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[2024] EWCA Crim 1576

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BRISTOL
HER HONOUR JUDGE MOIRA MACMILLAN 52SE0012323

CASE NO 202402286/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 5 December 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE GARNHAM

RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY KC
(Sitting as a Judge of the CACD)

REX
V

TREVOR TANNER

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MS C FLINT appeared on behalf of the Appellant.
MS S CAVENDER appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE MACUR:

1. This is an appeal against conviction, with the leave of the single judge. On 28 May 2024, Trevor Tanner (“the appellant”) was convicted of the aggravated offence of stalking, contrary to section 4A of the Protection from Harassment Act 1997 (“the Act”). The complainant was Caroline Lacey, his ex-wife (“C”).
2. The relevant parts of section 4A(1) (AB)(ii) provides:

“(1)A person (“A”) whose course of conduct—

- (a) amounts to stalking, and
- (b) either—

...

(ii) causes B serious alarm or distress which has a substantial adverse effect on B’s usual day-to-day activities is guilty of an offence if A knows or ought to know that A’s course of conduct will cause B so to fear on each of those occasions or (as the case may be) will cause such alarm or distress.”

3. The issues in this appeal arise from the alleged failure of the prosecution to adduce evidence of C’s significant alarm or distress such as to impact upon her ordinary daily life. We say “alleged”, since the trial judge found that, although there was scant evidence of the same, there was a case to answer and that a reasonable jury, properly directed, could conclude that these elements were proved. Nevertheless, subsequently the judge permitted the prosecution to reopen their case and to recall C to give evidence on these matters.
4. The grounds of appeal are that the judge (i) should have acceded to the submission of *no case to answer* (this was a classic *Galbraith (R v Galbraith) (1981) 2 All ERs 1060*) limb

one case) ; in the alternative, (ii) should not have allowed the prosecution to reopen the case and (iii) in any event, should not have allowed the prosecution to recall C who had been observing the trial via CVP link since giving her evidence.

5. Ms Flint appears for the appellant and Ms Cavender for the respondent. Both were trial counsel.

The Facts in Brief

6. The appellant was married to the complainant for over 30 years. They separated in 2017 and are now divorced. Since the divorce the appellant had been convicted of harassing C and breaching restraining orders made in her regard. One such conviction, on 27 July 2020, also involved the appellant placing a tracking device on the complainant's vehicle.
7. The previous convictions were part of the Agreed Facts laid before the jury, namely:
 - (1) 24 February 2020, malicious communication resulting in an indefinite restraining order which included a direction that the appellant should not go to C's home address and not to contact her.
 - (2) 27 July 2020 harassment and breach of the restraining order.

On 29 March 2020, the appellant was seen by C near her home address and his car parked nearby. On 14 April, he approached her in the car and spoke to her briefly before driving off. On 30 April, C found a small device attached to her bumper. As she drove to the police station to report the tracker, she saw the appellant parked near to the station. As a result, the restraining order was amended, the appellant was excluded from a larger area and, whilst the appellant was on remand for those offences, C moved house.
 - (3) 30 October 2020, harassment and breach of restraining order.

- (4) 8 January 2021, five cases of harassment and breach of a restraining order. There had been multiple breaches of the restraining order by the appellant driving within the exclusion zones, as evidenced by automatic number plate recognition hits and the appellant hiring vehicles within the exclusion zones. For these offences, he received 36 months' imprisonment.
8. In April 2022, the appellant was released from prison on licence and was being managed by both the Probation Service and a Police Offender Manager.
 9. In May 2022, C and her sister Jacqueline had moved away from the area in which she had previously resided to an address that she hoped would be unknown to the appellant.
 10. On 10 January 2023, the appellant met with his offender manager, PC Hodder. PC Hodder was concerned about the appellant's behaviour and requested ANPR checks on the cars of the appellant, C and her sister. The checks revealed that the appellant's car had been travelling along the same stretch of road as C's car, with the vehicles approximately 81 seconds apart. PC Hodder therefore arranged for police to examine C's vehicle. We interpolate at this point to commend PC Hodder for the positive action taken and the active management of the offender.
 11. On 2 February 2023, C took her car to a police station where two tracking devices were found attached to its underside. The devices contained memory cards, one of which appeared to be live. The appellant was arrested the same day and recalled to prison for breach of licence, where he remained pending trial of this case. The appellant was

interviewed by police on 25 May 2023 and remained silent throughout.

12. The prosecution case at trial was that between 16 November 2022 and 30 January 2023, the appellant had placed the tracking devices on the complainant's vehicle to monitor her location and that this conduct caused the complainant serious alarm or distress, creating a substantial impact on her usual day-to-day activities. The defence case was that the appellant denied fitting the tracking devices to the car.
13. C's evidence-in-chief was video recorded, and the 'Achieving Best Evidence' interview was played to the jury in significantly edited form. Prosecution counsel did not seek leave to ask any further questions in examination in chief. There is a transcript of the edited interview but not of C's evidence in cross-examination.
14. In summary, C said that she knew that she was being interviewed regarding the trackers found on her car. She gave evidence of her previous relationship with the appellant and said she feared him. He had previously fitted a tracker to her car and threatened her. He would continuously breach the restraining orders in place. The last time she had seen the appellant:

“I was coming from my sister's to towards my place and when I'm driving, if I ever see a black Merc, it just takes my, (indicating) eye off and I just, I just saw the registration and I said to my sister, 'I think that's Trevor just past us.' If that is him that would have been the last time I, I've seen him that would be the last time I have seen him ... err about a couple of months ago.”

Questions were then asked to establish whether the appellant would have had any opportunity to fit the tracker to the car to C's knowledge.

15. Ms Flint cross-examined C. We assume that she did not seek to question C how she felt upon the discovery of the tracker or what impact it had on her day-to-day life. Certainly, Ms Cavender did not suggest this was so.

16. On 23 May 2024, Ms Flint made a submission of 'no case to answer', on the basis that the prosecution had failed to prove that C had been caused serious alarm or distress because of the extant stalking behaviour alleged or, that if she had been caused the serious alarm or distress it had not led to a substantial adverse effect on C's usual day-to-day activities. C had mentioned a possible sighting of the appellant in his car during the relevant period however:

“She doesn't mentioned being terrified when she saw him. She doesn't mention any, being alarmed when she saw him. She doesn't mention any impact from seeing the car on that occasion.”

C had moved house prior to the indictment timeframe. There was no evidence of any impact since or during the indictment time frame.

17. Ms Cavender submitted that, whilst the serious alarm or distress must be caused by the course of conduct alleged, it need not be contemporaneous to it. There was evidence of the alarm and distress C experienced when she glimpsed the appellant's number plate but also the very substantial alarm and distress which had been caused to her as she came to realise what he was doing:

“The very fact that he had been prosecuted is enough to have reduced her to what looked like something of a quivering wreck when she came to give, give evidence a couple of days ago. That confirmed by her opening words in the ABE she’s terrified of him. She was also too frightened to give evidence on the ABE and, in my submission, although she hasn’t known until really this case, the evidence being produced during this case, she hasn’t known the detail about what was happening. She has known, from the fact that the prosecution brought at all been tracking her ... so it’s partly the fact she was aware of it at end of January and partly the distress caused to her by knowing there must be evidence - trackers were on the car.”

18. The judge ruled that:

“ ...

There is limited evidence to go before the jury of the Complainant’s alarm or distress caused by the Defendant in the context of these proceedings rather than previous proceedings. However, the Complainant did say that, in the course of the time during which the Defendant’s said to have pursued the course of conduct, she noted the Defendant’s car and this was a matter of concern to her given the context in which this would have occurred.

Should the jury find that that was indeed the Defendant’s car... it would be open to the jury to conclude that the Complainant was caused serious alarm or distress by this, if only by virtue of the fact that she noted this immediately and said in evidence that she noted this and it, it drew her attention and was something of significant concern or sufficient concern to her to bring to her sister’s attention.

....

in addition to the Complainant saying during her police interview... that she was terrified of the Defendant ... could lead to a jury properly directed, finding that element of this offence proved... The concern that the Complainant had, in the course of these proceedings, that she or her sister were being subjected to

harassment amounting to stalking by the Complainant for, on another occasion led to them taking their cars to be examined by the police and these tracker devices were found as a consequence of that decision that had been made, and that seems to me to be something which is indicative of the alarm or distress caused by this conduct, course of conduct having a substantial adverse effect on their usual day to day activities...

... Complainant... was caused considerable alarm or distress having become made aware that these trackers had been placed on her car on another occasion, and that is something it would be open to the jury to conclude ... that there is some evidence at least upon which a jury, properly directed, could find all elements of this offence proved.”

19. Despite the positive ruling in its favour, the prosecution immediately applied to reopen their case and to recall C to address the issues highlighted by the submission of no case to answer, namely evidence as to whether the complainant had been caused serious alarm or distress and whether it had any effect on her usual day-to-day activities.

20. C had in fact provided a written statement, dated 23 November 2023, which made clear that, after being told that trackers were found on her car:

“I immediately broke down crying. I was devastated and verging on hysterical. I wasn't expecting them to find them, and I was in total shock.

When the realisation set in, I started thinking about all the places I'd been, and I didn't know how long he'd been following me. I felt totally unsafe all over again and wondered if he would ever give up. I realised that moving out of Bristol to Chepstow to get away from him had been a complete waste of time. I began feeling very scared again, not knowing where he was. When I had first moved to Chepstow, I felt free and could do what I wanted to without him knowing or finding me. This disappeared instantly and I became the frightened woman I had been when he was stalking me previously.

My mental health got much worse after this. Every time I see a black Mercedes or someone who looks a bit like Trevor, I panic even though I know he is back in prison. I am constantly on edge, and I started having nasty nightmares again which had stopped when I first moved to Chepstow. The nightmares were about the horrible times I had with Trevor when I was in my 20's ...

In addition to the psychological effect on me, I have recently been diagnosed with angina which is worsened by stress. My Crohn's disease has got worse since this latest incident and I am on another dose of steroids to help deal with it.

Since discovering the trackers on my car on this occasion, I have had to move house again... I have also had to change my car. [This] is also having an impact on my finances... I feel like I always live in fear of him. I want to have a life but feel like I will always be looking over my shoulder.”

However, that evidence was not then before the jury.

21. Not unreasonably, Ms Flint opposed the application to reopen the prosecution. She submitted that there had been a fundamental omission by the prosecution and to recall C would cause prejudice to the appellant by evoking sympathy for C. What is more, C had been following the case on CVP and heard evidence from the police analyst which could affect her evidence

22. Nevertheless, the judge ruled that the prosecution could reopen their case and recall C to give further evidence. For reasons that will become apparent, we do no more than summarise the ruling: the witness statement ,to which we refer above, had been uploaded to the DCS a considerable time before trial and the failure to lead the evidence was due to prosecution oversight; whilst the exercise of her judicial discretion to allow the prosecution to reopen the case was one that should be exercised extremely rarely bearing

in mind in particular the risk of prejudice to the defence she also looked at the interests of justice overall. The judge noted that the defendant had not previously indicated that he challenged the impact of the alleged harassment upon the complainant, rather he denied fitting the trackers. Finally, any prejudice caused by virtue of the fact that C had been continuing to observe the trial could be catered for in the trial process.

Discussion

23. The offence of harassment simpliciter is created by section 2 of the Act:

“(1)A person who pursues a course of conduct in breach of [section 1(1) or (1A)] is guilty of an offence.

(2)A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding six months, or a fine not exceeding level 5 on the standard scale, or both.”

The offence of stalking is created by section 2A of the Act:

“(1)A person is guilty of an offence if—

(a)the person pursues a course of conduct in breach of section 1(1),
and

(b)the course of conduct amounts to stalking.

(2)For the purposes of subsection (1)(b) (and section 4A(1)(a)) a person’s course of conduct amounts to stalking of another person if —

(a)it amounts to harassment of that person

(b)the acts or omissions involved are ones associated with stalking,
and

(c)the person whose course of conduct it is knows or ought to know that the course of conduct amounts to harassment of the other person.”

Subsection (3) give examples of the acts or omissions which are ones associated with stalking including:

“(a)following a person

...

(f)interfering with any property in the possession of a person

(g)watching or spying on a person.

(4)A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding 51 weeks, or a fine not exceeding level 5 on the standard scale, or both.”

24. Section 7(2) of the Act recognises harassment to include causing alarm or distress to the person.

25. Section 4A(1) (b) is set out in [2] above. The maximum sentence for the aggravated offence is 10 years’ imprisonment. That which elevates the stalking behaviour to the aggravated offence is that the alarm or distress caused is serious and which has had a significant impact on the complainant’s usual day-to-day activities.

26. We agree with Ms Flint that C’s evidence that she thought she had seen the appellant’s car and mentioned it to her sister cannot be construed as indicative of serious alarm or distress arising from the incident of stalking and no reasonable jury properly directed could find it such. Further, it appears to us that the judge made a factual error in her reasoning on this point. C said she mentioned to her sister that she thought she “had seen Trev” and that she was invited to take her car to the police station because of PC Hodder’s suspicions, to which we have previously referred. The evidence was not , as the

judge indicated, that C contacted the police to raise her concerns about being followed , after thinking she had seen the appellant's car, nor indeed did she raise such concerns with her sister.

27. Assuming the general demeanour of C in the ABE interview to have been accurately described by Ms Cavender, we note that the questions during the interview before its redaction ranged over the alleged coercive and controlling behaviour during the course of the marriage and previous incidents of stalking and were not directed to the extant offence. Since the judge made no reference to demeanour, we assume that she sensibly disregarded it.

28. We would be extremely cautious in accepting Ms Cavender's submission, that evidence of C's continuing fear of the appellant considering his previous stalking and other behaviour would entitle the jury to infer that, upon becoming aware of the trackers being placed on her car during the indictment period, C would have experienced significant alarm or distress. We agree with Ms Flint that the judge was wrong to conclude that a reasonable jury properly directed could find that that C being invited to take her car to the police station amounted to a substantial adverse effect on her usual day-to-day activities.

29. It follows that we uphold ground 1 of the appeal. We conclude that the judge should have allowed the submission of no case to answer and directed the jury to return a not guilty verdict to the charge of aggravated stalking.. In these circumstances, we do not go on to consider grounds 2 and 3.

30. Ms Cavender sought permission to retry the appellant. It is not appropriate, in all the circumstances as indicated above, nor in the interests of justice, for the prosecution to have a second bite of the cherry. We refuse the application.

31. We do however turn to the question of whether we should substitute the lesser offence of stalking in breach of section 2A of the Act.

32. Section 3 of the Criminal Appeal Act 1968 provides:

“(1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence [to which he did not plead guilty] and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.

(2)The Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.”

33. We are in no doubt that the jury would have been entitled, on the evidence that was led before them prior to the submission of no case to answer, to convict the appellant of an offence of harassment.

34. The maximum sentence is one of 51 weeks. Ms Flint realistically recognises that the previous convictions of the appellant are of significant aggravating factor. Despite the personal mitigation that is afforded to him by state of his health, it is not a matter that has dissuaded him from pursuing a course or campaign of conduct against C amounting to

harassment and stalking. We consider it is necessary, not only to mark his antecedent record with the fact that he has committed a further such offence, but also to impose a prison sentence, albeit that the time served will mean his immediate release.

35. In the circumstances, we regard that the appropriate sentence after trial would have been one of 10 months. That is the sentence that we intend to impose on the substituted conviction for a section 2A offence.

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

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