prosecutor wishes the court to make: see Criminal Procedure Rules 31(3) and *Baldwin* at [32].
- (4) The factual basis for making an order does not have to be uncontested. In the event of dispute, the civil burden of proof applies: see *Major* at [15].
- (5) If the prosecutor intends to rely on hearsay, the prosecutor should serve hearsay notices: see *Baldwin* at [36].
- (6) A judge is required to identify the factual basis for imposing an order. That includes identifying in the judgment the evidence justifying the necessity for

making the order and means giving reasons with sufficient clarity to identify the factual basis upon which the judge is acting: see *Major* at [17] to [20] and *Baldwin* at [40] and [44].

This last principle is not obviated by the existence of consent, although the court may rely upon the consent as part of its consideration of the case in hand.

26. The principles identified at (4) to (6) above provide important procedural safeguards designed to ensure fairness and that restraining orders will not be made without a sufficient evidential and legal basis.

### **Issue 1: Necessity**

27. Mr Johnson submits that there is no proper basis for a finding of necessity in this case. For the Crown, it is submitted that a sufficient evidential basis existed to enable the court to make a finding of necessity.
28. The first point to make is that the judge made no finding of necessity. Nor is there anything in the proceedings that would justify this court in assuming that the judge made such a finding, albeit unspoken. As with all such decisions, the judge's ruling must be taken at face value, subject to necessary implications. In this case, not only did the judge make no finding of necessity, but the need for such a finding was not identified by prosecuting counsel (or defence counsel for that matter). There is, therefore, no indication that the judge had in mind the need for necessity to be established.
29. Had the judge considered the need for necessity, she should, in our judgment, have concluded that necessity was not established. Because the judge did not identify the evidence upon which she relied to justify a finding of necessity, we are limited to the matters that were raised in open court. As to that, the only reason given for imposing the restraining order was that the appellant's ex-wife had apparently said that she would feel "better protected" if the restraining order were to go beyond the current non-molestation order which was due to expire in July 2024.
30. We have no reason to doubt that that is what she said; but it does not begin to demonstrate necessity, either immediate or after July 2024. For the next 18 months she was protected by the non-molestation order. There was no basis for a finding that a restraining order was necessary to protect her against a risk of harassment thereafter.
31. The inadequacy of the given reason is the more apparent when the prosecution's description of the three messages is taken into account. The prosecution rightly conceded that the messages were not vexatious or harassing in nature. Having read the messages, we entirely agree. The messages were directed to the appellant's son through an approved App and provided no foundation for a finding, if such a finding had been made, that there was a future risk of harassment of his ex-wife that required the protection of a restraining order to be superimposed on the current non-molestation order.
32. Mr Harris, who represents the Crown before us (but did not appear before the court below), made two main points. First, he submitted that it is for the appellant to show

that the order is flawed. We agree. Second, he submitted that the question of necessity should be seen in the context of the appellant's confirmation to the court by his counsel that he agreed to the making of the order. Mr Harris submits that a different course would have – or might have – been followed if that consent had not been forthcoming. When asked what evidence the Crown would rely on now, or might then have relied upon in addition to what the court was told, he identified the fact that there would be an ongoing relationship between the appellant and his ex-wife, if only in relation to their son; the background of contested Family Court proceedings; that there were in the background allegations of domestic abuse and coercive behaviour going back to 2017, the details of which we do not have but which we know are denied by the appellant; the three anodyne messages before the court; and the fact that they caused the appellant's ex-wife some upset.

33. Leaving on one side our judgment that even this catalogue of information could not have justified a conclusion that a restraining was necessary, this submission, in our judgments, puts things completely the wrong way round. As we have identified above, the question of consent should and could only properly arise after notice of an intention to make an application which identifies the evidence upon which the prosecution contends that a restraining order is necessary. An expression of consent before then could only be a consent in principle and does not obviate the need for the evidence upon which the Crown intends to rely to be identified. Had that been done, we are in no doubt that the appellant would have taken issue with the basis that is now said would have been advanced, and the court would have had to consider the dispute and the issue of necessity in the light of that dispute.
34. A further objection to this submission is that because no steps were in fact taken to identify the evidence upon which the application would be based, we cannot be confident that the Crown would have identified all or any of the features suggested by Mr Harris in his submissions to us today.
35. One further point arises on the materials that were presented to the court by the prosecution. There is no indication in the papers before us that the appellant or his counsel were told in advance that a conversation with his ex-wife would be repeated by counsel in open court as material upon which the court could rely. The starting point is that a hearsay notice should have been served if this information was to be relied upon. At the very least, if no hearsay notice was served, clear and transparent disclosure should have been given to the appellant and the court, and agreement sought if the formality of the hearsay notice was to be dispensed with. Because we do not know what, if anything, was said between counsel on this point, we do not base our decision upon it. But it will be relevant for future consideration if and when a restraining order after acquittal is in contemplation.
36. For the reasons we have given, we conclude that there was no sound basis for a conclusion that a restraining order was necessary. Thus, even if the judge had made a finding of necessity, we would have ruled that it was unjustifiable. We would allow the appeal on that basis.

## **Issue 2: Procedural Errors**

37. We recognise that there may in many cases be a pragmatic attraction in resolving a

contested trial on terms that include a restraining order after acquittal. However, a restraining order is a significant restriction upon a person's liberty and is not to be regarded as a mere bargaining chip in negotiations between the prosecution and the defence. In fairness to Mr Harris, we should record that he rejected any suggestion that that was what happened in this case.

38. That said, the procedural requirements that we have identified are essential protection for defendants. They are designed and intended to prevent the unjustified imposition of restraining orders, however pragmatically attractive that course might appear to be at the time.
39. Here there were a number of fundamental errors. First, the prosecution did not file a notice of intention to apply. It merely uploaded a draft of the order it sought. Second, the draft order was an inadequate substitute for a notice of intention to apply, because it neither summarised the relevant facts, identified the evidence on which the prosecutor relied in support, nor attached any written statement that the prosecutor had not already served. These are not onerous requirements, even taking into account the pressures on a busy prosecutor at this time. Third, the prosecution did not identify during the hearing that a finding of necessity was an essential prerequisite to the making of an order, or the evidence upon which it relied as justifying the making of such an order on the ground of necessity.
40. The result was that that the judge was not in a position to consider the evidence, if any, upon which the prosecutor relied. That, in turn, led directly to the judge's failure to identify the evidence upon which she relied and upon which she might have based a finding of necessity.
41. Returning to the question of consent, Mr Harris submits that Mr Gotch could at any stage have indicated concern about any aspect of the proposed order. So he could. But the point of procedural protections is that they are to provide security against things going wrong as, on any view, they did in this case.
42. Mr Harris appeared to accept that general proposition, as he characterised the procedure that was followed in this case as "regrettable" and "unsatisfactory". That is not a promising foundation for his brave submission that the failings we have identified did not reach the threshold that would require us to set aside the order.
43. For the reasons we have given, we are unable to agree with his submission. As we have already made clear, for this court to speculate about what evidence a judge may have had in mind, when the judge has not indicated what actually was in mind, would remove a fundamental procedural safeguard that must be respected in every case. As in [20] of *Major*, our response must be:

"While there may well have been good reasons for making the order, in our judgment they are not apparent from the Recorder's remarks and we can therefore reach no conclusion as to whether or not the making of the order in this case was in fact justified. It follows that the second ground of appeal is made out and we quash the restraining order. ..."

44. It should not be thought that we have ignored the terms of Criminal Procedure Rule 31(9), which provides that:

"Unless other legislation otherwise provides, the court may –

- (a) shorten a time limit or extend it, even after it has expired;
- (b) allow a notice or application to be given in a different form or presented orally; and
- (c) dispense with the requirement for service, even after service was required."

45. We would only add that if the court intends to take advantage of the flexibility that this rule envisages, the substantive requirements to which we have referred do not lose any of their importance. Indeed, it may be said that the less formal the nature of the application, the more important it is that the substance of the procedural protections be maintained.

### **Conclusion**

46. For these reasons, the restraining order must be quashed and the appeal allowed. In those circumstances it is neither necessary nor desirable for us to investigate the factual dispute about whether the appellant was advised of the need for necessity before a restraining order could be made and the potential consequences if he was not.

47. We therefore allow the appeal on the basis of the reasons we have given above. We make no observation or finding about the issues arising out of the factual dispute.