Neutral Citation Number: [2022] EWCA Crim 1482

Case No: 202101595 B2/
202101596 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM
MR RECORDER BALCOMBE QC
T20180226

Royal Courts of Justice
Strand, London, WC2A 2LL

9 November 2022

Before :

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE PEPPERALL
and
MRS JUSTICE FOSTER

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Between :

SANA MUSHARRAF	**Appellant**
- and -	
REX	**Respondent**

- -
- -

Ms Farrhat Arshad (instructed by **GT Stewart Solicitors)** for the **Appellant**
Ms Carole Fern (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date : 20 October 2022

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Approved Judgment

This judgment was handed down remotely at 11.00am on 9 November 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice William Davis:

Introduction

1. Between 11 and 26 March 2019 the appellant, Sana Musharraf, was tried in the Crown Court at Isleworth before Mr Recorder Balcombe QC ("the judge") and a jury on an indictment containing two counts of carrying out a course of conduct amounting to stalking causing serious alarm or distress, contrary to section 4A of the Protection from Harassment Act 1997 ("the Act").

2. On 26 March 2019 the jury convicted the applicant on count 1. They acquitted her on count 2 but convicted her of the lesser alternative of simple stalking contrary to section 2A of the Act. On 3 July 2019 she was sentenced by the trial judge to 33 months' imprisonment on count 1 with a concurrent term of two months on count 2. A restraining order was made pursuant to section 5 of the Act for a period of 10 years.

3. Ms Musharraf now appeals against her conviction on Count 1 with the leave of the full Court. She also appeals against her sentence, this appeal being restricted to the terms of the restraining order.

4. The appellant was represented by Ms Farrhat Arshad who did not appear at the trial. Ms Fern, who appeared in the court below, appeared for the respondent.

The facts

5. The appellant is now aged 38. She was born in Pakistan. As an undergraduate she attended the Institute of Business Administration in Karachi, one of the top universities in Pakistan. She went on to obtain a Master's degree in business administration at that university. She then spent some time in Japan on a scholarship before coming to the UK. She came to the UK in 2013 in order to study for a Master's degree in law and accounting at the London School of Economics.

6. Jason Whiston is a senior lawyer in the Government Legal Department. At the relevant time he gave occasional lectures at the LSE. The appellant attended a lecture he gave in October 2013 after which the appellant approached Mr Whiston to ask about some aspect of the lecture. Over the course of the next 12 months the appellant and Mr Whiston met on an occasional basis. Their meetings were concerned with academic matters. However, they then developed a relationship which lasted for about 2 years before coming to an end in the middle of 2017. The nature of that relationship was in dispute. Much of the trial was taken up with the competing accounts of the relationship as given by Mr Whiston and the appellant. Whatever the precise position, during its currency the relationship was sexual.

7. Between July 2017 and February 2018 the appellant engaged in a variety of activities which the prosecution alleged amounted to stalking of Mr Whiston. This was count 1 on the indictment. At the trial the activities alleged were not factually in dispute. They were: sending an excessive number of text messages; attending Mr Whiston's home and place of work unannounced; making allegations about him to others. The allegations were that Mr Whiston had raped and sexually assaulted her and had exploited her sexually. As well as to Mr Whiston's friends and family, the appellant

made the allegations to his employers and to the Solicitor's Regulatory Authority i.e. his professional regulator. The jury had a typed document headed Time Line which summarised the matters particularised in the indictment.

8. Mr Whiston gave evidence to the jury which confirmed the events as set out in the Time Line document. He said that the allegations of sexual misconduct were completely false.

9. Count 2 related to a lady named Tamara Mohammed. Ms Mohammed was Mr Whiston's new partner from 2017. She was the subject of at least five uninvited visits to her home by the appellant between July and October 2017. The prosecution alleged that these visits amounted to stalking. As we have indicated, the jury convicted the appellant of the offence of simple stalking rather than the aggravated form of the offence.

10. The appellant's case in summary was that she had acted as she did because Mr Whiston had taken advantage of his position. She was a vulnerable person given her lack of sexual experience and the absence of any friends or family in the UK to whom she could turn. She said that Mr Whiston had manipulated her and had sexually abused her, the abuse including rape on at least one occasion. Her case was that a reasonable person would not have known that behaving as she did would have caused serious distress or alarm either to Mr Whiston or to Ms Mohammed. She relied inter alia on the statutory defences provided in the Act i.e. her conduct was pursued for the purposes of preventing crime and/or was reasonable in the circumstances.

The grounds of appeal

11. The full Court gave leave to appeal against conviction on a relatively narrow basis. A number of the grounds advanced was rejected. The principal issue on which leave was given was whether it was wrong in law to leave to the jury complaints made by the appellant to Mr Whiston's employer and professional regulator as possible acts of stalking. Further, if the complaints in law could amount to acts of stalking, was it necessary to direct the jury that the complaints could only form part of the relevant course of conduct if they were proved by the prosecution to be false? The secondary point on which leave was given concerned what were said to be misdirections by the judge in relation to two ingredients of the offence, namely "course of conduct" and "substantial adverse effect" on Mr Whiston.

12. In relation to sentence, the full Court rejected the argument that the custodial term imposed was manifestly excessive or reflected any error of principle. However, leave was given to argue that some parts of the restraining order were excessively wide and lacking in precision albeit that no point had been taken at the time the order was made.

The statutory framework

13. Section 1 of the Act prohibits harassment. Insofar as is relevant for our purposes it reads:

> *(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 to harassment of the other.*

(2) For the purposes of this section or Section 2A(2)(c) the person whose course of conduct is in question ought to know that it amounts to [or involves] harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to [or involved] harassment of the other.

(3) Subsection (1)…. does not apply to a course of conduct if the person who pursued it shows—

(a) that it was pursued for the purpose of preventing or detecting crime,

(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Simple harassment is a summary offence punishable with up to six months' imprisonment: see Section 2 of the Act. Section 7 of the Act provides that references to harassing a person include alarming the person or causing the person distress.

14. Section 2A of the Act creates the offence of stalking. This provision was added by the Protection of Freedoms Act 2012. It reads:

(1) A person is guilty of an offence if—

(a) the person pursues a course of conduct in breach of section 1(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…..

Stalking is also a summary offence. However, the maximum period of custody available for this offence is 51 weeks.

15. Stalking requires a course of conduct which is defined in Section 7 of the Act as conduct on at least two occasions. As Section 2A(2) makes clear, there are three elements to stalking: a course of conduct amounting to harassment; the acts or omissions involved in the course of conduct are associated with stalking; knowledge or constructive knowledge that the course of conduct amounts to harassment. The Act does not provide a comprehensive definition of acts or omissions associated with stalking. Rather,

examples are given. Some of the examples involve acts aimed directly at the victim such as following or watching a person. Other examples involve indirect acts e.g. publishing material relating to the victim.

16. Section 4A of the Act creates the aggravated offence of stalking involving fear of violence or causing serious alarm or distress. This provision also was added by the Protection of Freedoms Act 2012. It reads:

> *(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.*
> *(3) For the purposes of this section A ought to know that A's course of conduct will cause B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities if a reasonable person in possession of the same information would think the course of conduct would cause B such alarm or distress.*
>
> *(4) It is a defence for A to show that—*
> *(a) A's course of conduct was pursued for the purpose of preventing or detecting crime,*
> *(b) A's course of conduct was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*
> *(c) the pursuit of A's course of conduct was reasonable for the protection of A or another or for the protection of A's or another's property…..*

The maximum sentence for the aggravated offence is 10 years' imprisonment. We are concerned with the offence under Section 4A(1)(b)(ii). This requires the prosecution to prove that the victim was caused serious alarm or distress which had a substantial adverse effect on their day-to-day activities. The statutory defence is in similar terms to that applicable to harassment save that the course of conduct must be reasonable for the protection of the perpetrator or another or for protection of their property.

The judge's directions

17. The judge provided the jury with detailed written directions in relation to the offences. This part of the summing up was delivered prior to counsels' speeches. The directions were provided to and discussed with counsel in advance. Following counsels' speeches the judge summed up the evidence at the conclusion of which he provided the jury with a written route to verdict. This document also was discussed with counsel.

18. It is not necessary for us to set out the entirety of the written directions provided during the first part of the summing up. The parts relevant to the appeal are as follows:

> *3.1. For the offence of stalking involving serious alarm or distress to be made out there are six matters that have to be proved, and therefore in order for you to be in a position to convict, P must make you sure of each of those elements of the offence.*
> *3.2. The six matters that P must prove are as follows.*
> *(a) That the Defendant **engaged in a course of conduct**, which means 'behaved in a way' that **amounted** to **harassment** of the complainant.*
> *(b) That the **Defendant knew or ought to have known** that her course of **conduct amounted to harassment** of the complainant.*
> *(c) That the acts making up the harassment course of conduct were **acts associated with stalking**.*
> *(d) That the Defendant's **course of conduct** (including the acts associated with stalking) **caused the complainant serious alarm or distress***
> *(e) That such **serious alarm or distress had a substantial adverse effect on the complainant's usual day-to-day activities***
> *(f) That the **Defendant knew or ought to have known that her course of conduct would cause such serious alarm or distress**.*
> *3.3. Further explanation is required with respect to the terminology.*
> *3.4. As regards what amounts to '**harassment**':*
> *(a) There is no specific definition as to acts that do or do not amount to harassment.*
> *(b) Harassment is not simply unattractive or unpleasant behaviour, even if such behaviour should happen to result in alarm or distress being caused.*
> *(i) That a complainant may suffer alarm or distress as a result of another's behaviour does not necessarily mean that he has been harassed.*
> *(ii) The law recognise that irritations or annoyances, even a measure of upset, will arise at times in everybody's day-to-day dealings with others, and therefore it does not criminalise the causing of such.*
> *(c) For a defendant's behaviour to amount to harassment it will need to have crossed the boundary of what has to be tolerated in day-to-day life, and to involve **a persistent and deliberate course of improper, oppressive and unreasonable conduct that it is targeted at the individual complainant and that is calculated to, and does in fact produce alarm or distress.***
> *(d) The repeated making of false and malicious assertions against a professional to his regulatory body can amount to harassment.*
> *3.5. As regards the term 'a course of conduct', it means conduct consisting of a series of related acts occurring on at least two occasions in relation to the complainant. It therefore follows that a course of conduct cannot be made out if there is conduct directed against a complainant on only one occasion.*
> *3.6. The need to consider 'a course of conduct' means that you do not look at the acts complained of in isolation. You have to consider each of the individual acts complained together with the others – that is to say, as a whole. It is the course of conduct which has to have the quality of amounting to harassment, rather than individual instances of conduct. And so:*
> *(a) It is not necessary for it to be shown that each of the individual incidents relied upon involved oppressive conduct, targeted at the complainant and calculated to cause him or her alarm and distress;*

(b) Even though in isolation some of the individual incidents could be considered neutral or harmless, there can be a course of conduct amounting to harassment if acts on a number of occasions, taken as a whole, make up a course of oppressive conduct that is targeted at an individual and calculated to cause alarm and distress…..

*3.10. As to what is meant by '**acts associated with stalking**' the law provides that they include (but are not limited to) the following:*

(a) following a person;

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

(c) publishing any statement or other material relating or purporting to relate to a person;

(d) loitering in any place (whether public or private);

(e) watching or spying on a person.

*3.11. The need to show that conduct/acts associated with stalking caused the complainant **serious** alarm or distress, means that conduct resulting in a trivial adverse effect is not sufficient.*

The parts emphasised by bold type in the text appeared in that fashion in the document provided to the jury.

19. It is not necessary for us to set out the route to verdict in full. No issue is taken with much of that document. We shall rehearse only those questions which now are said to involve a misdirection or a failure to give any or any adequate direction. These are:

Question 1

Has the prosecution satisfied you so that you are sure that the Defendant pursued a course of conduct targeted at the individual complainant?

(a) If your answer is "No" your verdict will be 'Not Guilty' of the offence of Stalking involving distress, and 'Not Guilty' of either of the alternative offences in relation to that complainant.

(b) If your answer is "Yes" go on to consider question 2.

Question 2

Has the prosecution satisfied you so that you are sure that there came a time by which the Defendant's course of conduct targeted at the complainant amounted to harassment of that complainant?

(a) If your answer is "No" your verdict will be 'Not Guilty' of the offence of Stalking involving alarm/distress, and 'Not Guilty' of either of the alternative offences in relation to that complainant.

(b) If your answer is "Yes" go on to consider question 3

….

Question 4

Has the Defendant shown it to be more likely than not:

(i) that the course of conduct amounting to harassment which you considered proven when answering question 2, was [at all times]pursued for the purpose of preventing a crime

or

(ii) that [at all times] it was reasonable for her to pursue that course of conduct?

(a) If your answer is "Yes" your verdict will be 'Not Guilty' of the offence of Stalking involving alarm/distress, and 'Not Guilty' of either of the alternative offences in relation to that complainant.

(b) If your answer is "No" go on to consider question 5

Question 5

Has the prosecution satisfied you so that you are sure that the acts found by you when answering question 3 to make up the harassment course of conduct were acts associated with stalking i.e. (a) following a person; (b) contacting, or attempting to contact a person by any means; (c) publishing any statement or other material relating or purporting to relate to a person; (d) loitering in any place (whether public or private); watching or spying on a person. – See paragraph 3.10 of the Legal Directions

(a) If your answer is "No" your verdict will be 'Not Guilty' of the offence of Stalking involving alarm/distress, 'Not Guilty' of the offence of Stalking but (in the light of your answers to questions 2, 3 and 4) 'Guilty' of the offence of Harassment.

(b) If your answer is "Yes" go on to consider question 6

Question 6

Has the prosecution satisfied you so that you are sure that the Defendant's course of conduct (including the acts associated with stalking) caused the complainant serious alarm or distress?

(a) If your answer is "No" your verdict will be 'Not Guilty' of the offence of Stalking involving alarm/distress, but (in the light of your answers to questions 2, 3, 4 and 5) 'Guilty' of the offence of Stalking.

(b) If your answer is "Yes" go on to consider question 7

.....

Question 9

Has the Defendant shown it to be more likely than not:

(i) that the course of conduct (including the acts associated with stalking) found proven by you in answering question 5 was pursued by her for the purpose of preventing a crime;

or

(ii) that at all times the pursuit of that course of conduct was reasonable for the protection of the Defendant or another?

(a) If your answer is "Yes" your verdict will be 'Not Guilty' of the offence of Stalking involving alarm/distress, but (in the light of your answers to questions 2, 3, 4 and 5) 'Guilty' of the offence of Stalking.

(b) If your answer is "No" your verdict will be 'Guilty' of the offence charged.

There was a footnote to Question 2 which read:

1 In relation to Mr Whiston the course of conduct is alleged to comprise: sending of an excessive number of messages, visiting his home, attending at his place of work, contacting his friends and family and making allegations against him,

contacting his employer and his regulatory authority and making allegations against him.
In relation to Dr Tamara Mohammed/Whiston the course of conduct is alleged to comprise: visiting her home uninvited and unannounced.
2 See paragraph 3.4 (c) of the Legal Directions

The reference back to paragraph 3.4(c) of the written directions was in relation to the term harassment.

The parties' submissions

20. On behalf of the appellant the core submission was that (a) the complaints made to Mr Whiston's employer and to his professional regulator could not amount to acts associated with stalking and (b), in any event, the judge failed to direct the jury properly on the meaning of "course of conduct" in relation to the complaints to the employer and the regulator. Ms Arshad argued that, although Section 2A(3) of the Act provides examples of acts and omissions associated with stalking rather than an exhaustive list, the natural meaning of the words "associated with stalking" could not encompass making a complaint in writing to a person's employer or regulator. The judge should have directed the jury to exclude those complaints from their consideration of the appellant's course of conduct. Her alternative submission is that, if the written complaints to the employer and the regulator could have been acts "associated with stalking", it was for the jury to make that decision. For them to do so, they had to be directed to consider whether they were such acts. No such direction was given.

21. Associated with the core submission was the argument that the jury were not provided with any proper definition of "course of conduct" by reference to the nexus required. Ms Arshad accepted that such a direction was not needed in relation to the text messages sent by the appellant, the visits by the appellant to Mr Whiston's house or place of work and the allegations made to friends and family. She said that it was "unarguable" that they did not amount to a course of conduct. This proposition did not apply to the written complaints. They were not so connected in type and in context as to lead inevitably to the conclusion that they were part of the course of conduct.

22. Ms Arshad went on to argue that the sending of the complaints to the employer and the regulator could not be considered to be unreasonable. An act can only constitute harassment if it is unreasonable. She relied on *Crawford v CPS* [2008] EWHC 148 Admin where the Divisional Court said "an intention to cause distress cannot of itself cause harassment if what was done was reasonable". Ms Arshad submitted that the judge fell into error because he only dealt with reasonableness in the context of the statutory defence whereas he ought to have recognised that the prosecution had to prove that what was done was unreasonable in order to establish harassment.

23. The next submission on behalf of the appellant was that the judge failed to direct the jury that they had to be satisfied that the allegations made in the written complaints to the employer and the regulator were untrue. If the complaints were or might have been true, they were incapable of amounting to harassment. Ms Arshad argued that a further requirement arose, namely that the conduct of the complaint (even if true) was out of the ordinary. She relied on the observation of Judge Moloney QC in *David v Hosany* [2016] EWHC 3797:

> *…the law should be slow to deter bona fide complaints of sexual harassment by exposing complainants to the added risk of themselves being accused of harassing their alleged abusers (unless their conduct of the complaint process has been well out of the ordinary, which is not the case here).*

This observation was made in the context of a civil claim for harassment but Ms Arshad submitted that the requirement for the conduct to be "well out of the ordinary" similarly should apply to criminal proceedings.

24. Finally Ms Arshad said that the judge misdirected the jury in relation to causation of serious alarm or distress. Rather than directing them unequivocally that they had to be sure that the acts associated with stalking caused the serious alarm or distress, the judge referred to "the course of conduct (including the acts associated with stalking)" as being the necessary cause. That gloss allowed the jury to take into account the complaints to the employer and the regulator even if they were not acts associated with stalking.

25. The respondent denied there was anything of substance in the submissions made on behalf of the appellant. It was said that the judge's written directions coupled with the route to verdict required the jury to address the issues which arose in the case. The evidence made it clear that there was a profound dichotomy between the account given by Mr Whiston and the evidence of the appellant. The jury could have been left in no doubt about the prosecution case in relation to the complaints to the employer and the regulator. The judge directed the jury properly in the light of the factual background to the case.

Discussion of appeal against conviction

26. Ms Arshad submitted that the scheme of the Act consists of four building blocks: harassment; stalking; causing serious distress; statutory defences. We agree with that analysis. Thus, we must first address the question of harassment. We have no doubt that complaints made by D to V's employer and regulator of some kind of misconduct can amount to harassment so long as the complaints cause V distress. Whether true or untrue complaints of that kind almost inevitably will cause the victim distress. We do not accept the submission that an act can only amount to harassment if it is unreasonable and that this is an element of the offence to be proved by the prosecution before consideration of any statutory defence. Section 1(3) of the Act is in clear terms. Section 1(1) of the Act (which sets out the prohibition of harassment) does not apply if the person who pursued the relevant course of conduct shows that in the circumstances what they did was reasonable. Thus, harassment is a course of conduct which causes a person distress. The reasonableness of the conduct is not an issue unless and until the perpetrator raises it as a defence. The passage in *Crawford v CPS* cited by Ms Arshad is simply a shorthand exposition of this proposition. Appropriate complaints to an employer or regulator almost certainly will fall within the defence of reasonableness.

27. In this case the position taken at trial by the prosecution in relation to the complaints was quite clear. Mr Whiston's evidence was that they were false. The appellant was cross-examined on that basis. The defence stance was similarly unequivocal. The allegations made were true. They formed just one part of the appellant's overall case that she had been manipulated and abused by Mr Whiston. That is the context in which the judge's directions must be viewed. At paragraph 3.4(c) of the directions the judge

in a highlighted passage set out what the prosecution had to prove in order to establish harassment:

> ***…a persistent and deliberate course of improper, oppressive and unreasonable conduct that it is targeted at the individual complainant and that is calculated to, and does in fact produce alarm or distress.***

This was followed immediately by the proposition that making "false and malicious assertions against a professional to his regulatory body" could amount to harassment. The judge did not set out in terms that the complaints only could amount to harassment if they were untrue. It was unnecessary for him to do so given the terms of his directions on harassment. Harassment involved "improper, oppressive and unreasonable conduct". Harassment could include false allegations to a regulator. The jury could not have been in any doubt that they had to be satisfied that the complaints were untrue in order to take account of them as part of the course of conduct amounting to harassment.

28. The judge did not give any direction in relation to a requirement that the complaints had to be "well out of the ordinary" before they could amount to harassment. This is not something he was asked to do. Had the point been raised with him, we are sure that he would have rejected it as being irrelevant to the case before him. The observation in *David v Hosany* on which reliance has been placed related to "bona fide complaints of sexual harassment". The suggestion was that, when the complaints were true, the making of complaints could only amount to harassment if they were made in some very unusual manner. That might relate to the repeated making of the same complaint or to the nature of the complaint itself. We note that *David v Hosany* concerned a civil action for harassment. In the context of criminal proceedings the judge, when directing the jury in relation to harassment, must follow the scheme of the Act. There is no reference to actions being "well out of the ordinary" in the Act. In any event, this is not a case in which the prosecution invited the jury to consider the complaints of sexual misconduct as harassment if they were or might have been true. Nor did the judge. On the facts the observation in *David v Hosany* was of no relevance.

29. For those reasons we reject the submissions of Ms Arshad in relation to harassment. We turn to the issue of stalking. There is no simple definition of the term "stalking" in the Act. Leaving aside the mental element (which is not of relevance to the points in issue in this appeal), stalking requires harassment (which is a course of conduct) which amounts to stalking. There is a degree of circularity in the initial statutory definition. Thus, section 2A(2)(b) of the Act stipulates that the acts or omissions relied on are "ones associated with stalking", section 2A(2)(c) providing examples of such acts or omissions. Ms Arshad accepted that the list of examples was not exhaustive. The Act states in terms that they are only examples. What the examples demonstrate is that stalking will involve behaviour directed at a particular person. In some cases the behaviour will be immediately apparent e.g. when it involves contacting the person. It may be covert e.g. following or spying on a person. It can involve publishing material relating to the person. Depending on the factual context, we see no reason why that cannot encompass the sending of complaints to others about the person. The natural meaning of the term "stalking" does not exclude such actions. The facts of this case provide a clear example of how they may amount to stalking i.e. when they represent a continuation and escalation of a pattern of behaviour.

30. What of the submission that the jury should have been directed specifically to consider whether the written complaints to the employer and the regulator were acts associated with stalking? We have set out the relevant parts of the written directions. At paragraph 3.2 the judge set out fully and accurately the elements of the offence charged under Section 4A. He identified the six matters which the prosecution had to prove. He went on to deal with each of the matters in some detail. He directed the jury on the meaning of acts associated with stalking by reference to the statutory definition. He did not deal with each act or omission by reference to the factual allegations in the case. There was no need for him to do so. When he dealt with the evidence at a later stage of his summing up, the judge referred to all of the acts and omissions including the written complaints. He gave detailed directions at paragraph 3.6 about the approach the jury should take to the acts on which the prosecution relied. Quite rightly no complaint is made about those directions or about the route to verdict. The jury were left to determine which acts were associated with stalking. That was the correct approach.

31. The submission that the jury were not provided with a proper definition of "course of conduct" also requires consideration of the directions given to them. Paragraph 3.5 of the directions defined a course of conduct as "a series of related acts occurring on at least two occasions". Paragraph 3.6 engaged in a more detailed discussion of the concept. We see no merit in the argument that the judge should have said more than he did. His directions were tailored to avoid the problem which arose in *Patel* [2005] 1 Cr App R 27 where the judge said nothing to indicate that the acts relied on had to be connected in any way.

32. All of the complaints made about the judge's approach to his directions must be viewed through the prism of the evidence put before the jury. This was not a case in which there was any significant dispute about what the appellant had done. There was a substantial dispute in relation to the nature of the relationship between the appellant and Mr Whiston, most crucially in terms of the sexual activity between them. However, the reality of the case was that the jury either would accept the evidence of Mr Whiston or the evidence of the appellant. There was no room for any middle ground. Even if the case had been one for a nuanced approach to the facts, the judge's directions were sufficient to meet that position. As it was, the directions were designed to meet the case being considered by the jury.

33. The final matter raised by Ms Arshad concerned the direction given (and the question posed in the route to verdict) in relation to causation of serious alarm or distress. The formulation of the judge's direction on this issue must not be read in isolation. In question 6 of the route to verdict, the judge required the jury to ask themselves whether they were sure that "the course of conduct (including the acts associated with stalking) caused…serious alarm or distress". The use of the word "including" arguably was infelicitous. However, this question could only be considered by the jury if they had already concluded that the course of conduct amounted to harassment (question 2) and that acts involved in the harassment were acts associated with stalking (question 5). Since the jury were directed to take a stepped approach, they could not have understood question 6 to involve some wider and undefined course of conduct. It is apparent from the written directions that this was not the approach the jury were invited to take.

34. It follows that we do not consider that any of the arguments raised in relation to the conviction of the appellant on count 1 in relation to Mr Whiston has any substance. The conviction was safe.

Sentence

35. The restraining order made against the appellant is the sole aspect of sentence with which we are concerned. The order, which was of 10 years duration, had five paragraphs. No objection is taken to the first and last of those paragraphs. The other paragraphs are said to be too wide and/or so imprecise as to render them impossible to enforce. The order was as follows:

> It is therefore ORDERED that:
>
> • Sana Musharraf is restrained from contacting Jason Whiston, Jason Whiston's children, Dr. Tamara Whiston, Virginia Wall, Angus Whiston, Shivani Jegarajah, Shivani Jegarajah's children, Alison Whiston, Jenny Manson, Mike Manson, or Jonathan Rowan directly or indirectly, by any means including telephone, text, or internet, except and only through her legal professionals, to which legal representatives a copy of this restraining order must be shown.
>
> • Sana Musharraf is restrained from contacting the Government Legal Service, Bar Standards Board, London School of Economics and Solicitors' Regulation Authority regarding Jason Whiston.
>
> • Sana Musharraf is restrained from referring to Jason Whiston and Dr. Tamara Whiston by name, image, or otherwise to any person or entity other than legal professionals who Sana Musharraf has retained to represent her or Sana Musharraf's medical providers, to which legal or medical professionals a copy of this restraining order must be shown.
>
> • Sana Musharraf is restrained from distribution of any materials to, from, recording, or referring to Jason Whiston or Dr. Tamara Whiston including but not limited to emails, texts, whatsapp messages, voice or video recordings.
>
> • Sana Musharraf is restrained from entering or going within 200 metres of One Kemble Street, London, 102 Petty France, London or any other location where she is aware that Jason Whiston, his children, or Dr. Tamara Whiston are present.

36. In relation to the second paragraph Ms Arshad argued that the jury's verdict did not necessarily mean that they concluded that the appellant's complaints of rape were false. In those circumstances the judge was not justified in imposing any restriction on her ability to pursue such complaints. The prohibition imposed was against the public interest in allowing proper investigation of significant allegations. Moreover, the prohibition prevented the appellant from making any enquiry as to what had happened in relation to the written complaints she had made.

37. As to the third and fourth paragraphs the submission of Ms Arshad was that the prohibitions imposed therein were both too wide and impossibly vague. They also represented a disproportionate breach of her rights under Article 10 of the Convention.

38. Any assessment of the restraining order must be in the context of the course of conduct adopted by the appellant towards Mr Whiston and Ms Mohammed. When sentencing the appellant the judge found as a fact that the allegations made by her to Mr Whiston's employer and professional regulator were false and malicious. That is a finding he was entitled to make having heard the evidence. The argument made in relation to the second paragraph of the order by reference to the jury's verdict is unsustainable. Therefore, the prohibition in that paragraph must be judged in the context of false and malicious allegations having been made against Mr Whiston. In that context some prohibition against contacting the named institutions was wholly reasonable and proportionate. We accept that some provision should have been made for the appellant

to respond to correspondence or e-mails in relation to the complaints made in 2017 even though that is not something about which the judge was addressed at the time. To accommodate that requirement, the second paragraph of the order must be amended to include the following additional words:

> *…save that this restraint shall not prevent Sana Musharraf from responding to fresh communication from those institutions provided that any such response is not copied or forwarded to any third party save to her legal professionals for the purpose of seeking legal advice.*

39. We do not consider that the third and fourth paragraphs of the order are wrong in principle. Clearly they represent a restriction of the appellant's right to freedom of expression. Article 10 does not prescribe an untrammelled right. It is subject to restrictions necessary to protect the rights of others. In this case Mr Whiston and Ms Mohammed required protection from the appellant. The provisions of the third paragraph are proportionate since they permit the appellant to refer to the protected persons in communications with her legal or medical professionals. It is not clear why the fourth paragraph did not contain the same caveat. The wording in the third paragraph from "….to any person or entity.." to the end of the paragraph must be added to the fourth paragraph to provide a consistent approach and one which protects the appellant's ability to seek legal and medical advice.

40. Other than the matters to which we have referred we do not consider that there should be any amendment of the restraining order.

Conclusion

41. We dismiss the appeal against conviction. We allow the appeal against sentence to the very limited extent we have indicated. We require the respondent within 7 days of the handing down of this judgment to submit a fresh restraining order to the Court reflecting the amendments to which we have referred in order that the Court may serve it on all relevant parties.