R v O'Neill [2016] EWCA Crim 92 the Court of Appeal

INTRODUCTION

1. On the 5th December, 2014, in the Crown Court at Kingston-upon-Thames, before HHJ Dodgson, the Appellant was convicted of two counts (counts 4 and 5) of Breach of a Non-Molestation Order, contrary to s.42A of the Family Law Act 1996 ("the FLA 1996").

2. The FLA 1996 provides, insofar as relevant, as follows:

" 42. Non-molestation orders.

(1) In this Part a 'non-molestation order' means an order containing either or both of the following provisions

(a) Provision prohibiting a person ('the respondent') from molesting another person who is associated with the respondent; .

42A Offence of breaching non-molestation order

(1) A person who without reasonable excuse does anything that he is prohibited from doing by a non-molestation order is guilty of an offence."

3. On the 9th January, 2015, she was sentenced by HHJ Dodgson on both counts to concurrent Community Orders for a period of twelve months with an unpaid requirement of 40 hours and a supervision requirement.

4. On the verdict of the jury, the Appellant was in breach of paragraph 1 of a Non-Molestation Order made by a High Court Judge in the Family Division, dated 21st May, 2013 ("the Order"), which provided as follows:

" The Respondent, ZN, is forbidden to intimidate, harass or pester the Appellant, PR, and must not instruct, encourage, assist or enable any other person to do so, or in any way suggest that any other person should do so."

(Italics added.)

5. The Appellant was acquitted of a further three counts of Breach of a Non-Molestation Order.

6. The Appellant appeals against conviction by leave of a different constitution of the Full Court, limited to a single Ground, following refusal of leave by the Single Judge.

7. The single Ground of Appeal was that the Judge misdirected the jury as to the definition of harassing conduct.

8. The direction in question was in these terms (at pp. 7 8 of the Transcript of the summing-up):

" What does 'harassing' mean? Harassment means causing alarm or distress. Intimidation has its ordinary meaning. I'm not going to try and define that anymore. It's an ordinary English word. You're quite capable of discerning amongst you what that means.

Now, we've also got the word 'pestering' in the indictment. .I direct you that in the circumstances of this case, pestering is not something that you need concern yourself with. That is not to say that the Crown say there was no pestering. They may well say that there was,

of sorts, but it does not fit within a particular legal capsule, if I can put it in that way ..It would require a course of action. ..in these circumstances, just really cross out 'pestering'. You're going to be considering: were these communications harassing or intimidating .? "

9. For the Appellant, Mr Rule (who did not appear in the Court below) submitted that, when considering whether the conduct was "harassing", the jury ought to have been directed to consider whether it was oppressive and unreasonable.

10. We were grateful to both Mr. Rule and to Mr. Hookway, who appeared for the Crown (here and below), for their assistance.

THE FACTS

11. The Appellant was a qualified solicitor. From about 1997, she was in an intermittent intimate relationship with Mr PR ("the Complainant"), who was at the time her employer or supervisor and was himself married. The relationship ceased around the end of 1999 but resumed again around 2002 to 2003. The couple had a daughter together and she was born in April 2004 but, by that time, their relationship had once again finished. Their daughter ("K"), initially lived with the Appellant but Family Court proceedings over the period 2005 2010 culminated in K going to live with the Complainant who had three other children from a previous relationship. Under the terms of that Court Order, the Appellant was permitted contact with her daughter which had to be arranged with the Complainant.

12. On the 14th May, 2013 (for reasons which are not before us), the Complainant made an ex parte application to the High Court for a Non-Molestation Order. A temporary order was granted on the same day, including a provision for it to be reviewed by a High Court Judge at a hearing on the 21st May, 2013. At that hearing, which the Appellant did not attend, Theis J made a further order (as above, "the Order"), expressed to last indefinitely insofar as it applied to the Complainant. Paragraph 1 of the Order was in the terms already set out. The Order was served originally by e-mail and a further copy was also sent by post on the 24th May, 2013.

13. We turn next to the e-mails sent to the Complainant (and others) in 2013, forming the gravamen of the Counts on which the Appellant was convicted.

14. Count 4 related to the following e-mails:

i) 25th May: The Appellant sent an e-mail to the Complainant regarding the care arrangements for K and expressing concerns about her relationship with her nanny.

ii) 29th May: This e-mail expressed concerns for K's wellbeing, stated that K wanted to be with the Appellant and reiterated her proposals for care arrangements, accused the Complainant of failing to provide financially for her or their daughter and further accused the Complainant of hiding the truth which, she stated, would come out.

iii) 16th July: This e-mail was purportedly sent to the Complainant by the Appellant's mother. It invited K on holiday and stated that the author would not stop writing to the Complainant and his daughter despite the police having spoken to the Appellant in this regard. The e-mail accused the Complainant of overriding his daughter's wishes to her detriment and of untruthfully telling others that K did not want to live with her mother. It was stated that the Complainant's attempts to silence the Appellant and her mother from telling the truth would not work. The Complainant was accused of being angry, of trying to cut the Appellant out of her daughter's life, of concealing the truth and getting others to lie on his behalf. Near the end of the

e-mail, this is said: "There is growing interest in this story in the locale, particularly since it forms part of and is integral to your own attempt at a personal cover up".

iv) 24th July: This e-mail too purported to come from the Appellant's mother. It addressed similar matters to those raised in previous e-mails. It went on to make reference to a letter written by a psychotherapist from The Priory, stated to have raised concerns about photographs of young girls found on the Complainant's computer and the risks said to be posed by his unaccompanied contact with K. It was said that some parents (at K's school) had seen the letter:

" which is in the public domain and forms the basis of a press article about you. The article and photos will be distressing to your children which is a pity but will vindicate ZN and the suggestion she is lying. What the parents want to do with the information they have is up to them and nothing to do with ZN who does not encourage or influence them. We now have family who are parents at the school and naturally no court order will prevent us from contacting them or them from speaking freely about the matter within the school or outside, particularly whilst there are concerns about her welfare. "

The e-mail then returned to the familiar themes of where K was to live and whether K wished to visit the Appellant and her mother over the summer. Finally, this e-mail concluded as follows:

" If telling the truth or writing to ask to see K amounts to harassment of you so be it. K will see our dismissal of your continuing attempt to silence us and force us to walk away from her via orders etc. as a measure of our commitment to protect her and yours to cover up the truth."

15. Pausing there, it may be noted that all the e-mails were copied to a Mr. Simon Hall who worked with the Complainant at the same firm and (it would appear) had been helping him liaise with the Appellant, including as to access arrangements.

16. Count 5 related to an e-mail sent, it would seem, on both the 10th and 13th October 2013, by the Appellant to the Complainant and copying in various other individuals who were said to have responsibility for K's welfare. Mr Hall was again copied in. The Appellant expressed regret that the Complainant had not permitted K to join her on holiday in the summer. She invited K on a further holiday over Halloween and requested contact with her at Christmas. She again expressed concern about his refusal to allow K to visit the Appellant and the effect it was having on K's emotional wellbeing. The e-mail moved on to addressing the Complainant's "psychiatric issues" and referred to the " imagery on your computer and your fixation with young girls dressed in school uniform absolutely relevant in terms of K's welfare as she hits puberty". Continuing, the e-mail asserted that it was essential that K had females around her who were aware of the situation and the risks posed to her. The e-mail made it clear that the letter from the therapist (referred to above) had been seen by others and that the Appellant would share the information in her daughter's best interests.

17. In interview, the Appellant made no comment to the questions put to her.

18. The prosecution case on Counts 4 and 5 was that the Appellant sent the e-mails which were intimidating and/or harassing and were intended to be so. She was aware of the terms of the Order and she had no reasonable excuse for sending the e-mails.

19. The defence case on Count 4 was that the Appellant did not know the terms of the Order before sending the first e-mail; the second e-mail was neither intimidating nor harassing; the third and fourth e-mails had been sent by her mother and had nothing to do with her. As to

Count 5, the e-mails were neither intimidating nor harassing. In seeking to protect her child she had a reasonable excuse for sending the e-mails she did.

20. In very broad terms, the issues for the jury were whether or not the Appellant sent the e-mails (Count 4 only); whether or not the e-mails were intimidating or harassing and were intended to be so; if so, whether or not the Appellant had a reasonable excuse for sending them. There were also issues as to whether or not the Appellant knew of the terms of the Order which are no longer of concern on this appeal.

21. Some mention should be made of the Complainant's and the Appellant's evidence (as recorded in the Judge's Summing-Up). The Complainant found the 25th May e-mail totally bewildering. The 29th May e-mail left him feeling "bewildered and battered". It had to be viewed in the context of a chain of events and the experience was really horrible. The 16th July e-mail left him feeling bullied and threatened. It was intimidating to him. The 24th July e-mail he found "ghastly, bullying, intimidating and wrong". The 10th October e-mail had an effect on him which was intimidating and harassing and made him feel absolutely ghastly. It was getting bigger and bigger. He saw it as bullying and he did not know when the next e-mail was going to arrive or what it would say. In cross-examination, he denied that he had an inappropriate interest in children; he had no inappropriate images on his computer; nor was it a matter he had discussed with either the Appellant or his therapist. The topic had never been raised in the Family Court. He was upset to be accused of such things. He had received counselling from The Priory but it had nothing to do with a sexual interest in pubescent girls.

22. Giving evidence, the Appellant averred that when she and the Complainant were in a sexual relationship he developed an obsession with dressing her as a school girl and caning her. It was one of the matters which prompted them to seek help for him at The Priory. She had spoken to his psychotherapist on her own about the matter. Later, it became apparent to her that the Complainant had images on his computer of 11 14 year old children dressed in school uniform; she had seen 60 or 70 such images. She was not really concerned at the time. She was now concerned for her daughter's welfare the Complainant might abuse K as she approached puberty. Her various other concerns echoed those which appear from the e-mails set out above. Her parents were also very concerned as to K's welfare. As to the 25th May e-mail (sent at a time when she was not aware of the terms of the Order), she accepted that "it was rather intimidatory in tone" but it was just a matter of fact. She did not think that the 29th May e-mail amounted to harassment and it had not been her intention to harass or intimidate although she accepted that the tone of the penultimate paragraph was "rather intimidatory". The e-mails of 16th and 24th July were written by her mother and she did not know that her mother was going to write them. She did not think that the 10th and 13th October e-mails were harassing or intimidating. They were simply to ask about access. The passage about young girls was a reply to something said by the Complainant. She had provided the letter from the Complainant's psychotherapist to a friend who was a parent at the school. She was motivated to write the e-mails by K's unhappiness and K's desire to live with her.

23. In cross-examination, the Appellant agreed that she had made no mention in the Family Court proceedings of the Complainant's alleged sexual predilections although it was a matter about which she had told the CAFCASS officer. She did not accept that the 25th May e-mail was harassing. At the time of sending the 29th May e-mail, she was not thinking straight and hoped that the Complainant might come round to her way of thinking.

24. The Appellant was convicted by the jury.

THE RIVAL CASES

25. For the Appellant, Mr Rule's essential submission was that the Judge's direction as to harassing conduct omitted reference to any element of oppression; it was that element which set the threshold, so justifying the attachment of criminal liability to the Appellant's conduct. Mr Rule referred us to a number of authorities in this regard, to which we shall come. "Oppression" added something and could not be equated to "without reasonable excuse"; accordingly, the Judge's several references to the question of whether the Appellant had a "reasonable excuse" for what she did went to a separate issue and did not make up for that failure to deal with the element of oppression. Mr Rule placed emphasis on the context in which the e-mails had been sent, their intermittent nature and the "cessation" between July and October 2013. The Judge's direction was in error; he had omitted an ingredient of the offence oppression comprised a missing additional element. If that was right, then it was a "leap too far" to conclude that the conviction was safe.

26. For the Crown, Mr Hookway underlined that the Judge's direction had been agreed after discussion with counsel. However, he very fairly accepted, that it was now difficult to say that a reference to "oppression" should not have been added. The thrust of his argument was that the conviction nonetheless remained safe. Given the contents of the e-mails, the Complainant's evidence and the Appellant's evidence "conceding" that passages in the 25th and 29th May e-mails were intimidatory, oppression would not have added much.

DISCUSSION:

27. The matter falls conveniently under two broad headings:

i) Was there a misdirection? ("Issue I")

ii) If yes, was the conviction nonetheless safe? ("Issue II")

Issue I:

28. We return to the Judge's direction (set out above). As is apparent, "pester" dropped out of the picture and no more need be said about it. No complaint is or could be made as to the Judge's direction in respect of "intimidate". However, with respect to the Judge and for the reasons which follow, it seems plain to us that there was a mis-direction as to the meaning of "harass". In fairness to the Judge, his direction was agreed with counsel (then appearing) but that feature cannot preclude our conclusion.

29. The Judge defined harassment as "causing alarm or distress". It is to be inferred that the Judge's formulation is taken from s.7(2) of the Protection from Harassment Act 1997 ("the 1997 Act"). S.7(2) is in these terms:

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

Whereas the Judge equated harassment with causing alarm or distress, s.7(2) of the 1997 Act speaks of harassment including alarm or distress. The difference is significant and goes to the minimum threshold requirement for conduct to warrant the sanction of the criminal law.

30. S.1(1) of the 1997 Act contains the prohibition of harassment and is widely drafted:

" (1) A person must not pursue a course of conduct

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts harassment of the other.

.. "

S.1(3) contains various defences, to one of which we shall return (below). S.2 provides (inter alia) that a person who pursues a course of conduct in breach of s.1(1) is guilty of an offence.

31. Given the width of the prohibition (s.1(1)) and the criminal offence which flows from a breach of that prohibition, a key issue here is the need to distinguish between conduct which, however objectionable, does not justify invoking the criminal law and conduct which crosses the line and results in criminal liability. This is especially so when regard is had to the many and variety of areas where allegations of harassment (justified or not) may arise: by way of examples, the workplace, the field of Public Order and family or domestic situations.

32. Many actions that cause alarm or distress will not amount to harassment; hence, the requirement, well established in authority (see below), that the conduct must also be oppressive. The requirement of oppression always and of course to be considered in context serves as a yardstick, helping the law to draw a sensible line between the give and take of daily life and conduct which justifies the sanctions of the criminal law. As will thus be appreciated, by equating harassment with the causing of alarm or distress and omitting any mention of the element of oppression, the Judge's direction fell into error.

33. Relatively few citations suffice to make these observations good. In Thomas v News Group Newspapers Ltd [2001] EWCA Civ 1233; [2002] EMLR 4, the defendants published articles about police sergeants being demoted after the claimant (referred to as a "black clerk") complained about racist jokes. The issue for the Court was whether it was arguable that the articles harassed the claimant by inciting racial hatred against her. For our purposes, the importance of the case lies in the observations of Lord PR MR (as he then was), at [29] [31]:

" 29. Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.

30. The act does not attempt to define the type of conduct that is capable of constituting harassment. 'Harassment' is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.

31. The fact that conduct that is reasonable will not constitute harassment is clear from section 1(3)(c) of the Act .. "

34. **Majrowski v Guy's and St. Thomas's NHS Trust** [2006] UKHL 34; [2007] 1 AC 224 concerned the question of whether s.3 of the 1997 Act created a statutory tort for which an employer could be vicariously liable. For present purposes, the observations of Lord Nicholls and Baroness Hale furnish valuable guidance on drawing sensible lines. At [30], Lord Nicholls said this:

" ..courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the

boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under section 2. "

At [66], Baroness Hale expressed the point this way:

" All sorts of conduct may amount to harassment. . A great deal is left to the wisdom of the courts to draw sensible lines between the ordinary banter and badinage of life and genuinely offensive and unacceptable behaviour."

35. In **Dowson and others v Chief Constable of Northumbria Police** [2010] EWHC 2612 (Admin), Simon J (as he then was) dealt with 6 linked claims made by police officers of Northumbria Police, complaining that the actions of a Detective Chief Inspector amounted to harassment of officers under his command for which the defendant was vicariously liable. In the course of his review of a number of authorities, Simon J (at [132]) cited the following passage from the judgment of Gage LJ in Conn v Sunderland City Council [2007] EWCA Civ 1492, at [12]:

" .It seems to me that what, in the words of Lord Nicholls in Majrowski, crosses the boundary between unattractive and even unreasonable conduct and conduct which is oppressive and unacceptable, may well depend on the context in which the conduct occurs. What might not be harassment on the factory floor or in the barrack room might well be harassment in the hospital ward and vice versa. In my judgment the touchstone for recognising what is not harassment for the purposes of sections 1 and 3 will be whether the conduct is of such gravity as to justify the sanctions of the criminal law. "

At [142], Simon J set out, with respect, most helpfully, his own summary of what needed to be proved as a matter of law in order for the claim in harassment to succeed:

" (1) There must be conduct which occurs on at least two occasions,

(2) which is targeted at the claimant,

(3) which is calculated in an objective sense to cause alarm or distress, and

(4) which is objectively judged to be oppressive and unacceptable.

(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.

(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'."

36. In **R v Haque** [2011] EWCA Crim 1871; [2012] 1 Cr App R 5, the defendant was charged with putting his brother in fear of violence by harassment, contrary to s.4(1) of the 1997 Act. Giving the judgment of the Court, Hooper LJ accepted (at [69]) that s.1 of the 1997 Act is so broadly defined that it may be necessary to "import non-statutory requirements into the definition of the offence". In accordance with prior authority, the Crown thus had to prove, inter alia, that the conduct in question was oppressive; the Crown did not need to prove that the defendant's conduct was also unreasonable as s.1(3) provided that it was for the defendant to show that his conduct was reasonable (at [73]).

37. Turning from the 1997 Act to the Family Law context from which the present case emanates, our understanding is that the wording of the Order is the "standard" wording when such injunctions are sought or, at least, this wording is very widely used. In this regard, the observations of Sir Stephen Brown P, in **C v C [1998] Fam. 70**, at 73, are instructive as to the gravity which is required before the law is engaged:

" .[Molestation] implies some quite deliberate conduct which is aimed at a high degree of harassment of the other party, so as to justify the intervention of the court .

There has to be some conduct which clearly harasses and affects the applicant to such a degree that the intervention of the court is called for."

38. Finally, in this review of authority, Blackstone, at B2.180, provides a very useful summary:

" The definition provided by s.7 is clearly inclusive and not exhaustive 'Harassment' is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce the consequences described in s.7. By s.1(3) of the Act reasonable and/or lawful courses of conduct may be excluded. The practice of stalking is arguably the prime example of harassment .but a wide range of other actions could, if persisted in, be so categorised. A course of conduct which is unattractive and unreasonable does not of itself necessarily constitute harassment; it must be unacceptable and oppressive conduct such that it should sustain criminal liability Harassment includes negative emotion by repeated molestation, annoyance or worry. The words 'alarm and distress' are to be taken disjunctively and not conjunctively, but there is a minimum level of alarm or distress which must be suffered in order to constitute harassment. "

39. Pulling the threads together:

i) We respectfully agree with and adopt the opening lines of this passage from Blackstone as providing a concise, working understanding of "harassment"; thus, to repeat:

"The definition provided by s.7 is clearly inclusive and not exhaustive 'Harassment' is generally understood to involve improper oppressive and unreasonable conduct that is targeted at an individual and calculated to produce the consequences described in s.7. By s.1(3) of the Act reasonable and/or lawful courses of conduct may be excluded."

ii) Harassment, within the meaning of the Order, cannot simply be equated with "causing alarm or distress".

iii) The danger of doing so is that not all conduct, even if unattractive, unreasonable and causing alarm or distress, will be of an order justifying the sanction of the criminal law.

iv) Here, the Judge's direction ought to have included a reference to the jury needing to be sure that the conduct was oppressive, not merely causing alarm or distress.

v) Some such further wording, dealing with the element or ingredient of oppressive conduct, would have served to focus the jury's mind on the distinction between criminal conduct and conduct (however unpleasant) falling short of attracting criminal liability.

vi) Accordingly, there was a misdirection in this case as to the meaning of the word "harass" in the Order.

40. For completeness, we add this. S. 1(3)(c) of the 1997 Act affords a defendant a defence; a course of conduct will not amount to harassment if the defendant shows that " in the particular

circumstances the pursuit of the course of conduct was reasonable". Accordingly and for the reasons given in **R v Haque** (supra), certainly where the 1997 Act is directly applicable, the Crown does not need to prove that a defendant's conduct is unreasonable. The present case involves offences allegedly committed in contravention of the FLA 1996, rather than the 1997 Act. In our judgment, however, "harass" in the Order is to be read as it would be under the 1997 Act, so that the Appellant would not be in breach of the Order if she could make good the defence under s.1(3)(c) of the 1997 Act. In that regard, the Judge's direction (see, esp., at p.11 of the summing-up) was amply fair to the Appellant, perhaps generous as to the burden of proof.

Issue II:

41. Despite the misdirection we have found, was the conviction nonetheless safe? The point is a short one but critical to the outcome of this appeal.

42. We have not found this question straightforward. On the one hand, it can properly be said that the Crown's case was strong; the contents of the e-mails did the Appellant no credit and were extremely objectionable. The Judge's direction as to the word "intimidate" could not be faulted. Moreover, as recorded in the summing-up, the Appellant herself accepted that some of the contents of two e-mails were "rather intimidatory in tone". On the other hand, our conclusion as to a misdirection involves the Judge having omitted to give the jury a direction as to an important, central element or ingredient of the offence.

43. On balance, we have come to the conclusion that while a jury may very well have convicted the Appellant had the Judge given a correct direction as to the meaning of "harass" in the Order given the objectionable content of the e-mails we cannot be sure that they must have done so; we accept Mr Rule's submission that that would be a "leap too far". It is possible, not simply fanciful, that a focus on the point that not all objectionable conduct causing alarm and distress constitutes harassment might have resulted in an acquittal. For our part, we also would not wish to read too much into the Appellant's acceptance that a part of two e-mails was "intimidatory in tone", in the light of her evidence as a whole, as summarised by the Judge.

44. In the circumstances, we are driven to allow the appeal.