

Neutral Citation Number: [2018] EWCA Crim 755

No: 201705574/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 23 March 2018

B e f o r e:

LORD JUSTICE BEAN

MR JUSTICE SWEENEY

HIS HONOUR JUDGE LEONARD QC
(Sitting as a Judge of the CACD)

R E G I N A

v

DAVID THOMAS HARVEY

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Mr D Morton appeared on behalf of the **Appellant**

J U D G M E N T (Approved)

If this transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

1. MR JUSTICE SWEENEY: This is an appeal against sentence by leave of the single judge.
2. On 29 September 2017, in the Crown Court at Manchester, the appellant, aged 54, and treated as being of good character, pleaded guilty to Count 2, making an explosive substance in such circumstances as to give rise to a reasonable suspicion that he had not made it for a lawful object, contrary to section 4 of the Explosive Substances Act 1883 ("the 1883 Act"). His plea of not guilty to Count 1, an allegation of making an explosive substance with intent to endanger life, contrary to section 3 of the 1883 Act, was accepted.
3. On 5 December 2017 the appellant was sentenced by His Honour Jonathan Foster QC, sitting as a Deputy Circuit Judge, to 3 years 4 months' imprisonment. He was also made the subject of a Restraining Order until further order.
4. The facts, in short, are these. The appellant lived alone at an address in Droylsden in Manchester. He was reasonably educated, but lived an isolated life with no real social contact, and displayed traits of schizoid and paranoid personality disorders. He had an interest in science, including an interest in explosives and scientific experiments. He had turned his kitchen in to a homemade laboratory and had diverted his electricity meter. He had, amongst other things, chemicals, test tubes, electrical equipment, two bomb-making books, a leaflet about how to blow things up, explosives and propellants, notes on

chemical experiments, and newspaper clippings in relation to the 7/7 bombings in London, together with a box of screws.

5. Over the 3 years leading up to May 2017 the appellant had fallen out with his immediate neighbours, the Topping family. The appellant felt, probably wrongly as the judge found, that Anthony Topping and his family were causing excessive noise and nuisance. For their part, the Toppings often lived in fear of the appellant's unsocial actions and what he was going to do next.
6. For his part, the appellant resolved to teach the Toppings a lesson by scaring them to such an extent that they would move from their house. To that end he made a small explosive device, consisting of a metal cube measuring a little over an inch by inch, into which he put 6 grams of ground match heads and a flash bulb. The cube was then tightly taped up, with two long leg wires from the flash bulb emerging from it.
7. The expert who later examined the device concluded that if an electric current from a battery was passed along the leg wires the flash bulb would operate and cause the match head composition to explode with a loud bang, which would cause alarm. The expert further concluded that fast moving fragments of the metal cube would be projected away from the explosion, thereby giving rise to the potential for harm to be caused to people or property in close proximity.
8. On 26 May 2017 the appellant, using longer wires that he had attached to the leg wires, lowered the device from one of his upstairs windows to just above the fence that separated his property from that of the Toppings, and left it hanging there. It was seen by Mr Topping who immediately thought that it was a nail bomb. He took his young

children inside and then photographed the device in situ.

9. Given that it was only 4 days after the bombing at the Manchester Arena, Mr Topping was reluctant to call the police. Instead he went to the appellant's front door, but there was no answer. However, he then saw the appellant pulling the device back inside and heard him say: "It's just wires". Mr Topping then took the photographs that he had taken to his local police station and sought their advice.
10. The police searched the appellant's house shortly thereafter. At first the appellant directed them to a different device, complaining that his neighbours were noisy and that he wanted to teach them a lesson. However, the actual device was then found in the appellant's bedroom, along with similar equipment. The homemade laboratory in the kitchen was also found, together with the various items in it, which we have already described.
11. In interview the appellant said that he studied the sciences and had conducted experiments. He said that noise from his neighbours was disturbing him and that he had dangled the device to frighten Mr Topping. He had not, he said, intended to detonate it.
12. As to the newspaper clippings in relation to the 7/7 bombings, he said he had no feelings towards any terrorist group and had only been interested in the types of device used.
13. In his victim personal statement, made in July 2017, Mr Topping indicated that he thought daily about the likely consequences of the appellant's return home, and spoke of the fear and distress that the appellant's actions and behaviour had caused to him and to his family.

14. A psychiatric report dated 2 October 2017 indicated, as we have touched on, that the appellant demonstrated traits of schizoid and paranoid personality disorders. However, the author was not convinced that the appellant posed excessive concern to public safety - given his settled mental state and behaviour in prison.
15. The pre-sentence report indicated that the appellant displayed limited victim empathy - given his perception that his neighbours had provoked a response from him by their behaviour. Whilst the appellant was assessed as posing a high risk of serious harm to the public, the author of the report opined that that risk could be reduced through appropriate engagement with specialised interventions, but recognised that a custodial sentence was inevitable.
16. In passing sentence the judge rehearsed the facts, underlining that the appellant's stated purpose had been to teach his neighbours a lesson and to scare them, so that they would move from their house, and that he had succeeded in scaring them by the use of a viable explosive device, albeit one that was fairly unsophisticated and not capable of causing serious harm. The judge made clear that he did not class the appellant as a terrorist, but instead as a rather eccentric man, who was not in tune with the modern changes in life, and who conducted amateur experiments of no great threat. In those circumstances, said the judge, it was not necessary to make a finding of dangerousness. Absent a Sentencing Council Guideline, or a guideline authority, the judge concluded that it was appropriate to take into account the fact that the nearest analogous guidance was that provided by section 51A of the Firearms Act 1968 ("the 1968 Act"), namely the minimum term of 5 years' custody for the possession of a prohibited weapon. He also mentioned the Guideline in relation to the possession of offensive weapons, and that it indicated a range

of 2 to 4 years' custody. The judge made clear that he had not found the case of R v Riding [2009] EWCA Crim 892, to which he had been referred by the prosecution, to be particularly helpful. It was, said the judge, a very real part of this case that the appellant had achieved his purpose, which was to scare his neighbour. The judge also regarded it as significant that the inevitable and foreseeable consequence of the appellant's actions, so soon after the Manchester Arena bombing, was the diversion of public services (in terms of both the immediate and later forensic investigation) at a time of heightened public concern. Repeating that sentence was on the basis that the appellant was not a terrorist but an isolated man, interested in science and making experiments of no great threat, the judge indicated that the appropriate notional sentence after trial was, in his view, one of 5 years' imprisonment, which he reduced by a third to reflect the appellant's plea, which had been indicated at the first reasonable opportunity.

17. The Grounds of Appeal are that the judge erred when stating that he did not find the case of Riding to be particularly helpful. Rather, it is suggested that the case was of considerable relevance to the issues concerning the approach to the sentence of the appellant, both in terms of the impact of the custodial sentence on the appellant and the approach to the length of the inevitable custodial term. In addition, it is suggested that it was wrong in principle to judicially determine that the starting point in the appellant's case, comparably with section 51A of the 1968 Act, should be 5 years.

18. Developing those Grounds this morning Mr Morton, on the applicant's behalf, submits that Riding was quite a different case on its facts. He stresses that the appellant is aged 54 and was treated as being of good character. He reminds us that the reason for the delay between arrest, charge and sentence was, in significant part, because of ill-health

suffered by the appellant in consequence of a rat bite whilst in custody, which made him extremely ill.

19. As to the appropriate starting point in this case, Mr Morton submits that time served (some 6 months) up to sentence, the equivalent of a sentence of 12 months, would be sufficient to reflect the appellant's culpability.
20. As we have said, there is no Sentencing Council Guideline in relation to offences contrary to section 4 of the 1883 Act. Nor any guideline case. However, whilst Mr Morton has cited only Riding, there have been several other cases over the last 30 years in which this court has considered sentences imposed for offences, whether of making or possessing explosive substances, contrary to section 4 of the 1883 Act. They include R v Currie [1988] 10 Cr App R(S) 452; R v Lloyd [2001] 2 Cr App R(S) 111; R v Campbell [2004] EWCA Crim 2309; R v Tovey [2005] 2 Cr App R(S) 100; R v Pierce [2008] EWCA Crim 1785; R v Rodgers [2011] EWCA Crim 9111; R v Kasprzak [2014] 1 Cr App R(S) 20 and R v Schindler [2016] EWCA Crim 1758.
21. Each of these cases was decided on its own facts. They ultimately involved notional sentences after trial ranging from a conditional discharge/fine (in wholly exceptional circumstances in Campbell), to 8 or more years' imprisonment in Tovey (in which the amount of discount for plea, if any, is not clear).
22. However, it is possible to discern from the cases three matters that must be considered when passing sentence in a case of this type; namely (i) the background of the offence and the motivation of the offender (ii) the potential for harm posed by the explosive substance (even if there was no intention of use) and (iii) the strong need for deterrence.

Equally in Riding, the court approved reference to sentence for firearms offences as being the nearest analogy.

23. Obviously, if the background to the offence and/or motivation of the offender is involvement in terrorism, or in organised, or other, serious crime, sentence is likely to be at levels far above those in the cases that we have cited. The more so as, from 13 April 2015, the maximum sentence for offences under section 4 of the 1883 Act was increased from 14 years to life imprisonment.
24. Here, as the judge found, there was no involvement in terrorism, but the background was the appellant's eccentric interest in explosive devices used by terrorists, the creation by him of a homemade laboratory in his kitchen, and the collection by him of relevant literature and materials.
25. The appellant made not just an explosive but a small, functional, explosive device, which had the potential to injure people in proximity to it, albeit not seriously. Equally, whilst the offence can be committed simply by a making or possession which lacks a positive lawful object, the appellant had a positive unlawful object, namely to scare the Toppings to such an extent that they would move to another address. The Toppings' young children were exposed to the device and, unsurprisingly, the whole Topping family were very scared.
26. It is therefore clear that the appellant's offence was some distance from being at the bottom of the culpability range. Equally, in accordance with Riding, the judge was entitled to draw an analogy with sentence in firearms cases but otherwise, given that it was decided on its own facts, not to find that case to be particularly helpful. Further, he

was entitled to take into account the diversion of public resources in Manchester at a time of heightened concern. Finally, and very importantly, the judge had to give effect to the strong need for deterrence including, albeit that he rightly imposed a Restraining Order, deterring the appellant from further offending against the Toppings.

27. In our view the immediate custody threshold was crossed by some margin. However, weighing the aggravating and mitigating features, it seems to us that the appropriate notional sentence after trial in the appellant's case was one in the order of 42 months' imprisonment. Hence, after full discount for plea, the ultimate sentence imposed upon him should have been one of 28 months' imprisonment.

28. We therefore quash the sentence of imprisonment that was imposed and substitute for it a sentence of 28 months' imprisonment. The Restraining Order will remain as before.

29. To the extent that we have indicated, this appeal is allowed.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400