Neutral Citation Number: [2018] EWHC 3567 (Admin) Case No: CO/2518/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 21/12/2018

Before :

LORD JUSTICE IRWIN
MR JUSTICE PHILLIPS

- -

Between :

CRAIG WILLIAM PENDLEBURY	**Appellant**	**- and -**
DIRECTOR OF PUBLIC PROSECUTIONS	**Respondent**	

- -

James Nieto (instructed by **Landmark Law Solicitors**) for the **Claimant**
Mark Weekes (instructed by **The Crown Prosecution Service**) for the **Defendant**

Hearing date: 30 October 2018

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Judgment Approved

Lord Justice Irwin:

Introduction

1. This is an appeal by way of case stated from the decision of the East London Magistrates on 16 January 2018, to convict the Appellant of an offence contrary to Section 4A of the Protection from Harassment Act 1997, namely stalking involving fear of violence.

2. On 13 November 2017 the Appellant was brought before the magistrates at Thames Magistrates' Court and pleaded not guilty to the following charge:

> "Between 30/9/17 and 10/11/17 that within the CCC your course of conduct amounted to stalking and caused Adelina Sasnauskaite to fear, on at least two occasions, that violence could be used against her when you knew or ought to have

known that your course of conduct would cause fear of violence to Adelina Sasnauskaite on each occasion in that a large number of occasions you have made a number of phone calls, text messages and visited her at work and various home addresses. Contrary to S.4A(1)(a)(b)(i) and (5) of the Protection from Harassment Act 1997."

The Facts

3. The facts found by the magistrates were recounted by them in the case stated as follows:

> "a. That the Appellant and the victim had been in a
>
> relationship for approximately three years and that this relationship had broken down.
>
> b. A number of texts, telephone calls and social media messages were sent by the Appellant to the victim, including calls made four times in one day.
>
> c. The Appellant made threats towards the victim of the use of a sexually explicit recording on a USB stick designed to cause the victim fear.
>
> d. That DC Johnson discovered two messages relating to the USB stick on 29 October 2017.
>
> e. That the Appellant had displayed aggressive verbal behaviour many times to the victim.
>
> f. That the victim "felt frightened that she would be hunted down" by the Appellant.
>
> g. That the number of and timing of the messages were designed to cause fear of violence to the victim and that the Appellant ought to have known his actions would cause the victim to fear him.
>
> h. That the Appellant had made admissions that he had sent the victim a number of messages.
>
> i. That the Appellant had visited the victim's place of work on 10 November 2017.
>
> j. That the victim saw his silhouette in the dark and that he was concealing himself, and that the victim immediately grabbed her phone out of fear.
>
> k. That by concealing himself and then approaching the victim the Appellant's actions were calculated to cause fear of violence.
>
> l. The Appellant made admissions that he attended the victim's place of work.

m. That the victim had been scared by the Appellant's actions.

n. The Appellant's responses to questions were random and inconsistent.

o. The facts "a" to "l" amounted to stalking on more than two occasions.

p. The facts "a" to "l" amounted to the victim fearing violence on at least two occasions and that the pattern of behaviour by the appellant amounted to the fact that he knew or ought to have known that his actions caused the victim to fear that violence would be caused towards her on both occasions."

4. They summarised the evidence of the complainant as follows:

> "**Adelina Sasnauskaite**, gave evidence that:
>
> She was repeatedly contacted by Mr Pendlebury up to four times a day and that he went to her place of work on 25 October 2017 in Poplar. That Mr Pendlebury had made threats to show a sexually explicit recording of her on a USB stick which she denied existed. She said that she had blocked him on Facebook and tried to block her phone, but he kept changing numbers. Mr Pendlebury said he would turn up every day at her work and she felt unsafe and called the police. She said she felt "paranoid like he was hunting me down". This was investigated by DC Johnson.
>
> She stated that Mr Pendlebury attended her work place on 10 November and she saw his silhouette as he was concealing himself across the road. Once he knew she saw him he crossed the road over to her side. A conversation ensued and she had grabbed her phone and called the police. Mr Pendlebury called her a whore, slut and similar names and that he was rambling. She was scared by his actions, and on many occasions, he had been verbally aggressive towards her."

5. In addition, the prosecution called the officer, DC Johnson. He had dealt with Ms Sasnauskaite's report and had found the USB stick.

6. The Appellant gave evidence which was summarised as follows:

> "That he accepted he sent messages about the USB stick, he knew that she had blocked him on Facebook but that they had mutual friends. She had hacked into his Facebook and so he was trying to annoy her. That Adelina knew he had naked photos of her. That all the conversation and messages were two ways and that their chat is "naughty chat". He did not know she had a place in Poplar and that she came running over to him saying I was harassing her. He waited for the police and that they had a perfectly sociable "catch up" chat and that she only

> started crying when the police arrived and she "pulled an Oscar"."

7. The Bench then recorded their findings as follows:

> "We found that the victim gave credible and consistent evidence throughout her responses to questions. She says that she was frightened and paranoid that he would hunt her down and referred many times to his verbal aggressive behaviour. Given the circumstances of the texts that the Appellant sent and that she saw his silhouette in the dark where he appeared to be concealing himself and then walked across the road to her side and throughout her evidence she had been scared by his actions, these factors allowed us to draw the necessary inferences from his conduct making us certain that both limbs of the Act were met beyond reasonable doubt i.e. on at least two occasions there was a pattern of stalking, causing her to fear violence on each occasion and that he knew or ought to have known his (*sic*) that his conduct would cause the victim to fear violence. Taken together with the inconsistent responses by the Appellant and in assessing both witnesses' demeanour we were satisfied that there was fear of violence and knowledge by the defendant as to his conduct on two occasions and that this was a pattern of behaviour which gave us no doubts and which then resulted in a finding of guilt."

8. The Appellant was subsequently sentenced to a Community Order for twelve months, with conditions of unpaid work, a Rehabilitation Activity Requirement and curfew. There is no challenge to the sentence.

9. I will turn to the question formulated for this Court in a moment. But it is worth summarising the concerns of the Appellant in outline. Essentially it amounts to three points. Firstly, that before a fear of violence can be established, there must have been shown to be "actions capable of conveying violence to the Complainant [meaning] some activity entailing physical force, violent conduct, or the threat of physical force or violent conduct". Secondly, there was no such evidence here. And thirdly, the inferences by the Bench "were not properly drawn" from the evidence which was given and could not properly be drawn "in the absence of direct evidence that the Complainant feared that violence would be used by the Appellant".

The Question

10. The question drafted by the Bench was:

> "Was there sufficient evidence for us to find a course of conduct on at least two occasions of stalking and that on each occasion violence would be used against her when he knew or ought to have known that his course of conduct would cause fear of violence to Adelina Sasnauskaite so making Mr Pendlebury guilty under S4A Protection from Harassment Act 1997?"

11. Whilst it is clear that the Bench were attempting to reflect the Appellant's concerns, I am of the view that the question, if redrafted, could and should

reflect the statutory provisions more closely. Accordingly, pursuant to the power under PD 52E, paragraph 3.9, I would redraft the question as follows:

> "Was there sufficient evidence to prove (1) that the Appellant's course of conduct amounted to stalking and (2) caused the complainant to fear, on at least two occasions, that violence would be used against her and (3) that the Appellant knew, or ought to have known, that his conduct would cause fear of violence on each of those occasions."

The Statute

12. The relevant statute is the Protection from Harassment Act 1997 ["the Act"]. The provisions establishing this offence read:

> "**4A Stalking involving fear of violence or serious alarm or distress**
>
> (1) A person ("A") whose course of conduct—
>
> (a) amounts to stalking, and
>
> (b) either—
>
> (i) causes another ("B") to fear, on at least two occasions, that violence will be used against B, or
>
> (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.
>
> (2) For the purposes of this section A ought to know that A's course of conduct will cause B to fear that violence will be used against B on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause B so to fear on that occasion."

13. S4A is one element in a graduated sequence of offences created by the Act. Harassment is prohibited by S1, and S2 creates the offence of harassment. By S7(2), an interpretation section:

> "References to harassing a person include alarming the person or causing the person distress."

14. S2A creates the offence of stalking:

> "**2AOffence of stalking**
>
> (1) A person is guilty of an offence if—
>
> (a) the person pursues a course of conduct in breach of section (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.

(3) The following are examples of acts or omissions which, in particular circumstances, are ones associated with stalking —

(a) following a person,

(b) contacting, or attempting to contact, a person by any means,

(c) publishing any statement or other material—

(i) relating or purporting to relate to a person, or

(ii) purporting to originate from a person,

(d) monitoring the use by a person of the internet, email or any other form of electronic communication,

(e) loitering in any place (whether public or private),

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

(g) watching or spying on a person."

15. Section 4 creates the offence of putting people in fear of violence. The important words are:

"**4. Putting people in fear of violence.**

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion."

As with S4A, there are statutory defences not relevant to this case.

16. It will be seen that S4A represents the most serious of the offences created in this part of the Act, since it combines or accumulates the elements of stalking, which either induces fear of violence on two or more occasions, or causes serious alarm or distress with the requisite consequences.

The Submissions

17. The principal contention of the Appellant is that for his conviction to stand his actions must have been "capable of conveying violence to the Complainant: activity entailing physical force, violent conduct or the threat of the same". Mr Nieto says that is simply not made out on the evidence.

18. He lays stress on the judgment of the Court of Appeal Criminal Division in *R v Qosja* [2016] EWCA Crim 1543. The facts of that case were summarised by the Court thus:

> "4. The prosecution case was that the appellant had stalked the complainant between 28th July and 2nd August 2015. He telephoned and sent her over-familiar text messages. On 1st August 2015 he gained unauthorised entry into her house and entered her bedroom while she slept. She woke to find him sitting on her bed. He was drunk and angry, and indeed went on to slap her face twice. Later that day in the afternoon he returned to her room, again uninvited, to return keys which he had taken to the house without authorisation."

19. The Court went on to consider various of the authorities bearing on S4A, considering whether the relevant fear had to be fear of immediate or present violence. They concluded it did not:

> "31. In our judgment, a plain and natural reading of the wording of section 4A (1)(b) (i) of the Protection from Harassment Act 1997 reveals that the section is wide enough to look to incidents of violence in the future and not only to incidents giving rise to a fear of violence arising directly out of the incident in question. Nor is there any requirement for the fear to be of violence on a particular date or time in the future, or at a particular place or in a particular manner, or for there to be a specific threat of violence. There can be a fear of violence sufficient for the statute where that fear of violence is of violence on a separate and later occasion. The position can be tested simply by reference to the example of somebody saying "I'll come back and get you". On Miss Scott's interpretation that would be insufficient fear to fall within the scope of the section; that is not a position that we consider to be correct.
>
> Whether or not fear of violence is sufficient to satisfy the requirements of section 4A(1)(b(i) is a question of fact and degree on the evidence. What is key is that the complainant has to fear on at least two occasions that there **will** (rather than **might**) be violence directed at him or her."

20. I pause to note that the last part of those remarks should not be misunderstood. The prosecution does not have to prove that the fear will be fulfilled. Fear that something

"will take place" is a belief, not a proof that the thing feared will in fact arise. Moreover, the distinction between a fear that something "will" happen, and a fear that something "might" happen is not necessarily easy to formulate. The two words are descriptors of the degree of fear: in a sense no fear can be other than a fear that something "might" happen, until it actually does so. In my view, the point being emphasised by the Court of Appeal, based on the language of the statute, is that the fear of violence must be real and not remote, or hypothetical.

21. In my judgment, the decision in *Qosja* gives little or no support to the broad points advanced by Mr Nieto. The statute requires no objective conduct on the part of a defendant beyond the stalking. Here no issue is taken as to the stalking. The remainder of the statutory test is concerned with the effect on the mind of the complainant, and the knowledge, or constructive knowledge, of the accused. Once it is proved that an accused has engaged in a course of conduct which fulfils the definition of stalking in S2A of the Act, then the next question which arises is the actual effect on the mind of the victim.

22. However, Mr Nieto's further points have more substance. There is no evidence from the victim here (for victim she was, of stalking at least) of fear of violence. She was clearly both alarmed and distressed by the Appellant and she felt frightened she would be "hunted down", but these words are insufficient to establish the fear of violence. The evidence is not specific or clear enough. In the course of argument, it was put to Mr Nieto that the evidence of the victim's reaction in the episode of 10 November was obviously explained by a fear of violence. He rejected this, but submitted that even if that were the case, this was one episode and the statute requires two.

23. Mr Weekes for the Crown submitted that there was ample evidence of circumstances which could justify fear on the part of the victim. That was sufficient as a basis for the inference by the Bench that she had feared violence in fact. There is no requirement for direct evidence of the fear. That point can be derived from the decision in *Simon Howard v Director of Public Prosecutions* [2001] EWHC (Admin) 17. In that case the Appellant had offered violence on one occasion, and she had given direct evidence of her fear in respect of that first episode. On a second occasion, the Appellant had directly and graphically threatened violence against the victim's dogs. The victim had not been asked if she feared violence to herself as a consequence. The Magistrate had nevertheless concluded that "by her demeanour in Court, I reached the inevitable inference that [the victim] lived in fear of [the appellant]". The Court concluded that was a sufficient basis for the necessary second episode of fear of violence.

24. On that basis, Mr Weekes argued that there was sufficient material here to conclude that the necessary fear of violence could be inferred in respect of the earlier episodes.

Analysis

25. According to the case stated, by which we are of course bound, the victim here gave no direct evidence of a fear of violence.

26. The evidence of a threat to use the sexually explicit material is not evidence of a fear of violence as such, although it might indicate the degree of hostility and even ruthlessness on the part of an offender. Thus finding "c" as recorded by the Bench was an error, if fear of exposure of sexually explicit material was thought to constitute a "fear" within the terms of S4A. Equally, in my view a fear that she would be "hunted down" by the Appellant, unless more is said, is not evidence of a fear of

violence; it might perfectly well be a fear of stalking, of never being left in peace from harassment. The words "hunt" and "stalk" are, after all, synonyms.

27. The pattern of "aggressive verbal behaviour" might well found a fear of violence, even where violence has not previously taken place, particularly in the context of a stalker. However, the victim did not herself link that behaviour to a fear of violence.

28. In my view, the episode of 10 November would very easily engender a fear of violence, given the bizarre and frightening appearance by the Appellant. Moreover, there is here at least some evidence of the victim's reaction. The finding that the victim responded by "grabbing" her phone out of fear leads me to conclude that in respect of that occasion the Bench were entitled to conclude that the victim was reacting through a fear of violence, even though she never said so in evidence.

29. However, in the end it does not seem to me that the prosecution evidence established more than one occasion on which the Bench, if directing themselves properly, could be sure the victim was induced to feel fear of physical violence by the actions of the Appellant. It may be that closer or more skilful questioning might have elicited the necessary answers, but the critical questions do not appear to have been asked, or if asked, answered so as to found more than one occasion of a real fear of violence, as opposed to a fear of continued harassment and stalking. The finding that the victim was "scared" by the Appellant's actions, and the acceptance of her credibility cannot change the content of her evidence. In my judgment, it is not enough to establish that conditions existed which might reasonably have engendered a fear of violence: that will be so in many stalking cases. The matter is one of fact. The Bench must be sure that such a fear was actually engendered. In this case there was no history of violence and no attempt at violence. There was no threat of violence, against the victim or anyone (or anything) else. The offence requires proof of a specific state of mind on the part of the victim, not merely proof of circumstances which might reasonably engender that state of mind.

30. I am also unpersuaded that the case of *Simon Howard* is of any assistance. In that case the victim was threatened with being stabbed on the earlier occasion, in other words there was a direct threat of very serious violence: to "slash her throat". On the second occasion there was a direct threat of violence to her dog. After the first such episode, it was inevitable that the victim there would be put in fear of physical violence herself, when further threats and anger came from her stalker. That was the reasoning of Lord Woolf LCJ in paragraph 21. Such is not the case here.

31. Neither counsel took the Court to the helpful authority of *R v Henley* [2000] Crim LR 582. In that case the Court of Appeal quashed a conviction for this offence on the ground that the judge had wrongly directed the jury that "to put [the victim] in fear of violence meant "to seriously frighten" her as to what might happen: that was an error. As the Editor of the Criminal Law Review put it in the Commentary:

> "The trial judge equated [the fear of violence] with causing the victim to be seriously frightened but this interpretation is (rightly) rejected by the Court of Appeal. A serious fear can be caused by all sorts of non-violent reasons."

32. I must not be thought to minimise what happened to the victim. This was an unpleasant case of stalking, and the evidence showed clearly that the victim was alarmed and distressed by what happened. Had the matter been approached

differently, it may be that the ground for a proper conviction under S4A would have been established. However, a conviction cannot be maintained on such a basis.

33. For those reasons, I would allow the appeal.

Mr Justice Phillips:

34. I agree with Irwin LJ's statement of the relevant legal principles and reformulation of the question drafted by the Bench. I also agree that the magistrates were entitled to find that the episode of 10 November 2017 was an occasion on which the Appellant's stalking of the victim caused her to fear violence. The more difficult question is whether they were entitled to find that there had previously been at least one other such occasion.

35. I take a different view as to the inferences which could be drawn from the words used by the victim in giving evidence, taking into account that the magistrates were assessing her demeanour as she gave that evidence. In my judgment, evidence from the victim that she was "paranoid that he would hunt her down" and "scared by his actions" was capable of supporting a finding that there was a fear of violence, particularly as it was juxtaposed with references to the Appellant's verbal aggressive behaviour. It is not a requirement that a victim uses the word "violence" in describing her fears: magistrates listening to a victim describing a fear of being "hunted down" could certainly conclude, from her demeanour, that that was a reference to fearing violence.

36. However, in this case the magistrates stated that they drew the inference that the victim feared violence "... in the circumstances of the texts the Appellant had sent and the that she saw his silhouette in the dark where he appeared to be concealing himself…". The texts to which the magistrates expressly referred contained threats by the Appellant to show a sexual explicit recording, not threats of violence. Further, the occasion on which the victim saw the Appellant concealing himself was the 10 November 2017. It follows that neither of those "circumstances" in any way supported an inference that the victim feared violence on occasions prior to 10 November 2017 and demonstrates that the magistrates took into account impermissible matters in determining that question. In particular, their approach appears to have been to look at everything in the round over the whole of the relevant period and then to determine what inferences to draw as to the victim's state of mind. That approach, however, entails incorrectly taking into account the events of 10

November 2017 in assessing the victim's state of mind on occasions prior to that date. As the magistrates did take those events into account as part of the factual matrix they were considering in determining the victim's state of mind, they were entitled to find that the victim was caused to fear violence only on that occasion.

37. I therefore agree with Irwin LJ that the magistrates erred in finding that there were at least two occasions on which the victim feared violence, although for different reasons.

38. I too would allow the appeal.