IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1343

No. 202301906 A2

Royal Courts of Justice

Tuesday, 24 October 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE HOLGATE
HER HONOUR JUDGE DE BERTODANO

REX
V
KALANTHER NIBRAZ

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Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

MS B BAILLIE appeared on behalf of the Appellant.

MISS H LONGWORTH appeared on behalf of the Crown.

J U D G M E N T

MR JUSTICE HOLGATE:

1 On 26 April 2023, in the Crown Court at Manchester before Mr Recorder Long, the appellant pleaded guilty on a re-arraignment to controlling or coercive behaviour in an intimate or family relationship contrary to s.76 of the Serious Crime Act 2015 (count 1) and to two assaults occasioning actual bodily harm (counts 2 and 3).

2 On 18 May 2023, he was sentenced by the same judge to an overall term of 27 months' imprisonment, comprising 27 months for the offence under count 1 and concurrent terms of 6 months for the assaults. He appealed against sentence with the leave of the single judge.

3 The appellant had been in a relationship with the complainant since 2004. They married in 2006 and they moved together to the UK from Sri Lanka in 2007. The period covered by count 1 ran from 1 October 2019 to 26 October 2022, although the Crown submitted that the appellant's abusive behaviour throughout the marriage provided relevant background information.

4 The appellant had sold the complainant's jewellery, saying he needed the money, He told her that she had to work for her own money. She got a job at a shop in Piccadilly Station. She heard friends talk about going on holiday and she asked the appellant about having a holiday. The appellant said that she should simply be grateful that she was in the UK and she was too ugly to go on holiday with him. Indeed, throughout their marriage the appellant would often insult the claimant's physical appearance.

5 The couple have three children. In 2015, the appellant left for Sri Lanka and came home when the complainant was 7 months pregnant with their youngest child. He stayed until the child was born and then returned to Sri Lanka for a year. He came back, left again and then returned in October 2019, after which the lockdown prevented him from trying to leave the UK. The appellant told the complainant that while he had been away he had had sexual relationships with other men and women. He showed her pictures and messages. While the appellant was away the complainant had called him, but he told her not to do so unless it was important. He was told that the children were asking after him and his response was that he did not want to speak to them. He said on this occasion that he was unhappy that she was not rich or beautiful, which affected how the complainant felt about herself.

6 After returning to the UK the appellant did not work, so the complainant was the sole provider for the family. The appellant spent money earned by the complainant on cannabis. He rook away her bank card. He took her salary, even when money was needed to buy food for the children. He blamed the complainant for their poor financial circumstances and said that her parents should have bought them a house when they married. This caused an argument between the complainant and her father, pushing her away from her family. Unhappily, this argument was not resolved at the time of her father's death.

7 The appellant prevented the complainant from applying for British citizenship, telling her that that would suggest that she did not appreciate him. He isolated her. He told her that certain friends were bad influences and prevented her from contacting them. He did allow her brief contact with one friend, but only when she was ill. He then called that friend to terminate the relationship.

8 At one point the complainant said that she had had a relationship with another man whilst they were separated and the appellant had been in Sri Lanka. The appellant threatened to shame her by telling her friends. On 12 October 2022, the appellant told the children details about the relationship and that they could no longer call the complainant "Mum", but had to

call her by her first name. He made the complainant write a letter promising obedience to him.

9 On 15 October 2022, the complainant took one of their children to the mosque and the appellant told her to leave her telephone at home. When she was out he looked through her telephone. When she returned, the appellant said that she must be slashed with a belt because of an affair he had discovered. He told her to remove her trousers, which she did, and then he hit her ten times (count 2). The complainant was in the bedroom with the youngest two children listening in the living room below. He then dragged the complainant to the bathroom by her hair and told her to shave her hair off, which she did.

10 On 25 October 2022, the appellant was in a bad mood. The complainant ran a bath for him. The appellant asked when he should go to Sri Lanka. The complainant responded, "October," as that had been his plan. He then became angry with her, apparently for telling him what to do. He shouted at her and insulted her. He kicked her in the stomach. Their daughter was watching. The appellant then threw a baby bath at the complainant which hit her arm, causing bruising and a small cut (count 3). She then went to a friend and contacted the police.

11 The appellant was arrested that evening. In interview he said that he treated the complainant well. He said that he had not agreed with her relationship with her family and friend, so he had told her not to contact them. But he did give her freedom and had not taken her telephone. He alleged that she had shaved her hair voluntarily.

12 In her victim personal statement, the complainant said that she remained scared of the appellant for what he could do to her and the children. She described the serious effects which his conduct had had on her. She was unable to work for a period because of the harm caused to her mental health. The complainant described how the appellant still tried to control her even while remanded in prison.

13 The appellant had two convictions for offences of no significance to the sentence in this case. He had not previously received a custodial sentence. However, the author of the pre-sentence report said that the appellant maintained attitudes and beliefs which sought to justify and minimise his behaviour. He appeared to have regarded his wife's property and money as belonging to himself. The appellant was assessed as posing a high risk of serious harm to the complainant and a medium risk to his children based upon them witnessing his domestic abuse. While acknowledging that the offending crossed the custody threshold, the author set out community-based options should the court decide that to be appropriate.

14 In his unfortunately brief sentencing remarks, the judge said that the offence under the 2015 Act fell within category A1, but towards the lower end. However, he would impose a sentence on count 1 to take into account the offending on counts 2 and 3, for which he would pass concurrent sentences. The judge said that on that basis he arrived at a starting point (but really a sentence after trial) of 30 months on count 1. This was then reduced by 10 per cent for the late guilty plea. He then made a restraining order.

15 We are grateful to Ms Baillie for her submissions this morning. We have also read the respondent's notice. The appellant does not challenge the length of the custodial term as a proper application of the sentencing guidelines. She advances one ground: the sentence was wrong in principle because comments made by the judge on 26 April gave rise to a legitimate expectation that a sentence not involving immediate custody would be imposed. The appellant relies on *R v Gillam* (1980) 2 Cr. App. R. (S) 237 and *R v CD* [2018] EWCA Crim 571.

Discussion

16 We do not follow why the judge imposed concurrent sentences of 6 months for each of the s.47 offences when they fell within category B2 of the guideline and merited 18 months' custody in each case. Of course, applying the totality principle, the uplift in the sentence for coercive behaviour would be rather less than 18 months. Taking even a figure towards the bottom of the range of category A1 for count 1, his overall sentence of 30 months after trial cannot be described as manifestly excessive. There is no criticism of the credit for plea.

17 We turn to the question of principle raised by the appellant. In *Gillam*, the sentencing judge, having read a social enquiry report which was unfavourable to the offender and, indeed, foresaw a custodial sentence, adjourned the hearing to find out whether community service was available and the offender was suitable for it. He granted bail in the meantime. The second report made a firm recommendation in favour of a community service order. Nonetheless, at the next hearing the judge imposed immediate custodial sentences. This court decided that in those circumstances the court's decision to require a second report specifically on community service created a reasonable expectation that the offender would be punished in that way if that report found that alternative to be satisfactory in all respects.

18 In *CD*, the sentencing judge would have imposed a non-custodial sentence if he had been in a position to do so without a pre-sentence report. But he needed to adjourn for a report addressing that option, which then provided no grounds for departing from that view. It was on that basis that the court followed the approach taken in *Gillam*.

19 On the other hand, where a sentencer adjourns a case for a pre-sentence report to be obtained before the stage of sentencing has been reached, or adjourns for a report without creating a reasonable expectation of a non-custodial sentence, it is not wrong in principle for the judge to pass a custodial sentence when the subsequent report recommends a non-custodial disposal (see *R v Stokes* (1983) 5 Cr. App. R (S) 449 and *R v Houghton & Alexander* (1985) 7 Cr. App. R. (S) 299). In *R v Norton & Claxton* (1989) 11 Cr. App. R. (S) 143, the court said that whether it should intervene in the interests of justice to alter a sentence which was otherwise correct depends entirely on what was said and what happened at the hearing before the Crown Court in that particular case. If the judge adjourns a sentencing exercise for a specific disposal to be investigated, but indicates in clear terms that all options remain open, then depending upon the precise circumstances and on what happened at the hearing, an argument based upon legitimate expectation is unlikely to succeed (see *R v Toni Page* [2005] EWCA Crim 406).

20 In this case, the appellant says that on the morning of 25 April 2023, before he pleaded guilty, the judge said that if he pleaded guilty "it might not be immediate custody". Following the guilty pleas on the following day, the judge ordered a PSR, saying that he would look at a constructive option if one was available, but that all sentencing options were open to him. But, of course, it is necessary to read the transcripts of what was said as a whole.

21 The transcript of the morning of 25 April 2023 contains a discussion about whether the Crown was ready to proceed with some of its evidence. Ms Baillie said that the appellant wanted the trial to start that day, having already been in custody for nearly 6 months, equivalent to a sentence of 12 months. She said that, if convicted, he would be unlikely to receive a prison sentence much longer than that term. The judge responded that counsel might be being optimistic about an eventual sentence. He also said that this introduced an alternative to immediate custody but, as his following remarks made clear, that was in the context of an observation that parties sometimes consider a plea to a specific offence "as

opposed to count 1 on the indictment". The judge went no further than that. Just before adjourning at the end of the morning he said that "in the event of conviction, the outcome obviously would be an unpredictable issue as far as the defendant was concerned".

22 In our judgment, nothing that was said in the morning session created a legitimate expectation of a non-custodial sentence. In fairness to Ms Baillie, she accepted that position in her oral submissions this morning.

23 When the court resumed in the afternoon of 25 April 2023, the judge said that he assumed that the prosecution would not be proceeding with an allegation of rape which had previously been referred to in the papers. But the Crown said that the complainant had indicated that morning that she wished to pursue that allegation. After a brief discussion, the judge adjourned so that the prosecution could get its house in order before the trial resumed the next day.

24 The following day, the prosecution did not seek to raise any allegation of rape. More importantly, there was no application to add some alternative offence to count 1, the controlling or coercive behaviour. Instead, the appellant was re-arraigned on the indictment, he pleaded guilty and Ms Baillie made a request for a pre-sentence report.

25 The judge then said:

> "Yes, I agree, he should have a pre-sentence report. It is obviously strongly in his interest to cooperate with the Probation Service and ask for their help because I will, whilst all sentencing options are open on 18th May, I will look for a constructive disposal if one is available."

It is upon that particular passage that Ms Baillie seeks to advance the ground of appeal.

26 But shortly afterwards the judge addressed the appellant directly:

> "You have pleaded guilty to these offences. I am going to sentence you 18th May, in 3 weeks' time. As I have just said to your counsel, I have ordered a pre-sentence report. When I sentence you, all sentencing options will be available to me, including further custody. It is strongly in your interest to cooperate with the Probation Service to look for alternatives. Very good. You will remain in custody until then."

27 Taking these passages together, along with the fact that the appellant was further remanded in custody, we do not consider that he had any legitimate expectation of receiving a non-custodial sentence, even if the pre-sentence report was favourable to that disposal. But, in fact, the pre-sentence report was not favourable to the appellant. It did identify some matters about the appellant which were of concern. Accordingly, it identified options for a community punishment, without going so far as to recommend that that course be followed.

28 For all these reasons, we therefore conclude that the sentence imposed by the judge was not wrong in principle and, therefore, the appeal is dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.