

ENGLAND AND WALES / JUDGMENT

R v Robert Selvage

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[2025] EWCA Crim 1536 Royal Courts of Justice Strand London WC2A 2LL Wednesday 20 August 2025 Before: LORD JUSTICE WARBY MRS JUSTICE CHEEMA-GRUBB MR JUSTICE NICKLIN REX V ROBERT SELVAGE

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MS K GANNON appeared on behalf of the Appellant. MR R LIVINGSTON appeared on behalf of the Crown.

J U D G M E N T (Approved) LORD JUSTICE WARBY:

1. On 17 February 2025, after a trial in the Crown Court at Chelmsford, Robert Selvage, now aged 41, was convicted of one count of acting in breach of a restraining order, contrary to section 363 of the Sentencing Act 2020.
2. At his trial the applicant accepted that a restraining order had been made. He did not dispute that he had acted in contravention of the terms of that order. The defence case was that he had a reasonable excuse for his actions. The jury rejected that proposition but the applicant now applies for leave to appeal on the ground that the trial judge misdirected the jury as to the burden and standard of proof that was applicable where the defence of reasonable excuse was raised.

3. He is right about that. The prosecution concedes that there was such a misdirection. However, the prosecution does not concede that the conviction is unsafe as a result. That issue in any event is one for the decision of the court. That being so, the application has been referred to the Full Court by the Registrar.
4. The case arises from complaints by Susan Salvage. She and the applicant were in a relationship for some time. They married in August 2013, separated in March 2021, and subsequently divorced. They have two young sons aged 8 and 10. Mrs Salvage complained of unwanted communications from the applicant and on 29 March 2023 Essex Magistrates' Court made a restraining order against him which stated, so far as relevant, that he must not: "contact, directly or indirectly, Susan Salvage except via solicitors, Social Services, or the Family Court in relation to child contact/the division of their matrimonial assets..." The duration of the order was 2 years from the date it was made.
5. During the period of that order the applicant sent a number of text messages to the complainant's phone in relation to child contact and other matters. She however had changed her phone. She therefore did not discover the messages until 7 September 2024, when she switched on her old phone. When she discovered the messages she reported the matter to the police, which led to the applicant's arrest and the present proceedings. 6. In interview the applicant accepted sending the messages. He accepted that he was aware of the terms of the order. He explained that in June and July 2023 he had started receiving phone calls from his sons three or four times a week. These would be made to the landline at his parents', where he was staying. But in December 2023 the calls had stopped and, from his point of view, that happened without any reason. He said that when sending the messages complained of he had acted out of pure emotion. He apologised but said that he had started to message the complainant because he was concerned about the welfare of his children and wished to re-establish the telephone contact with them that he had previously enjoyed. On the material before us that telephone contact appears to have been established pursuant to arrangements made under an order of the Family Court.
7. The single count against the applicant in the Crown Court was acting in breach of a restraining order contrary to section 363 of the Act of 2020, which states as follows: "(1) It is an offence for a person who is subject to a restraining order without reasonable excuse to do anything prohibited by the restraining order." The particulars of the charge were limited to messages sent in the early days of September 2024. Copies of those messages have been provided to and read by this court. 8. In his Defence Statement the applicant admitted being subject to the restraining order. He admitted he was responsible for the communications relied on by the Crown. He accepted that those communications were made or attempted "in what at first consideration would appear to amount to a breach of the terms of the restraining order". However it was said: "The defendant had primarily the welfare of his children in mind and considers his communications were therefore reasonable in the circumstances." That was, in substance, the applicant's case at trial, when he gave evidence to the jury on lines similar to those he had used in interview, saying this: "Some of these

messages are for good reason. I was getting phone calls before. I was receiving phone calls during the court order and because they ceased, my reasonable excuse for breaking the order was to speak to my children. I could never understand the order. The order didn't consider the relationship between father and sons. I am their father. It wasn't fair. Phone calls ... would have been good for the children and good for me. I put my position as a father and a husband first and breached the order. I felt I had a reasonable excuse. And it's not fair. That's what I did, rightly or wrongly." Asked why he did not go through the Family Court he said he had considered it but was told that it would cost money and take a lot of time.

9. The Recorder directed the jury as follows: "Ordinarily, the burden of proving any defendant's guilt in a case is on the prosecution and a defendant doesn't have to prove anything. However, in this case, because Mr Selvage relies on the defence of reasonable excuse, some of the burden... is placed on him. Firstly, the prosecution must make you sure that the defendant did something that he was prohibited from doing by the court's restraining order, namely that he contacted Susan Selvage, other than via solicitors, social services or the family court. Well, that in fact, is admitted by the defendant... ... secondly you have to consider his defence, the defendant's defence of reasonable excuse. That is for the defendant to prove. He doesn't have to make you sure that he had a reasonable excuse but he does have to satisfy you that it is more likely than not that he had a reasonable excuse for contacting Susan Selvage, as he did. If he satisfies you that it's more likely than not that he had a reasonable excuse, he is not guilty. Conversely, if he fails to satisfy you that it is more likely than not that he had a reasonable excuse, you would find him guilty." The same approach was reflected in the written Route to Verdict with which the jury was provided.
10. This approach to the burden and standard of proof was common ground at the trial. No issue was taken with the legal directions or the Route to Verdict when these were circulated in draft by the Recorder. However, as both parties now agree, it is contrary to authority. The position, set out in a series of decisions of this court, is that in cases of this kind the onus lies on a defendant to raise issue of reasonable excuse evidentially but once that has been done the burden passes to the prosecution to satisfy the jury so that they are sure that the belief asserted by the defendant does not amount to a reasonable excuse.
11. In that connection we have been referred to R v Evans [2004] EWCA Crim 3102; R v Chambers [2009] EWCA Crim 1570; R v Damji [2020] EWCA Crim 1774 at [41] and [48] and, most recently, R v Leslie Arden [2022] EWCA Crim 906 at [16]. These cases were concerned with the offences provided for by section 5(5) of the Protection from Harassment Act 1997 and section 1(10) of the Crime and Disorder Act 1998. Those provisions were, however, precursors of section 363(1) of the Sentencing Act which is in materially identical terms. It is therefore clear that in law the prosecution bore the burden of making the jury sure that the applicant had no reasonable excuse for doing what he did.
12. In the circumstances we grant leave to appeal. The remaining question is whether the admitted misdirection means that the applicant's conviction is unsafe.

13. For the Crown, Mr Livingston has submitted that in all the circumstances and despite the misdirection in law it is hard to see how the jury could have been in doubt on the issue of whether the defendant had a reasonable excuse for contacting his ex-wife in the way that he did. The appellant - as he now is - knew of the order. He understood its terms. He contacted his ex-wife when he should not have done and the restraining order made it quite clear that in regard to child contact this should not be done via her but rather through the other mechanisms or routes identified in the order itself.
14. We see some force in those submissions. The appellant accepted that he knew of the order and that he had acted in breach of its terms. His factual case as to why he did so was not in dispute. The prosecution did not challenge his account of his motives and reasons for disobeying the order. The only challenge was to the reasonableness of those reasons. That in substance was the sole issue left to the jury for decision. We can see room for the view that this is not so much a matter of fact as an evaluative question the answer to which is unlikely to be affected, at least in practice, by issues about the burden and standard of proof.
15. We would also make these observations. On one view at least the essence of the appellant's defence was that he disagreed with the order or at least did not wish to comply with it for the reasons that he gave. That could be viewed as an indirect challenge to the legitimacy of the order or its enforcement. We doubt that Parliament when enacting the reasonable excuse provision intended that it should encompass a right to flout an order for reasons of this kind. Further, as has been pointed out, the appellant could in any event have communicated with his wife about contact without breaching the order, by going through solicitors or Social Services as well as via the Family Court. We think it is open to argument that the trial judge could, and may be should, have given the jury further assistance by way of legal directions about what might or might not amount in law to a reasonable excuse.
16. We add further that, on one view of the evidence in the case, the excuse offered only extended to some of the messages and could not avail the appellant in respect of all of them. As the judge pointed out in summing-up, and as the court has been able to confirm by reviewing the messages, some of them were not just addressed to the complainant, they were only about her and her relationship with the appellant and not about the children or contact with the children in any way.
17. All of this said, not all of these points were put to the jury and none were put in the way that we have articulated them. The fact remains that the appellant did not have his case left to the jury in accordance with the law on the burden and standard of proof. We therefore find ourselves driven to the conclusion that the appeal must be allowed and the conviction must be quashed.
18. There is an application I think for a retrial.

19. MR LIVINGSTON: There is. The reasons for that are set out in paragraphs 24 and 25 of the Respondent's Notice. The fact of the matter is that Mrs Selvage is now left without any protection from Mr Selvage because the restraining order expired in March 2025 and --
20. LORD JUSTICE WARBY: Are there still orders of the Family Court in force? There are not.
21. MR LIVINGSTON: No. The non-molestation order was for a year and expired some time in 2024. There is no protective order at all in place and, as I pointed out earlier, this is an appellant who has breached the non-molestation order before, that is the reason why the restraining order was put in place. He has now at least arguably breached the restraining order and, as the second reason why which I put forward for a retrial is to uphold the importance of compliance with court orders which as the final line, and it may be in this sort of case where there has been more than one, arguably more than one breach, I appreciate the judgment that has now been made against the prosecution. It is important and it is important for Mrs Selvage's peace of mind and feeling that she is properly protected that there is something in place to protect her. A retrial in my submission, for the reasons set out in the Respondent's Notice, is requested.
22. LORD JUSTICE WARBY: Ms Gannon, do you resist an order for a retrial?
23. MS GANNON: My Lord, no. I am in the court's hands in relation to this.
24. LORD JUSTICE WARBY: We will grant the order for a retrial. We have to quash the one count on the indictment, the conviction on that. We order a retrial on that single count. We direct that a fresh indictment be served in accordance with rule 10.8(2) of the Criminal Procedure Rules not more than 28 days after the date of this order. (There has been a good deal of litigation about that time limit, it is probably better to ensure it is complied with). We direct that the appellant be re-arraigned on the fresh indictment within 2 months. The venue for the retrial will be determined by the presiding judge for the circuit, which is the South Eastern circuit.
25. MR LIVINGSTON: Yes.
26. LORD JUSTICE WARBY: There probably should be a reporting restriction order under section 4(2) of the Contempt of Court Act 1981, which will restrain the reporting of the judgment in this case or the proceedings in this court until after the conclusion of the proceedings in the court below. The standard form of order requires the parties to notify this court when the proceedings below, when the retrial is concluded, so that steps can be taken to lift the order or upon the automatic lifting of the order at the conclusion of proceedings to ensure that the judgment becomes public and reportable.
27. There is then a question about bail. I am not sure what the bail conditions or what bail arrangements were made before.

28. MR LIVINGSTON: Yes. I think at the time of the trial the defendant was in custody. That is the reason why the case actually came on perhaps surprisingly quickly in the present circumstances. He received a community order so I presume he is at liberty.
29. LORD JUSTICE WARBY: He is presently at liberty, that much I know because he is attending remotely by CVP from I think his residence.
30. MR LIVINGSTON: I have no instructions to the effect he has sent anymore messages or in any other way breached the order.
31. LORD JUSTICE WARBY: We are contemplating bail on condition of not contacting Mrs Selvage.
32. MR LIVINGSTON: My Lord.
33. LORD JUSTICE WARBY: Ms Gannon.
34. MS GANNON: No objection. To assist, yes, he was remanded in custody for these matters. There was originally a suspended sentence order which was activated so he previously was not on bail conditions in relation to this matter, he was remanded until trial.
35. LORD JUSTICE WARBY: We grant him bail on the single condition that he must not contact Mrs Selvage at all.
36. There is one further matter before I get some instructions from someone else, that is the Protection from Harassment Act contains a provision in section 5A for restraining orders on acquittal, which I am sure you are familiar with. One of the things it says is where the Court of Appeal allow an appeal against conviction they may remit the case to the Crown Court to consider whether to proceed under this section, that is section 5A(3). That is a possible means by which the concern expressed by Mr Livingston could be addressed in advance of any retrial. We are not urging it, we are just identifying it as an option. If there is an application we will entertain it. If there is none then that is the end of it. Mr Livingston.
37. MR LIVINGSTON: I have no instructions to make such an application.
38. LORD JUSTICE WARBY: On second thoughts we will do that of our own initiative because it only leaves it to the Crown Court to consider the issue. We make an order that the case be remitted to the Crown Court to consider whether to proceed within section 5A of the Protection from Harassment Act 1997. It will then be open to the defence to argue that that provision does not even authorise such an order or, alternatively, that if it does there should be no such order made so the position of the appellant is not prejudiced in the meantime. For the time being there is no order against save for the bail restriction that we have identified. (The Associate conferred with the Bench)

39. LORD JUSTICE WARBY: I do not know if you overheard that Ms Gannon but we need an address to communicate, the court needs an address to communicate with the appellant and the alternative to providing an address and ensuring that it is updated is for a residence condition to be added to the bail conditions.
40. MS GANNON: My Lord perhaps I can confirm instructions with my client after this hearing and confirm with your clerk.
41. LORD JUSTICE WARBY: Yes, I think that will be satisfactory. You can consult with Mr Livingston who may have his own reasons for wanting to know where the appellant/defendant is.
42. MS GANNON: My Lord, apologies. The only other matter I raise in terms of the bail condition is perhaps if it is worded with the restraining order that had been drafted, as there are children that Mr Selvage has, and so the restraining order had been drafted for no contact directly or indirectly except by solicitors, Social Services or the Family Court in relation to child contact. Perhaps I could --
43. LORD JUSTICE WARBY: Maybe you are right about that. We can mirror the restraining order in the bail conditions - is what you are asking us to do?
44. MS GANNON: Yes, my Lord, at my Lord's T12, it is the first condition (a) not to contact other than through Social Services, solicitors and the Family Court in relation to child contact or the division of matrimonial assets.
45. LORD JUSTICE WARBY: Yes, I quoted the restraining order in the judgment that I gave just now so I probably do not need to repeat those terms but we will on reflection make a bail condition in those terms which, to be clear, permits him to contact Mrs Selvage indirectly, through one or other of those prescribed means but not directly and whether or not he thinks he has a reasonable excuse is irrelevant in this context because this order, this bail condition is unqualified.
46. MS GANNON: I am grateful, my Lord. (The Associate conferred with the Bench)
47. LORD JUSTICE WARBY: That standard order, the sentencing remarks, a transcript of which will be obtained by the Registrar, be sent to the prosecution and the prosecution should ensure that that transcript is provided to the Crown Court judge who conducts any sentencing hearing, if there is one, following the retrial. That is something that it was held by the Vice-President of this court should be done in all cases in a case called R v AB [2021] EWCA Crim 692, so I omitted to deal with that. That of course assumes there is a sentencing hearing. (The Associate conferred with the Bench)
48. LORD JUSTICE WARBY: This is a provision that is occasionally included, namely that a broadcast of any part of the sentencing hearing or remarks be removed from YouTube or any other platform by the relevant court broadcaster and not be broadcast again. But this is not a case where the sentencing remarks were televised, so I do not think that applies and

we are certainly not going to make an order I do not think that any existing reports of other proceedings should be taken down. That would be excessive and unnecessary. So thank you for that.

49. The only final thing is if Mr Selvage is still watching proceedings via CVP, then he should be aware that the consequences of breaching the bail conditions could be severe and proceedings could be taken against him for that if that should occur. (The Associate conferred with the Bench)
50. LORD JUSTICE WARBY: That application for a legal order is a matter for you. You have a representation order already today from the Registrar.
51. MS GANNON: For today's purposes, yes.
52. LORD JUSTICE WARBY: Thank you very much. Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof. Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE Tel No: 020 7404 1400 Email: Rcj@epiqglobal.co.uk

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