

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 CRIMINAL SIDE
3

4 SCA NO: #0011/2020
5

6 JESSICA ANDREA SWINAMER
7

8 v.
9

10 THE QUEEN
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16 **Appearances:** Ms. Jessica Swinamer, Appellant, In Person

17 Ms. Ann Mulligan, for the Respondent/Crown
18

19 **Before:** Dame Linda Dobbs (Acting Judge)

20 **Hearing date:** 5th August 2020
21
22

23
24 **HEADNOTE**

25 *Criminal Law – Appeal from the Summary Court Against Sentence imposed by*
26 *Magistrate – Charges: Using an ICT network to defraud, abuse, annoy, threaten*
27 *or harass – Damage to Property – Attempting to Obstruct the course of justice –*
28 *Ground of Appeal: Manifestly excessive, insofar as the Magistrate declined to*
29 *record “no conviction”*
30

31
32 **JUDGMENT**
33



1 INTRODUCTION

2 1. On 12 November 2019, the Appellant, Miss Jessica Swinamer, pleaded guilty in the
3 Summary Court to the following charges

4 a. 2 x damage to property, contrary to s.267(1)(a) of the *Penal Code* (2013 Revision)
5 (maximum sentence \$5000 fine/5 years' imprisonment);

6 b. 2 x using an ICT network to defraud, abuse, annoy, threaten or harass, contrary to
7 s.90(1) of the *Information and Communications Technology Authority Law*
8 (2017 Revision) (maximum sentence \$10,000 fine/1 year's imprisonment);

9 c. 1 x attempting to obstruct the course of justice, contrary to s.107(1)(d) and s.318 of
10 the *Penal Code* (2017 Revision) (maximum sentence 7 years' imprisonment).

11 2. A further charge of causing fear or provocation of violence, contrary to s.88(a) of the
12 *Penal Code* (2017 Revision), was left to lie on file.

13 3. The court adjourned the matter for a Victim Impact Report ('VIR') and a Social
14 Inquiry Report ('SIR') to be prepared.

15 4. On 3 February 2020, the court, having received both reports adjourned the matter again
16 for a psychiatric report to be obtained.

17 5. Due to the Appellant's inability to pay for the psychiatric report, the matter proceeded
18 to sentence before Magistrate Gunn on 11 March 2020 in the absence of a report, at the
19 Appellant's request. The Appellant was legally represented at the hearing.

20 6. The Appellant was sentenced to a 2-year Probation Order with the following
21 conditions:

- 1 a. The Appellant shall submit to a mental health assessment if the BHAC report
2 remains unavailable to the Department of Community Rehabilitation (DCR);
- 3 b. The Appellant shall attend at and abide by any treatment program recommended
4 by the mental health professionals;
- 5 c. The Appellant shall complete the Anger Management Program and any other
6 rehabilitative programs recommended by the DCR;
- 7 d. The Appellant shall complete 150 hours of Community Service (CS) within 2
8 years;
- 9 e. The Appellant shall not contact Sally Kemp or her daughters directly or indirectly
10 and shall not comment/post about them on any social media.
- 11 7. Convictions were recorded for all matters.
- 12 8. The Appellant was ordered to pay Compensation in the sum of \$1,331 to David Reid,
13 and Crown costs in the sum of \$300.
- 14 9. The Respondent applied for a Protection Order under s.5 of the *Protection from*
15 *Domestic Violence Law* 2010, which was granted in the following terms:
- 16 a. The Defendant, Jessica Andrea Swinamer is, whether by herself or by servants or
17 agents, [prohibited] from in any way threatening to kill, assaulting, insulting,
18 molesting, interfering, annoying or troubling the complainant David Reid in any
19 way;
- 20 b. [The Defendant Jessica Andrea Swinamer is]:



1 (a) Not to contact directly or indirectly any member of David Reid's
2 immediate family (spouse, parents, siblings, children);

3 (b) Not to go within 50 feet of David Reid except with his consent;

4 (c) Not to go within 100 yards of David Reid's residence;

5 (d) Not to go within 100 yards of David Reid's place of work;

6 (e) Not to post/comment on any matter on social media including but not
7 limited to email, phone, social media (Snap Chat, Instagram, Facebook,
8 WhatsApp etc.) concerning David Reid or his immediate family;

9 (f) Not to go within 100 yards of the residence of any of David Reid's
10 immediate family.



11 10. The Appellant, who appears in person before this Court, sought leave to appeal both
12 her conviction and sentence.

13 11. The Grand Court, at a previous hearing, having pointed out that the Court, by virtue of
14 s.167 of the *Criminal Procedure Code* (2019 Revision), was unable to deal with
15 appeals against conviction where there had been a plea of guilty, granted an
16 adjournment for the Appellant to seek legal advice about her position. The Appellant
17 now pursues only the appeal against sentence.

18 **THE FACTS UNDERLYING THE CONVICTIONS**

19 12. The facts are taken from the Respondent's exposition of facts which were presented to
20 the Summary Court.

1 13. The Appellant and the victim, Mr. David Reid, had been in a relationship between
2 November 2010 and March 2014. In December 2016, Mr. Reid entered into a new
3 relationship with Ms. Sally Kemp. As a result, the Appellant began sending the victim
4 increasingly aggressive emails.

5 14. Some days before the incident, the subject matter of charges 1 and 2, the Appellant
6 emailed Mr. Reid to request a loan for, *inter alia*, accommodation, car insurance and
7 health insurance. Mr. Reid refused, noting that the Appellant had not repaid him for
8 previous loans. At 10:13am on 14 November 2017, the Appellant responded by email:
9 ‘*I will sell your diamond earrings and never think of you again period. Go to hell –*
10 *you fucking monster*’.

11 15. At around 2 pm the same day, Mr. Reid heard banging on his front door and the
12 Appellant’s voice yelling at him to come outside and speak to her. Mr. Reid responded
13 to the effect that they had nothing to talk about; he did not open the front door.

14 16. The Appellant then smashed the glass door and began kicking in the broken panel of
15 glass (Charge 1). Mr. Reid called the police. The Appellant began grabbing pieces of
16 the broken glass and throwing them at Mr. Reid, screaming “*why are you trying to ruin*
17 *my life?*”

18 17. The Appellant then walked down the stairwell outside Mr. Reid’s flat, whereupon he
19 heard multiple smashing noises. He saw the Appellant drive off. Mr. Reid went to
20 inspect his car and noticed that the windscreen had been shattered in three separate
21 places (Charge 2).

22 18. Thereafter, the Appellant began sending abusive emails and text messages to, or for the
23 attention of, Mr. Reid and his new girlfriend, Ms. Sally Kemp (Charges 4 and 5).

1 19. These communications contained, *inter alia*, the following comments:

2

Number	Date	Format	Recipient	Comment
1	14/11/17	Email	Chris Dinan (victim's business partner, understood to be for the attention of David Reid)	"[David] deserves to die and I have my whole life ahead to track him down"
				"[David's] new girlfriend and her 2 daughters better not stick around Cayman, I have many pictures, and their lives will lead to MASSIVE and SEVERE pain"
				"I DARE FOR SALLY TO WRITE BACK [...] I will come after your whole family, little by little, starting with your fucking ugly face need a remodelling"
2	07/12/17	Email	Chris Dinan (understood to be for the attention of David Reid)	"I will not be around much longer to tell you ALL how responsible you are"
				"Next time think about who you let into your bed, because your soul will suffer the consequences from this"
3	07/12/17	Email	David Reid	"I hope someday you experience what you did to me, and you can wonder if it was my ghost who came back for you"
4	22/12/17	Text	David Reid	"I'm pregnant. Please drop the charges."
				"You will get PR denied and get us deported"
				"Request 'no further action' or else we'll get deported"
5	31/12/17	Text	David Reid (understood to be for the attention of Sally Kemp)	"Don't forget to dress your daughters up like whores, so you can sell them to the highest bidder. Virginity pays a premium here. David will make all the necessary arrangements"
				"Don't send your soon-to-become whore daughters to Canadian schools. Better beg David to pay here, just let him fuck you more frequently. He'll get prostituted in between, when you are loopy goopy."
6	01/01/18	Text	David Reid	"I will get revenge – don't doubt it for a second. Sleep with one eye open."

3

1 20. On 22 December 2017, the Appellant attended Mr. Reid's home address, which he had
2 moved into only a few weeks earlier. The Appellant held onto one of Mr. Reid's dogs
3 in the yard, until Mr. Reid managed to extricate it. Half an hour later, Mr. Reid's
4 doorbell was rang. A pizza was on the doorstep with a note on top.

5
6 21. Later that day, the Appellant texted Mr. Reid in the terms set out at number 4 in the
7 above chart (Charge 6).

8
9 **THE MAGISTRATE'S FINDINGS**

10
11 22. The recommendation in the SIR was for Probation with significant conditions. The
12 Probation officer invited the court to consider imposing the Probation order without
13 entering convictions. Magistrate Gunn accepted the recommendation of a Probation
14 Order. However, she did not follow the second recommendation.

15
16 23. The Magistrate entered convictions, giving reasons for her decision. She identified the
17 following relevant factors:

- 18
19 a. The harassment took place over a prolonged period of time (paragraph 3,
20 Reasons);
- 21
22 b. Mr. Reid and his former partner¹ became gravely concerned for their safety
23 (paragraph 3, Reasons);
- 24
25 c. The Appellant's acts were obsessive and manipulative, and involved emotional
26 blackmail regarding her pregnancy and the threat of deportation (paragraph 3,
27 Reasons);
- 28

¹ Ms. Kemp



1 d. The Appellant persisted in her behaviour despite being told it was inappropriate
2 (paragraph 4, Reasons);

3
4 e. The incident involved Ms. Kemp's daughters (paragraph 6, Reasons).

5
6 24. At Paragraph 9, Magistrate Gunn said:

7 *"Whilst it is not surprising that a conviction for these offences will have a*
8 *significant effect on the defendant's reputation and maybe even on her ability to*
9 *secure employment, I am not persuaded that the consequences of recording a*
10 *conviction would be disproportionate to the offences as these are serious offences,*
11 *in particular the offence of attempting to obstruct justice. Not recording a*
12 *conviction even for a person of previously exemplary character and the*
13 *defendant's health mental health diagnosis, would be sending entirely the wrong*
14 *message to the defendant and the public."*

15
16 **GROUNDS OF APPEAL**

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18 25. There were many points raised in the grounds of appeal, including challenge to the
19 facts underlying the conviction and an alleged error in the SIR which related to an
20 incident which was not charged.

21
22 26. At the first hearing, the court in order to assist the Appellant in understanding the
23 court's powers on appeal, set out, with the concurrence of the Respondent, its powers
24 and what it could and could not take into account without more. This is in part why the
25 Court gave the Appellant time to take legal advice.

26
27 27. As already noted, the Appellant now challenges her sentence. The essence of the
28 Appellant's appeal is that her sentence was manifestly excessive, insofar as the
29 Magistrate declined to record "no conviction", as recommended in the SIR.



1 28. The Appellant argues that the impact of a conviction on her life has been
2 disproportionate, particularly in relation to her career prospects. She is now destitute,
3 in debt, facing eviction and unable to get a job in her field (financial) due to the
4 convictions.

5
6 29. The Appellant further submits that there is new material which was not in front of the
7 Magistrate, namely a psychiatric report, which would have persuaded the Magistrate to
8 record “no conviction.”

9
10 **THE RESPONDENT’S SUBMISSIONS**

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12 30. The Respondent submits that Magistrate Gunn identified the relevant factors upon
13 which her decision to enter a conviction were based. She rightly considered the
14 offences to be serious ones, in particular the offence of attempting to obstruct the
15 course of justice, such offences typically resulting in custodial sentences: *Att. Gen.’s*
16 *Reference (No. 17 of 2008)*².

17
18 31. Plainly, she felt that this matter deserved both punishment of the Appellant and a
19 deterrent effect to the wider community. Her decision was appropriate. That there was
20 a recommendation in the SIR that No Conviction be recorded does not bind the court.
21 It is a matter for the court’s discretion.

22
23 32. The Appellant’s emphasis on the impact of a recorded conviction on her life, in
24 particular her career prospects, was specifically considered by the Magistrate at
25 paragraph 9 of her Reasons. The Magistrate concluded that it was not disproportionate
26 to the commission of the offences.

27

2 [2008] EWCA Crim. 1341; [2008] R.T.R. 29.



1 33. The Respondent reminds the court that it was the Appellant who applied to proceed to
2 sentence without the benefit of a Psychiatric Report (paragraph 1, Reasons).
3 Nevertheless, it is contended that there is nothing within the Psychiatric Report dated 4
4 March 2020 that the Appellant now specifically seeks to rely on. It contains no obvious
5 mitigation and would not have persuaded the Magistrate to record no conviction. There
6 was no disadvantage therefore in proceeding in the absence of the report.

7
8 **THE LAW**

9
10 34. Under s.165(1) of the *Criminal Procedure Code* (2019 Revision) ('the Code'), the
11 Appellant has a right of appeal to the Grand Court against any judgment (including
12 conviction) or sentence of the Summary Court with which she is dissatisfied, on
13 matters of law or fact or both.

14
15 35. Under section 181 of the Code:

16
17 *"The court may [...] confirm, reverse, vary or modify the decision of the Summary*
18 *Court, including the passing of some other sentence (whether more or less severe)*
19 *or [...] make such other order in the matter as it may think just, and may, by such*
20 *order, exercise any power which the Summary Court might have exercised, and*
21 *such order shall have the same effect and may be enforced in the same manner as*
22 *if it had been made by the Summary Court provided that the court may,*
23 *notwithstanding that it is of the opinion that the point raised in the appeal might be*
24 *decided in favour of the appellant, dismiss the appeal if the court considers that no*
25 *substantial miscarriage of justice has actually occurred."*

26
27
28 36. Under s.35(1)(b) of the *Alternative Sentencing Law* (2008 Revision):

29
30 *"Where any person is charged with an offence which is punishable on summary*
31 *conviction, and the court thinks that the charge is proved but is of opinion that*
32 *having regard to the circumstances, including the nature of the offence and the*
33 *character and home surroundings of the offender, it is expedient to release the*
34 *offender on probation, the court may [...] without proceeding to conviction, make*
35 *a probation order."*
36
37

1 **DECISION**

2 37. During the Appellant's submissions, in light of the Appellant's various written
3 comments and documents (which the court has read in full including those submitted
4 after the most recent hearing containing, *inter alia*, repetition of matters which the
5 court had indicated cannot be considered), the court explained to the Appellant the
6 importance of focussing on errors made by the Magistrate, – whether error of fact or
7 law or error in the exercise of the Magistrate's discretion. The Appellant was also
8 invited to point out how the Psychiatric Report advanced her appeal.

9
10 38. The main point the Appellant stressed was, that, whilst others who have convictions
11 may be able to obtain employment, in her profession in the financial world, it would be
12 a complete bar to her obtaining employment. Additionally, she could not complete her
13 professional exams in the light of a conviction. She had applied for two jobs. She had
14 not mentioned the court proceedings to either company. Now one of the companies
15 was now doing due diligence before interview. It was imperative that the recording of
16 the convictions be expunged therefore, otherwise her 20-year career would be
17 destroyed.

18
19 39. I turn to the Magistrate's decision which has been set out above.

20
21 40. Magistrate Gunn gave clear reasons for:

- 22
23 a. Her decision to impose a Probation Order with the conditions set out; and
24 b. For declining to record "no conviction".

25
26 41. So far as the report that was not available at the time of sentencing is concerned, the
27 following is to be noted.

- 1 a. The Magistrate acknowledged that the Appellant had mental health problems and
2 took that into account when sentencing;
3
4 b. The Magistrate particularly noted that the Appellant was under the care of a doctor
5 for her mental health issues and commented that the circumstances of the offences
6 led her to suspect that further professional intervention may still be necessary.
7
8 c. The Magistrate's suspicions were borne out in the psychiatric report, which,
9 without going into detail, recommended that the Appellant undergo psychotherapy.

10
11 42. It follows from the above, that the report does not significantly assist the Appellant.

12
13 43. As for the Appellant's submissions that the convictions will ruin her career: The
14 Magistrate noted the possibility of damage to reputation and career in paragraph 9 of
15 her sentencing remarks. The fact that she is likely to be proved correct does not
16 undermine her decision.

17
18 44. The effect of the Appellant's submission amounts to the following: that every
19 professional person of previous good character, who commits an offence which attracts
20 a Probation Order, and who stands to lose their career as result of the guilty plea or
21 verdict, should be entitled to have "no conviction" recorded in the record, so that they
22 can keep their employment or find similar new employment. The inequity of that
23 approach needs no spelling out.

24
25 45. It is to be noted that recording "No conviction", although not exactly the same, is akin
26 to the imposition of an absolute discharge in the United Kingdom. The UK Sentencing
27 Council says the following:

1 *"Discharges are given for the least serious offences such as very minor thefts. The*
2 *court may give an absolute discharge, which means it decides not to impose a*
3 *punishment because the experience of going to court has been punishment enough.*
4 *However, the offender still gets a criminal record."*
5

6 46. By no stretch of the imagination could any of these offences be said to be in the
7 category of the least serious offences.
8

9 47. This case did not involve an isolated offence. It was a course of conduct. As already
10 noted, the Magistrate considered the case with care and gave cogent reasons for her
11 decision. The unfortunate consequences for the Appellant, lie not at the door of the
12 Magistrate, who on the facts, and for the reasons she gave, was entitled to exercise her
13 discretion in the way she did. The consequences lie at the door of the Appellant herself
14 (despite any extenuating circumstances) when she committed the offences.

15
16 48. It follows from the above, that this Appeal against sentence is dismissed.

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20 **Dated this the 17th August 2020**

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22
23
24 **Dame Linda Dobbs**
25 **Acting Judge of the Grand Court**

