Neutral Citation Number: [2022] EWCA Crim 113

Case No: 2021 03345 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT PORTSMOUTH
HH Judge Melville QC
T2020 0315

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
and
HH JUDGE WENDY JOSEPH QC
sitting as a Judge of the Court of Appeal, Criminal Division

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Between:

CHRISTOPHER LADBROOK	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Mr J-P MacNamara (assigned by **Registrar of Criminal Appeals**) for the **Appellant**

Hearing date: 13 January 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10:30 am on Friday 4 February 2022.

Lord Justice Holroyde:

1. This is an appeal, by leave of the single judge, against sentences totalling 16 months' imprisonment for one offence of assault by beating, contrary to section 39 of the Criminal Justice Act 1988, and two offences of sending a malicious communication, contrary to section 1 of the Malicious Communications Act 1988. At the conclusion of the hearing on 13 January 2022 we indicated that the appeal would be allowed and the total sentence reduced to 12 months' imprisonment. We indicated that we would give our reasons in writing at a later date. This we now do.

2. The victim of the offences was the appellant's wife ("the complainant"). She married the appellant in 2013. In 2017, when the complainant was having a difficult pregnancy with their second child, the marriage began to deteriorate. It seems that each felt the other was not being sufficiently supportive.

3. The first two offences were committed in May 2018, when the older child was aged 3 years and the younger was aged 8 months.

4. The 13th of that month was the complainant's birthday. The appellant did not buy her a present because, he said, she did not deserve one. The complainant, regarding that as the last straw, said that she wanted a divorce. She went out for the day with the children. She returned that evening, put the children to bed, and went to bed herself. The appellant came into the bedroom and, when she said that she did not want to speak to him, he struck her on the chest as she lay in bed, causing her pain and discomfort. She got out of bed to avoid him. The appellant shouted at her to get out of the house and struck her on the body several times with a pillow. The complainant left the house with the children. That incident was charged in count 3, assault by beating.

5. Shortly after that incident the complainant and the children moved out of the matrimonial home. She wanted to seek marriage counselling. On 22 May she and the appellant exchanged text messages which became the subject of count 4, a malicious communications offence. The appellant accused the complainant of lies and deceit, and demanded to know why she had used the credit card to pay for their home insurance. Dissatisfied with her explanation, he sent a message of foul abuse, which included telling his wife to "die in hell you double standard cunt". He went on to say:

> "I will do everything I can to end you and everything you have, that's what you have done to me. … Enjoy the next few years, I will make it the worst ever in your life because of what you have done to me due to the lack of regard and responsibility for your actions"

6. After further messages the appellant sent his wife a photograph of a fire, with a message saying "Say goodbye to all of your belongings". He went on to say that he was burning all her belongings, that it was great fun, and that he may burn the house next. He said:

> "At least you don't need to return as there's fuck all for you. That's most of your clothes done and your memory box. I'll keep going, it feels good."

7. After those events, the couple did receive counselling, and in May 2019 they resumed cohabitation. Their relationship deteriorated again, and on 28 January 2020 the appellant committed a further malicious communications offence, charged in count 5. Following an argument, he sent his wife a text message saying "Thank you for agreeing to leave the house this evening until you can figure out what you want from our family relationship". The complainant replied that she had not agreed to leave the house and would not do so. The appellant accused her of playing games and said he expected her to leave as her behaviour was affecting the children. When the complainant denied that allegation, and said that he was the one shouting and swearing in front of the children, the appellant replied that she had given him no option but to start divorce proceedings.

8. The complainant subsequently reported matters to the police. When interviewed under caution, the appellant made no comment. On 1 December 2020 he was sent for trial on charges of an offence of controlling and coercive behaviour in a family relationship (count 1) and an offence of assault by beating in March 2020 (count 2). At a hearing in the Crown Court on 13 January 2021 he pleaded not guilty to those charges. On 23 August 2021, which was the first day of his trial, agreement was reached between prosecution and defence that he would plead guilty to new counts 3-5. The prosecution offered no evidence on the original two counts.

9. The appellant is now aged 39. He was of previous good character. He has a university degree. He ran his own successful property letting business and was an enthusiastic member of the Territorial Army, holding the rank of corporal. He had served a 6 month tour of duty in Afghanistan. At the sentencing hearing on 30 September 2021 the judge was provided with a number of supportive references from persons who knew the appellant well.

10. A pre-sentence report indicated that the appellant prioritised his own needs over those of others, blamed his wife for his actions, saw himself as the victim and struggled to appreciate the impact of his actions on his wife and children.

11. The Sentencing Council has not published a guideline for malicious communications offences, but submissions were made by both counsel as to how the judge might approach his sentences for counts 4 and 5.

12. The judge in his sentencing remarks said that the communications were not only malicious but obviously cruel. They indicated an extraordinary attitude on the appellant's part, and showed his twisted view of his own entitlements. There was no hint of remorse. The judge concluded that only immediate imprisonment would be appropriate punishment. He decided that the appropriate sentences after a trial would have been 12 months' imprisonment on each of counts 4 and 5. He accepted a submission by defence counsel Mr MacNamara that guilty pleas had been entered as soon as the new counts were added to the indictment and that the applicant should be given full credit for them. The judge imposed consecutive sentences of 8 months' imprisonment on counts 4 and 5, with 1 month's imprisonment concurrent on count 3. Thus the total sentence was 16 months' imprisonment.

13. In his written and oral grounds of appeal Mr MacNamara submitted that each of the sentences on counts 4 and 5 was manifestly excessive in length; that concurrent rather than consecutive sentences would have been appropriate; that the judge failed properly to apply the principle of totality; and that the total sentence was manifestly excessive.

He did not pursue an initial submission that the sentence should have been suspended. He submitted that the judge in his sentencing remarks gave insufficient weight to the appellant's previous good character and substantial personal mitigation, in particular his service to his country. He pointed out, correctly, that the victim personal statement made by the complainant was of limited help in assessing the harm caused by the offences, because it was written with reference to the overall course of events covered by the original charge of controlling and coercive behaviour. He emphasised that the offences were distinct episodes, not a prolonged course of conduct.

14. In answer to questions from the court about the appropriate level of reduction for the guilty pleas, Mr MacNamara acknowledged that the judge had been generous in allowing full credit, but submitted that the applicant was entitled to a reduction of more than 15 per cent: perhaps 20 or 25 per cent. He explained that there had been a hearing on 20 August 2021 at which an unequivocal indication had been given that the applicant would plead to these three offences. In the event, prosecution counsel was not able to speak to the reviewing lawyer that day, and so it was only on the day of the trial that the pleas were accepted.

15. We are grateful to Mr MacNamara for his submissions, which were made with great skill. We focus on the sentences imposed on counts 4 and 5.

16. By his pleas to those counts, the appellant accepted that the messages sent in May 2018 were grossly offensive and contained threats, that the messages sent in January 2020 falsely asserted that his wife had agreed to leave the home, and that on each occasion his purpose was to cause her alarm and distress.

17. Where there is no relevant offence-specific guideline, the Sentencing Council's General guideline sets out overarching principles to be applied. This requires the sentencer to take account of the statutory maximum sentence; any relevant decisions of this court; and definitive guidelines for analogous offences, being careful to make adjustments for any differences in the statutory maximum sentence and in the elements of the offence. It also requires the sentencer, where possible, to assess seriousness by considering culpability and harm, to consider the five statutory purposes of sentencing and to consider any relevant aggravating or mitigating factors.

18. The maximum penalty for each of these offences is 2 years' imprisonment. No relevant case law was cited to the judge or to this court. We do not think that much assistance can be gained from the guideline relating to improper use of a public electronic communications network, which is a summary-only offence of a different kind, with a maximum sentence of 6 months' imprisonment. We are however assisted by the fact that in both the controlling and coercive behaviour guideline, and the guidelines applicable to harassment offences, "conduct intended to maximise fear or distress" is identified as a high culpability factor. In our view, the appellant had such an intention when he sent messages which he knew would cause great distress to the mother of two young children, whom he was trying to drive out of the matrimonial home. For that reason, we assess his culpability as high. We would add that the second offence involved a degree of planning, in that it appears to have been an attempt to manipulate the correspondence in order to provide spurious "evidence" of an agreement by his wife to leave the house, which he could try to use in the divorce proceedings he intended to commence.

19. As to harm, we accept Mr MacNamara's point about the victim personal statement. It is however clear that the appellant's conduct on both occasions caused at least significant fear and/or distress to his victim.

20. Although the judge did not say so in terms, these offences involve conduct within the scope of the Sentencing Council's Overarching principles - domestic abuse guideline. Paragraph 7 of that guideline makes clear that the domestic context of offending makes it more serious because it represents a violation of the trust and security which normally exists between people in a family relationship. Paragraph 8 refers to the fact that domestic abuse can inflict lasting trauma on the victim and on children who are aware of it having occurred. In this case, we regard the domestic context of the offending, and the fact that very young children were inevitably caught up in events, as a serious aggravating factor in this case.

21. We accept that there was considerable personal mitigation. A further, and important, factor in the appellant's favour is that he was to be sentenced only for the discrete offences to which we have referred: the prosecution had not pursued count 1, which alleged a course of conduct over a lengthy period.

22. We recognise that the judge had a difficult task in sentencing serious offences which are not the subject of a guideline. We understand why he took such a serious view of the offending, and we have no doubt that he was correct to conclude that immediate imprisonment was necessary. We are also satisfied that there was no error of principle in his imposing consecutive sentences on counts 4 and 5, which related to offences committed about 18 months apart. However, and with all respect to the judge, we are persuaded that he failed to give sufficient weight to the matters in the applicant's favour. In addition, we are persuaded that he did not sufficiently reflect the principle of totality. In our judgment, taking all relevant matters into account, the appropriate total sentence after trial was 15 months' imprisonment.

23. We also differ from the judge in relation to the level of the reduction which was appropriate for the guilty pleas. In this regard, we think it appropriate to make some general observations for the assistance of sentencers.

24. Section 73 of the Sentencing Code provides, in material part:

> "(1) This section applies where a court is determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court.
>
> (2) The court must take into account the following matters –
>
> (a) the stage in the proceedings for the offence at which the offender indicated the intention to plead guilty, and
>
> (b) the circumstances in which the indication was given."

25. The Sentencing Council's definitive guideline, Reduction in sentence for a guilty plea, explains (in section B) that its purpose is to encourage those who are going to plead guilty to do so as early in the court process as possible. An admission of guilt normally reduces the impact of crime upon victims, saves victims and witnesses from having to

testify and is in the public interest in that it saves public time and money on investigations and trials. The earlier a guilty plea is indicated, the greater the benefits it produces. For that reason, section D of the guideline indicates that the maximum level of reduction, namely one-third, is reserved for those who indicate a guilty plea at the first stage of proceedings. Where a guilty plea is first indicated after the first stage of the proceedings, the maximum level of reduction – subject to the exceptions in section F – is one-quarter, decreasing to one-tenth on the first day of trial.

26. It is important to emphasise that both the statute and the guideline focus on the time when a guilty plea is indicated, not when the plea is entered.

27. When a defendant pleads guilty to, or is convicted of, a lesser or different offence, and had at an earlier stage indicated his intention to plead guilty to that offence, the sentencer must consider exception F3:

> "**F3. Offender convicted of a lesser or different offence**
>
> If an offender is convicted of a lesser or different offence from that originally charged, and has earlier made an unequivocal indication of a guilty plea to this lesser or different offence to the prosecution and the court, the court should give the level of reduction that is appropriate to the stage in the proceedings at which this indication of plea (to the lesser or different offence) was made taking into account any other of these exceptions that apply. In the Crown Court, where the offered plea is a permissible alternative on the indictment as charged, the offender will not be treated as having made an unequivocal indication unless the offender has entered that plea."

28. The effect of the statute and the guideline is that it cannot be assumed that the defendant will inevitably be entitled to full credit for his guilty plea whenever a lesser or different offence is charged in the course of proceedings and he immediately pleads guilty to it. The sentencer should consider, on a fact-specific basis, at what stage the lesser or different offence was clearly identified as an allegation forming part of the prosecution case. If the eventual guilty plea is to an offence which was a permissible alternative verdict on the indictment as charged, then the lesser offence will have been identified as part of the prosecution case from the outset. In other circumstances, the allegation of the lesser or different offence may only clearly emerge as evidence is served or details of the prosecution case are provided. A defendant is of course entitled to put the prosecution to proof of its case as initially charged; but if the prosecution case clearly includes an allegation of a different or lesser offence, a defendant who delays his admission of that other offence cannot expect full credit for his eventual guilty plea.

29. A similar point was made by a different constitution of this court in *R v Stickells* [2020] EWCA Crim 1212. The appellant in that case had been charged with false imprisonment. At a plea and trial preparation hearing ("PTPH") he pleaded not guilty to that charge. Seven days later, he indicated that he would plead guilty to an offence of controlling and coercive behaviour in an intimate relationship. The case was accordingly relisted, a new charge was added and the appellant pleaded guilty to it. The sentencing judge reduced his sentence by 20 per cent. It was submitted on appeal that the judge should have allowed full credit, because "you cannot enter a guilty plea to a

non-existent charge". That submission was rejected, although the court decided that in the particular circumstances of that case the appropriate reduction was 25 per cent. Stuart-Smith J (as he then was), giving the judgment of the court, referred to section 144 of the Criminal Justice Act 2003 (the statutory predecessor of, and materially identical to, section 73 of the Sentencing Code), the sentencing guideline and case law, and concluded:

> "The critical question is when and in what circumstances the defendant first indicates his intention to plead guilty to the offence in question and the mere fact that it has not been charged does not mean that full credit for plea will be preserved until it is."

30. This approach is also reflected in both the Better Case Management and the PTPH forms which must be completed at early stages of proceedings. The former records "Pleas (either way) or indicated pleas (indictable only) or alternatives offered". The latter asks "Alternative plea: Is the defendant willing to offer a plea to another offence and/or a plea on a limited basis?"

31. The present case was not one in which the eventual pleas were permissible alternatives to the charge of controlling and coercive behaviour; and true it is that the charges to which he pleaded guilty were only added to the indictment on the day of trial. The allegations which were ultimately charged as counts 3-5 were, however, clear from the outset, and were always part of the prosecution case. When the case was sent to the Crown Court on 1 December 2020, the prosecution provided a case summary which included those allegations. Evidence about the relevant incidents, including the evidence of Mrs Ladbrook, was served. A more detailed case summary and chronology uploaded to the digital case system on 15 June 2021 again clearly identified the specific allegations. The appellant nonetheless maintained his not guilty pleas to the original charges, and gave no indication of a guilty plea to any charges, until a few days before his trial. His indication at that late stage, when the case was ready for trial and his victim had for months faced the prospect of a contested hearing, achieved very little of the benefits which flow from an early guilty plea.

32. In those circumstances, the appellant could not in our view expect to receive credit of more than about 15 per cent for his late indication of his intention to plead guilty to the conduct reflected in counts 3-5. We felt it appropriate to round down the resultant total term to 12 months' imprisonment.

33. It was for those reasons that we allowed the appeal to this extent: we quashed the consecutive sentence of 8 months' imprisonment on count 5, and substituted for it a consecutive sentence of 4 months' imprisonment. The sentences on counts 3 and 4 remained as before. Thus the total term of imprisonment was reduced to 12 months. The statutory surcharge was unaffected by that reduction, and remains as before.