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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 17 January 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE POPPLEWELL

HER HONOUR JUDGE WENDY JOSEPH QC
(Sitting as a Judge of the CACD)

R E G I N A
v
SEAN JOHN NANCARROW

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Ms H Marshall appeared on behalf of the **Appellant**
Mr J Sank appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

MR JUSTICE POPPLEWELL:

1. The appellant is aged 51. On 15th December 2017 he was sentenced by Mr Recorder Price QC in the Crown Court at Reading for the following offences to which he pleaded guilty: count 1, possessing prohibited firearms, namely four CS gas canisters, contrary to section 5(1)(b) of the Firearms Act 1968, two years' imprisonment; count 2, possessing disguised firearms, namely five stun guns disguised as mobile phones, contrary to section 5(1A)(a) of the Firearms Act 1968, five years' imprisonment; count 3, possessing a disguised firearm, namely an electrified knuckle-duster, contrary to section 5(1A)(a) of the Firearms Act 1968, five years' imprisonment; count 4, possessing extreme pornographic images, namely eighteen videos depicting bestiality, fifteen months' imprisonment. All sentences were to run concurrently.
2. He appeals against sentence with leave of the Full Court granted following an oral renewal of the application for permission which had been refused by the single judge.
3. The essential ground of appeal is that the sentences on counts 2 and 3 were wrong in principle or manifestly excessive because the Recorder ought to have found that there were exceptional circumstances which justified not imposing the statutory minimum term of five years for those offences.
4. The facts are these. In the summer of 2015, the appellant had been living for a number of years at a house in Bracknell with the owner, Miss Kalsi, initially as her partner and, following the cessation of their relationship, as a lodger. On 27th May 2015 he was involved in an incident of domestic violence with her, for which he was later charged and convicted of battery. He moved out of the house and left most of his belongings there.
5. About a month later, as a result of an incident at the house in which the appellant was not involved, the police attended on 25th June 2015, and again about a week after that. On

searching the house, they found the items that form the subject matter of the current appeal. Four CS gas canisters, four stun guns disguised as mobile phones and the electrified knuckle-duster were found inside a silver briefcase in the garage. A fifth stun gun disguised as a mobile phone was found in a gun cabinet in the garage. All but one of the stun guns were found to be in working order. Only one of them was charged. That was one of the mobile phone stun guns in the silver case.

6. On 24th May 2015, shortly before he had moved out of the home, the appellant had sent a text to another man saying: "Hav u stil got my stun guns that you took or hav u sold them cos I need them back[?]"

7. The defendant was arrested in late September 2015 and answered "no comment" to all questions. There was then a long delay (which was not of the appellant's making), until he was reinterviewed in March 2017, when he again answered "no comment" to all questions. Shortly thereafter he was jointly charged along with Miss Kalsi and indicated not guilty pleas on his first appearance before the magistrates' court. We have been told that the reason for the lengthy delay was for the purposes of the police examining mobile phones and computers in the context of the images of bestiality which had been found and which formed the subject matter of count 4.

8. The appellant pleaded guilty at the PTPH on a written basis of plea which was not accepted by the Crown. The written basis was as follows. He had ordered the stun guns and the CS gas canisters over the internet from China in two consecutive orders shortly after he had moved to new accommodation in Maidenhead between 2009 and 2010. He had done so because he thought that that was a high crime area and he felt unsafe. There were two such orders, he said, because he had thought that the first order was not going to arrive and had therefore placed a second order. Apart from unpacking

the stun guns and checking that they were operational, he said they had been kept since then in their packaging inside a metal case without the plug adapters that would have been necessary to charge them. Following that basis of plea, the proceedings were dropped against Miss Kalsi; and on 15th December 2017 the appellant appeared before the Recorder for a Newton hearing and for sentencing. The Recorder had the benefit at that stage of a psychiatric report from Dr Lally dated 21st November 2017 and of a pre-sentence report from the probation service.

9. The psychiatric report gave details of the appellant's history of mental illness and alcoholism, which had largely dated from the period since 2006, when he had become the carer for his brother. His brother had been suffering from depression and alcoholism, and was often aggressive or suicidal. It was the appellant himself who found his brother when, in 2008, he hanged himself with cable ties, as a result of which the appellant suffered post traumatic stress disorder with flashbacks and nightmares. Dr Lally's conclusions were summarised in paragraph 4 of his report in the following terms:

> "The defendant suffers from:
>
> a) Recurrent depressive disorder, current episode moderate severity.
>
> b) Harmful use of alcohol;
>
> c) Post traumatic stress disorder;
>
> d) Agoraphobia.
>
> His problems have become increasing chronic, complex and severe over the last ten years and I think the prognosis for recovery is poor. I doubt he would cope in a custodial environment and he would be a high risk of self-harm and suicide. His mental disorders are not currently of a nature or degree to warrant treatment in hospital and I do not recommend a mental health disposal."

10. The author of the pre-sentence report expressed the view that any risk of harm posed by the appellant could be effectively managed in the community with an alcohol treatment requirement and a rehabilitation activity requirement.

11. The appellant gave evidence at the Newton hearing before the Recorder on 15th December 2017. The Recorder rejected his evidence as to the circumstances in which he had come into possession of the disguised firearms and rejected his explanation for being in possession of them. Having heard the evidence himself the Recorder was fully entitled to reach that conclusion, which was supported by a number of matters which substantially undermined the appellant's evidence. In particular, there were two separate purchases of a number of stun guns. If the devices had been for self-protection, as he asserted, it is unlikely they would have been kept uncharged in a case in the garage; and indeed it was notable that the appellant retained them when he moved from the area in which he had said he felt unsafe. The text message (which the appellant falsely claimed had not been sent by him) revealed that he had provided stun guns to another to use or to sell or (at the least) knowingly allowed them to be taken; and it further indicated that he wanted them back in 2015 at a time when he was living with Miss Kalsi.

12. The Recorder therefore held that he was sure that the appellant had not told the truth about the circumstances in which he had acquired and kept the weapons, but went on to say that he could not be sure on the evidence why he had bought them or kept them for so long.

13. In the course of his ruling on the Newton hearing and in the course of his sentencing remarks, the Recorder treated this finding as conclusive against there being exceptional circumstances that could justify not imposing a minimum five-year term. He said that he accepted the findings in Dr Lally's report, but that this alone could not amount to

exceptional circumstances.

14. In the course of his sentencing remarks he also indicated that the sentence of fifteen months which he imposed on count 4 in relation to the bestiality images was one which would normally warrant a consecutive sentence but would run concurrently as a matter of totality because he was imposing the minimum term on counts 2 and 3.

15. When granting leave to appeal, the Full Court ordered a further psychiatric report to consider the appellant's health since his imprisonment. We have had the benefit of a report of Dr Reid dated 13th November 2018, who reviewed the appellant's records and interviewed him in prison. His report confirms the diagnosis of Dr Lally. He also records the further physical health issues that have been suffered by the appellant both before and after his imprisonment. He identifies that Mr Nancarrow suffers from a number of physical health issues. He has a diagnosis of sleep apnea, which is now treated with a CPAP machine. He has visual impairment dating back to 2009, arising from optic nerve damage - most likely secondary to his alcohol use. He has had dysplasia (potentially precancerous changes) on the floor of his mouth - likely precipitated by his history of smoking and consuming spirits. He has poor dentition, and in October of last year, as a result of that poor dentition, he developed a dental abscess which progressed into Lugwig's Angina - a potentially life-threatening infection which required a period of several days' ventilation in an induced comma in intensive care. As to his mental health issues, Dr Reid concludes that he has been appropriately medicated in prison after the first few days, following which his mood improved. The stress of being in prison has continued to have some adverse effect on his mood, leading to symptoms of depression from mild to moderate severity. The effect of the stress of being in prison on his mood is counterbalanced by the fact that his access to alcohol is

restricted; and these two factors - stress of imprisonment against reduced alcohol consumption - negate each other to some extent, resulting in a situation in which his mental state is not worsening, although it is unlikely to improve. It is clear from Dr Reid's report that Dr Lally's fears about the appellant's ability to cope in prison have not proved to have been validated by subsequent events: he is coping with prison satisfactorily and his mental and physical health is being satisfactorily attended to.

16. He had no previous convictions before 2015. In August 2015 he was convicted of the battery of Miss Kalsi, which occurred in May of that year, and on 1st December 2015 he was convicted of drink driving and sentenced to a community order. The pre-sentence report records that he complied well with the requirements of that order and attended Alcoholics Anonymous, but he subsequently relapsed into heavy drinking.

The Applicable Principles

17. Under section 5(1A)(a) of the Firearms Act 1968, a person commits an offence if he has in possession or purchases, acquires, sells or transfers a firearm which is disguised as another object.

18. Under section 51A(2) of the Firearms Act 1968 the court must impose a minimum term of five years' imprisonment for an adult offender convicted of such an offence, unless "the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its not doing so".

19. The authorities in this court establish the following principles as to the application of section 51A(2):

    (1) The purpose of the mandatory minimum term is to act as a deterrent (R v Zakir Rehman and Wood) [2005] EWCA Crim 2056; [2006] 1 Cr App R 77 at paragraph 12.

(2) Circumstances are *exceptional* for the purposes of subsection (2) if to impose five years' imprisonment would amount to an arbitrary and disproportionate sentence (Rehman at paragraph 16).

(3) It is important that the courts do not undermine the intention of Parliament by accepting too readily that the circumstances of a particular offence or offender are exceptional. In order to justify the disapplication of the five-year minimum, the circumstances of the case must be truly exceptional (R v Robert Dawson [2017] EWCA Crim 2244 at paragraphs 12 and 19).

(4) It is necessary to look at all the circumstances of the case together, taking a holistic approach. It is not appropriate to look at each circumstance separately and conclude that, taken alone, it does not constitute an exceptional circumstances. There can be cases where no single factor by itself will amount to *exceptional circumstances*, but the collective impact of all the relevant circumstances makes the case exceptional (Rehman at paragraph 11).

(5) The court should always have regard, amongst other things, to the four questions set out in R v Avis [1998] 2 Cr App R (S) 178, namely: (a) What sort of weapon was involved? (b) What use, if any, was made of it? (c) With what intention did the defendant possess it? (d) What is the defendant's record? (See, for example, R v Mccleary [2014] EWCA Crim 302 at paragraph 11.)

(6) The reference in the section to the *circumstances of the offender* is important. It is relevant that an offender is unfit to serve a five-year sentence or that such a sentence may have a significantly adverse effect on his health (Rehman at paragraph 15; R v Shaw [2011] EWCA Crim 167 at paragraphs 6-7).

(7) Each case is fact-specific and the application of the principles dependent upon the

particular circumstances of each individual case. Limited assistance is to be gained from referring the court to decisions in cases involving facts that are not materially identical (see, for example, R v Stoker [2013] EWCA Crim 1431 at paragraph 22).

(8) Unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in not identifying exceptional circumstances where they do exist, this Court will not readily interfere (Rehman at paragraph 14).

20. In this case the Recorder seems to have treated his rejection of the basis of plea as determinative against there being exceptional circumstances. That is an erroneous approach. He ought to have considered the questions in Avis, the appellant's mental and physical health and all the other circumstances of the case as factors that were to be taken together. He was mistaken in thinking that Dr Lally's report should be ignored on the ground that it was insufficient on its own to amount to exceptional circumstances. As the Lord Chief Justice made clear in Rehman, a holistic approach is required. Accordingly, we must consider ourselves whether there are exceptional circumstances that would make a five-year term disproportionate.

21. We do not consider that there are. The answers to the Avis questions are as follows. The answer to the first Avis question is that these are not lethal weapons. As to the second, it cannot be said with any confidence that no use was made or intended to be made of them by anyone. Of considerable significance is the conduct revealed by the text, which involves the appellant putting these or other stun guns into circulation for the use of another, or for him to sell on for others to use, or at least allowing that to occur; and this appellant wanting those stun guns back (presumably for his own use) in 2015.

Putting these stun guns into circulation is the very mischief at which the mandatory deterrent sentence is aimed. Although not lethal, disguised stun guns can be used to inflict serious injury, and the policy embodied in the Firearms Act 1968 is that strict liability for possession of them normally attracts a deterrent minimum sentence because of the dangers they pose. The text is also relevant to the third Avis question. Whilst it is impossible to say why they were acquired or kept by the appellant, the number of them, the nature of how they were stored and the text belies any purely defensive and self-protection motive, and the texts suggest subsequent dealing with either these weapons or others. This is not the kind of case in which they were acquired and left untouched and unthought about. The fourth Avis question is answered in the appellant's favour.

22. The Recorder, having quite properly rejected the appellant's account of how and why he acquired and kept them, was left in the position that there were no other events or explanation before the court. That leaves the appellant in a position where he was and is unable to point to anything in the acquisition or possession of these weapons that could amount to exceptional circumstances.

23. That leaves only two matters which may amount to exceptional circumstances. The first is the delay in the prosecution of the appellant; the second is his physical and mental health. So far as his physical and mental health is concerned, the medical evidence now before us suggests that it is being well managed in prison and that it is not possible to say that a five-year sentence on him is unduly onerous because of his health. The delay in prosecuting him is unfortunate, but we do not think that those two circumstances, either taken individually or together, could properly be described as truly exceptional. Accordingly, the appeal will be dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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