

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/01119/A2
[2024] EWCA Crim 945



Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 12th June 2024

B e f o r e :

VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MRS JUSTICE STACEY

HIS HONOUR JUDGE JOHN LODGE
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

BARRY ANTHONY DRAIN

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiglobal.co.uk (Official Shorthand Writers to the Court)

Miss G Compton appeared on behalf of the Applicant

Mr R Pyne appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 12th June 2024

LORD JUSTICE HOLROYDE:

1. On 15th January 2024, before His Honour Judge Dugdale sitting in the Crown Court at Winchester, this applicant pleaded guilty to one offence of breach of a restraining order (count 1) and one offence of damaging property (count 2).

2. On 26th February 2024 he was sentenced by Edis LJ to 24 months' imprisonment on count 1. No separate penalty was imposed on count 2. Suspended sentences totalling eight weeks' imprisonment were brought into effect concurrently. A fresh restraining order, with the same restrictions as had been included in the order which was breached, was imposed for five years.

3. The applicant's application for leave to appeal against his total sentence of two years' imprisonment has been referred to the full court by the Registrar.

4. The victims of the applicant's offences are a mother and daughter. The daughter is aged in her early teens. We shall refer to them as "C1" and "C2".

5. The facts of the offences can be briefly stated. Before doing so, however, we should set them into the relevant chronology of events.

6. The applicant (now aged 58) had previously been sentenced on 30 occasions for a total of 59 offences. In the recent past his offending had included the following.

On 10th November 2020, for three offences of threatening, abusive or insulting words or behaviour, contrary to section 4A of the Public Order Act 1986, and one offence contrary to section 5 of that Act, he was conditionally discharged for 12 months, ordered to pay

compensation, and made subject to a restraining order for two years.

On 7th January 2021, he was sentenced by a magistrates' court to a total of six weeks' imprisonment for offences of battery; using threatening, abusive or insulting words or behaviour, contrary to section 4A of the Public Order Act 1986; possessing an offensive weapon in a public place; common assault; assault by beating of an emergency worker; and breach of the restraining order. That was only the second time that the applicant had been imprisoned. His previous experience of custody was limited to a term of two months imposed in 1991.

On 4th June 2022, he was absolutely discharged by a magistrates' court for two offences of assault by beating of an emergency worker.

On 10th August 2022, in the Crown Court, he was absolutely discharged for an offence of racially aggravated intentional harassment, alarm or distress.

On 23rd January 2023, he was yet again absolutely discharged by a magistrates' court for three offences of breach of the restraining order.

On 27th July 2023, he was sentenced by a magistrates' court to concurrent terms of eight weeks' imprisonment, suspended for 12 months, for offences of damaging property and harassment. A fresh restraining order was imposed for one year.

7. The victims of those last offences were C1 and C2. The applicant had on a number of occasions thrown stones at their home, repeatedly kicked their front door, and pointed and gesticulated at them. The fresh restraining order prohibited him from having any contact directly or indirectly with C1 or C2, from attending or damaging their driveway, and from harassing, pestering or intimidating them or their visitors.

8. The present offences were committed very soon after the suspended sentence and the restraining order were imposed. They involved a breach of all aspects of the restraining order.

9. On the morning of 12th August 2023 a man knocked on the door of C1's house. He asked where her husband was. She replied that she did not have a husband. There was then conversation about the history between her and the applicant. During that conversation the applicant was shaking and swinging on the fence between their properties, causing damage to it. He was also pointing at C1 and making throat slitting gestures.

10. At the sentencing hearing the judge was assisted by a pre-sentence report and reports from the Liaison and Diversion Service. The author of the pre-sentence report noted that the applicant has a history of alcohol misuse, which he had not tried to address. The applicant denied what he had done, blamed others, and showed no remorse. The author of the report assessed him as posing a high risk of reconviction and of causing harm to his victims and as being unlikely to comply with any community disposal.

11. The Liaison and Diversion Service reports noted previous diagnoses of a personality disorder, bipolar affective disorder, depression and anxiety, but did not recommend any treatment.

12. The judge also had a Victim Person Statement from C1 which spoke of the "massive impact" which the appellant's behaviour had had on her and her daughter. They have had to amend all their domestic routines in order to feel safe. C1 has had to reduce her working hours, with the inevitable financial consequences, in order to be with C2 outside school hours. The applicant had made it unbearable for her to live in the house which had been her home for many years, and she no longer felt safe. C2's mental health and wellbeing had been very badly affected.

13. In his sentencing remarks the judge said that he accepted the Victim Personal Statement

and emphasised the need to recognise the harm suffered by the victims. He further emphasised the context of the present offences, namely the background of previous offending which he said was truly exceptional and required exceptional measures. He noted that since about November 2020 the applicant had conducted a campaign of aggressive intimidation aimed at his neighbours. The applicant's actions on 12th August 2023 were intended to, and did, intimidate and frighten them. The judge observed that the applicant had been given every opportunity to stop his campaign of abuse against his neighbours, but had carried on regardless. The judge stated that the reports indicated that the applicant's mental health was stable and that there was nothing to suggest that his mental health issues made his conduct less serious. The fact that his mental health was adversely affected by alcohol and that his offending occurred when he drank too much did not provide any mitigation. On the contrary, it made it worse.

14. The judge placed the offence of breach of the restraining order in category B2 of the relevant sentencing guideline, which gave a starting point of 12 weeks' custody and a range of up to one year. He concluded, however, that 12 months' imprisonment would be inadequate to deal with the applicant's culpability and the very serious harm which he had inflicted over a long period of time. He said that the appropriate sentence for the breach offence was 30 months' imprisonment, reduced to 24 months because of the guilty plea. He ordered the suspended sentences to be activated concurrently with that sentence.

15. In her helpful submissions on the applicant's behalf, Miss Compton accepts that there were aggravating features of the offending and that there was no real mitigation. However, she submits that the sentence before reduction for the guilty plea was more than double the top of the category B2 range and was for that reason alone manifestly excessive.

16. Mr Pyne, in his submissions on behalf of the respondent, submits that the judge was

entitled to find that it would be contrary to the interests of justice to sentence within the guideline. He argues that the total sentence was not manifestly excessive when taking into account: the previous offending, including against the same victims; the commission of these offences so soon after the restraining order was imposed; the impact on the victims; the aggravating factor of the applicant's regular inebriation; and the previous failures to respond to non-custodial sentences.

17. We are grateful to both counsel for their assistance.

18. The terms in which the submissions have been made suggest that it may be helpful if we begin with a reminder of the statutory provisions as to the duty to follow definitive sentencing guidelines.

19. Section 59 of the Sentencing Code, headed "Sentencing guidelines: general duty of the court" provides in subsection (1):

"(1) Every court —

- (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.

..."

20. Section 60, headed "Sentencing guidelines: determination of sentence" provides in material part:

"(1) This section applies where—

- (a) a court is deciding what sentence to impose on an offender for an offence, and
- (b) offence-specific guidelines have been issued in relation to the offence.

(2) The principal guidelines duty includes a duty to impose on the offender, in accordance with the offence-specific guidelines, a sentence which is within the offence range.

(3) Subsection (2) is subject to —

- (a) section 73 (reduction in sentences for guilty pleas),
- (b) sections 74, 387 and 388 (assistance by offenders: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered to be given) by the offender to the prosecutor or investigator of an offence, and
- (c) any rule of law as to the totality of sentences.

(4) If the offence-specific guidelines describe different seriousness categories—

- (a) the principal guidelines duty also includes a duty to decide which of the categories most resembles the offender's case in order to identify the sentencing starting point in the offence range, but
- (b) nothing in this section imposes on the court a separate duty to impose a sentence which is within the category range.

(5) Subsection (4) does not apply if the court is of the opinion that, for the purpose of identifying the sentence within the offence range which is the appropriate starting point, none of the categories sufficiently resembles the offender's case.

..."

21. The guideline for the offence with which we are concerned, like all the Sentencing Council's offence-specific definitive guidelines, identifies the offence range (that is, the overall range of sentences within the guideline) and a number of category ranges (that is, the sentencing ranges applicable to each of the categories identified in the guideline). As this court has made clear on a number of occasions, the effect of sections 59 and 60 is that a judge must sentence within the offence range, unless satisfied that in all the circumstances of the particular case it would be contrary to the interests of justice to do so. Plainly, that is a substantial threshold to be overcome if there is to be a justified departure from the guideline offence range.

22. The judge is also under a duty to identify which of the categories in the guideline most resembles the offender's case, in order to identify the appropriate starting point for sentencing – unless none of the categories sufficiently resembles the offender's case. But, having identified the most appropriate starting point, the judge is not under a separate duty to impose a sentence within the category range. Factors making it appropriate to adjust the starting point upwards or downwards may therefore result in a sentence which comes within the range of a higher or lower category than that which set the starting point.

23. In the present case the guideline offence range is from a fine to four years' custody. The judge sentenced within that range. Accordingly, although he referred at one point to the interests of justice requiring a sentence longer than the guideline prescribes, his sentence followed the guideline in accordance with section 59 of the Sentencing Code.

24. As is apparent from our brief summary of the applicant's antecedents, he had in the past been sentenced with remarkable leniency for his previous offences. The judge made clear that the applicant was not to be sentenced for those previous offences. The focus necessarily was on sentencing for the offending on 12th August 2023. However, the context provided by

the many previous offences made the present offending substantially more serious than it would have been if it had stood alone.

25. The judge identified the appropriate category as B2. In our view he could not have been criticised if he had concluded that the harm caused to the victims was properly described as "very serious harm or distress", thus bringing the case within category B1, with a category range going up to two years' custody. Given that he did not do so, he was undoubtedly justified in regarding the harm as coming very high in the range covered by category 1 and therefore meriting an initial upwards adjustment towards the top of the category range, before considering aggravating features.

26. The aggravating features rightly identified by the judge justified a substantial further upwards adjustment. Miss Compton's recognition that there was no real mitigation is realistic. We would add, for the avoidance of any doubt on the point, that even if the final sentence were to be two years' imprisonment or less, consideration of the imposition guideline makes it obvious that the sentence must be served immediately and could not be suspended.

27. By paragraphs 13 and 14 of Schedule 16 to the Sentencing Code, the judge was obliged to order the suspended sentences to take effect with the original term unaltered, or with the term reduced, unless it would be unjust in all the circumstances to do so. The presumption in circumstances such as these is that a suspended sentence will be activated consecutively to the sentences for the further offences. The applicant could not have complained if the judge had taken that course.

28. The issue for this court is whether the increase of the provisional sentence from a starting point of 12 weeks' imprisonment to 30 months, before making an appropriate reduction for

the guilty plea, renders the final sentence manifestly excessive.

29. We have hesitated to differ from the decision made by so experienced a judge. We are, however, persuaded that, notwithstanding the factors plainly justifying a substantial increase above the guideline starting point, the sentence for this single breach offence was manifestly excessive. In our judgment, the appropriate sentence, before giving credit of 20 per cent for the guilty plea, was 20 months' imprisonment. The appropriate sentence, after making that reduction, is accordingly 16 months' imprisonment. The suspended sentences totalling eight weeks' imprisonment must be activated in full and must run consecutively to that sentence.

30. We therefore grant leave to appeal. We allow the appeal to this extent. We quash the sentence of 24 months' imprisonment and the concurrent activation of the suspended sentences imposed below. We substitute for the breach offence a sentence of 16 months' imprisonment. We order that the suspended sentences totalling eight weeks' imprisonment be activated in full and consecutively to the sentence for the breach offence. As before, there will be no separate penalty for the damage offence.

31. The restraining order for five years will continue in force.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
