Case No: B4/2012/3174

Neutral Citation Number: [2012] EWCA Civ 1825
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CLERKENWELL & SHOREDITCH COUNTY COURT
(HER HONOUR JUDGE CRYAN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 11 December 2012

Before:

LORD JUSTICE JACKSON
and
SIR STANLEY BURNTON

- -

Between:

DOEY — **Appellant**

- and -

THE MAYOR AND BURGESS OF THE LONDON BOROUGH OF ISLINGTON — **Respondents**

- -

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Mr Reza Choudhury (instructed by Islington Law Centre) appeared on behalf of the **Appellant**.

Ms McKeown (instructed by London Borough of Islington) appeared on behalf of the **Respondents**.

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Judgment

Lord Justice Jackson:

Part 1: Introduction

1. This is an appeal by a contemnor against a 16-week sentence for contempt of court. Such appeals lie to the Court of Appeal pursuant to section 13 of the Administration of Justice Act 1960. By reason of rule 52.3(1) of the Civil Procedure Rules, there is no requirement for permission to appeal.

2. The contempt in this case comprises breaches of an antisocial behaviour injunction imposed by the county court. In this judgment I shall refer to the guidelines issued by the Sentencing Guidelines Council entitled "Breach of an Antisocial Behaviour Order" as "The Sentencing Guidelines" or "The Guidelines".

3. Strictly speaking, the Sentencing Guidelines are only applicable to criminal sentencing. Nevertheless, these guidelines have an obvious relevance to sentencing for civil contempt. In Amicus Horizon Limited v Thorley [2012] EWCA Civ 817 this court held that the guidelines are applicable when a civil court is dealing with breaches of an antisocial behaviour injunction: see paragraph 5 of the judgment of Toulson LJ.

4. After these introductory remarks, I must now turn to the facts.

Part 2: The Facts

5. The appellant is a tenant of a flat at 19 Blair Close Estate, St Paul's Road, London N1. Mr Stephen Edwards owns and occupies the flat at 21 Blair Close, which is immediately above the appellant's flat. There have been many instances of nuisance caused by the appellant to Mr Edwards and his wife. On 4 May 2012 an interim injunction was granted by the Clerkenwell and Shoreditch County Court restraining the appellant from causing nuisance, annoyance or harassment to Mr or Mrs Edwards.

6. The appellant committed a breach of that injunction on 12 or 13 May by playing loud music. The court dealt with that breach on 7 June 2012. It imposed a sentence of 14 days imprisonment.

7. On the same occasion the court discharged the interim injunction and accepted undertakings from the appellant. Those undertakings were as follows:

> "...not to engage in conduct causing or capable of causing nuisance, annoyance, harassment, alarm or distress to Stephen Edwards, Annabel Edwards or any person in the locality residing in, or engaging in, lawful activity in Blair Close, Blair Close Estate, St Paul's road, London N1..."

8. On 3 September the court made a suspended order for possession against the appellant. The court also granted an antisocial behaviour injunction in similar terms to the undertakings which the appellant had previously given. A power of arrest was attached to the injunction. A schedule of admissions was

appended to the court's order of 3 September. These admissions related to incidents between March 2011 and July 2012 of the following character:
(a) loud noise, music and screaming;
(b) disturbance and threats from visitors;
(c) the appellant and visitors banging on Mr Edwards' door;
(d) shouts from the premises of swearing words;
(e) door slamming and shouting and music at early hours;
(f) the appellant ringing the buzzer to the premises and shouting for Jackie, who was, or has from time to time been, the appellant's girlfriend.

9. This order was served on the appellant while he was at court on 3 September. Unfortunately, the appellant did not comply with the antisocial behaviour injunction. On the evening of Wednesday, 7 November 2012 noises of shouting and banging doors emanated from the appellant's flat. Mr and Mrs Edward could hear a violent argument taking place between the appellant and his girlfriend, Jackie. Jackie then departed. There was a commotion on the stairway. Mr Edwards opened his front door, because this was an evening when he needed to take his recycling rubbish down to the bins outside. The appellant, who was standing on the stairs, was loudly abusive towards Mr Edwards. Fortunately, Mr and Mr Edwards between them managed to video record the incident. In the course of the hearing today Sir Stanley Burnton and I have watched that video record. At one point during the incident the appellant shouted "You're a stiff" to Mr Edwards, meaning that he would be dead. The appellant then made a gesture as if shooting. The gesture cannot be seen on the video but it has been described and it is entirely consistent with what we could hear. Mr Doey made a loud noise like the firing of a gun. We had no doubt that, as is alleged in these proceedings, there was a shooting gesture to accompany the shooting noise.

10. Mr Edwards reported the matter to the police, who arrived soon after midnight and arrested the appellant. On the following day, Thursday 8 November, the appellant appeared at Clerkenwell and Shoreditch County Court before HHJ Mitchell. After hearing what was alleged, the judge typed up a schedule of allegations, of which the main section reads as follows:

> "You have been brought to court because it is said you were arrested because on 8th November 2012 at 0040 hrs because you engaged in conduct which cause or was capable of causing nuisance, annoyance, harassment, alarm or distress to Stephen Edwards in that:
> i) You shouted at Stephen Edwards: ‘You'll lose, trust me, you'll lose’; ‘you're a stiff’;
> ii) You pointed your arm at Stephen Edwards and made a loud noise as if firing a gun"

The judge then adjourned the case for five days so that the appellant could consider the schedule of allegations and take legal advice.

11. On Tuesday 13 November the matter came back to the county court before His Honour Judge Cryan for substantive hearing. Both parties were represented by counsel. The appellant admitted the conduct set out in the schedule of allegations. The judge held that the appellant's breaches of the antisocial behaviour injunction were so serious that a custodial sentence was required. He took 24 weeks as the starting point and, after giving credit to the appellant for his admissions, he reduced the sentence to 16 weeks. The judge also activated the previous suspended sentence which had been imposed and ordered the appellant to serve that sentence concurrently with the 16 weeks. Thus the total sentence imposed on the appellant was a term of 16 weeks imprisonment.

12. The appellant was aggrieved by the severity of that sentence. Accordingly, he appeals to the Court of Appeal.

Part 3: The Appeal to the Court of Appeal

13. By an appellant's notice filed on 4 December 2012 the appellant appealed to the Court of Appeal on three grounds. Ground 1 is that the judge failed to consider relevant matters, in particular the applicable provisions of the Sentencing Guidelines issued by the Sentencing Guidelines Council. Ground 2 is that the judge reached a decision which no tribunal properly seised of the facts of the case could have reached. Ground 3 is that the judge erred in the exercise of his discretion, in that he attached too much weight to the rights of Mr and Mrs Edwards and too little weight to the rights of the appellant.

14. This appeal has been argued this morning most attractively by Mr Choudhury, who appears on the appellant's behalf and has said everything which could possibly be urged in support of the appeal. So far as Ground 1 is concerned, Mr Choudhury draws the attention of the court to paragraph 11 of the sentencing guidelines. That paragraph reads:

> "11. When a court is considering the seriousness of breach of an order such as an ASBO, it will need to consider two aspects of culpability:
>
> (a) The degree to which the offender intended to breach the order.
>
> Culpability is variable and an offender may have:
>
> • intended the breach
> • been reckless as to whether the order was breached
> • been aware of the risk of breach; or
> • been unaware of this risk due to an incomplete understanding of the terms of the order.
>
> (b) The degree to which the offender intended to cause the harm that resulted (or could have resulted).
>
> Culpability will be higher where the offender foresaw the harm likely to be caused by the breach

> and will be at its highest where such harm was intended."

15. Mr Choudhury urges upon us that in this instance the appellant was drunk; not drunk to an extreme degree but drunk to a considerable extent. As a result of this, he did not have the degree of foresight or intention which is identified as an aggravating factor in paragraph 11 of the guidelines. I am not impressed by that argument. As Sir Stanley Burnton observed during the course of submissions, this is why the appellant should not have allowed himself to get drunk on the occasion in question. Drunkenness is normally seen as an aggravating factor, not a mitigating factor, in cases such as this. If the appellant blunts his perception or his foresight by drinking excess alcohol, he cannot rely upon that factor in order to reduce his culpability and to invoke the shelter of paragraph 11 of the Guidelines.

16. Mr Choudhury next took us to section 9 on page 9 of the Guidelines. There is set out on this page a table which categorises the antisocial conduct constituting a breach in three boxes: Box 1 is characterised as serious; Box 2 is lesser degree; and Box 3 is no harassment. The full description of Box 1 is serious harassment, alarm or distress has been caused or where such harm was intended. The full description of Box 2 is lesser degree of harassment, alarm or distress where such harm was intended, or where it would have been likely if the offender had not been apprehended. The judge in this case said with reference to that table:

> "Lesser is harassment, causing alarm or distress that such alarm was intended or it would have been likely if the offender had not been apprehended. Serious is harassment, alarm or distress being caused or where such harm was intended. I take the view that this is at the higher end of the middle category, if not above that..."

17. So it can be seen that the judge took the view that this case fell at the top of the second box or perhaps at the borderline between the first and second boxes. Mr Choudhury submits that the judge erred in his characterisation of this offence. Mr Choudhury accepts that this offence falls within the second box in that table but submits that the judge erred in putting the offence at the top end of that box. I do not accept that submission. These guidelines are, as has been many times emphasised, guidelines, not rigid rules. It seems to me that the judge was entirely correct to take the view that this case falls at the top of the second box or on the boundary between the first and second box. The shooting gesture accompanied by a shooting noise must be a manifestation of an intention to cause considerable alarm or distress, particularly when one bears in mind the background to this incident and the harassment to which Mr and Mrs Edwards were subjected for a substantial period before November 2012.

18. Mr Choudhury then drew our attention to the list of aggravating factors towards the bottom of that page in the Guidelines. Mr Choudhury accepted

that there had been a previous breach of a court order for which a two-week suspended sentence had been imposed, but he said, in effect, one swallow does not make a summer; one breach of a court order does not amount to a history of disobedience of court orders. I note, and I think that the judge took into account, the fact that there was only one breach of a previous court order.

19. The second aggravating factor was that the breach was committed immediately or shortly after the order was made. This breach occurred some two months after the order was made, and that I regard as being aggravating.

20. The third aggravating feature is that the breach was committed subsequent to earlier breach proceedings arising from the same order. That factor is present in this case.

21. The fourth aggravating factor is targeting of a person the order was made to protect, and that aggravating feature was present. There are two mitigating factors also set out on the page, but Mr Choudhury does not suggest that either of those factors is applicable in the present case. It seems to me that the judge must have had fully in mind all of those factors when he characterised this breach of the injunction in the way that he did.

22. Mr Choudhury also draws attention to the discussion of personal mitigation on page 5 of the Guidelines, but it does not seem to me that any of that mitigation is present in this case.

23. The second ground adds nothing to the first ground, as Mr Choudhury accepted. The only additional point which he makes under Ground 2 is that on the DVD we do not hear the appellant swearing, and that I accept.

24. Turning to the third ground, Mr Choudhury said that the judge did not have sufficient regard to the right of the appellant to remain in his flat to undergo treatment for his alcohol addiction and so to live a better life. I do not accept that the judge was disregarding the rights, such as they are, of the appellant. The local authority has brought eviction proceedings as a result of breaches of the suspended order for possession, and we are told the appellant is due to be evicted on 31 January. That is a separate matter. It is not part of the order which the court made in respect of breaches of the antisocial behaviour injunction. The short answer to Ground 3 is that Mr and Mrs Edwards do indeed have a right to live in their home undisturbed by harassment or nuisance caused by the appellant. The appellant does not have any right to cause such nuisance or harassment. I do not accept the submission that the judge attached too much weight to the rights of Mr and Mrs Edwards and too little weight to the rights of the appellant.

25. The sentence which the judge imposed for breach of the antisocial behaviour injunction was a proper sentence. It fell within the permissible range. It was in line with the Guidelines. I would dismiss this appeal.

Sir Stanley Burnton:

26. I agree the appeal should be dismissed for reasons given by my Lord.

Order: Appeal dismissed