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[2021] EWCA Crim 1588

IN THE COURT OF APPEAL

CRIMINAL DIVISION



CASE NO 202100943/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 7 October 2021

LADY JUSTICE SIMLER DBE
MR JUSTICE SPENCER
THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE MENARY QC
(Sitting as a Judge of the CACD)

REGINA
V
MARLON DEAN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR S COBLEY appeared on behalf of the Appellant

J U D G M E N T

1. MR JUSTICE SPENCER: This is an appeal against sentence brought by leave of the single judge.
2. On 19 March 2021 in the Crown Court at Derby, the applicant, now aged 29, was sentenced by Mr Recorder Reynolds to a total of nine years' imprisonment in respect of offences on two indictments. For the most serious offence, possessing a prohibited firearm, contrary to section 5(1)(aba) of the Firearms Act 1968 the sentence was six years' imprisonment. There was a consecutive sentence of three years' imprisonment in total for three offences of possessing class A drugs with intent to supply. There was a concurrent sentence of 12 months' imprisonment for having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988.
3. The firearms offence carried a mandatory minimum sentence of five years' imprisonment pursuant to s.311 of the Sentencing Act 2020. However, applying the new Sentencing Council Guideline for Firearms Offences, effective from 1 January 2021, the judge concluded that the appropriate sentence for that offence after trial would have been nine years' imprisonment. He allowed full credit of one-third for plea. The drugs offences were committed on two separate occasions, the later offences whilst he was effectively on bail for the first.
4. There are two grounds of appeal: first, that the judge was wrong to start at nine years for the firearms offence before credit for plea; second, that insufficient allowance was made overall for totality. We are grateful to Mr Cobley for his written and oral submissions.
5. The first offence in time was possession of heroin with intent to supply (count 2 on the first indictment). On 28 May 2019 the police attended an address in Stockbrook, Derby to execute a drugs search warrant. This was not the appellant's home address, as we understand it, but he was there when the police arrived and promptly fled from the house, climbing out of an upstairs window. As he ran away, he dropped a bag of heroin and discarded a second bag of heroin which was recovered from a child's trampoline in an adjoining garden. The combined weight of the heroin was 11.55 grams which could have been split into 115 deals with a street value of some £1,150. Inside the bedroom from which he had jumped to the ground the police subsequently recovered £119 in cash, a set of digital scales and two mobile phones. Analysis of the phones confirmed his involvement in selling class A drugs.
6. He was interviewed the same day by the police and made no comment. He was released under investigation and was therefore effectively on bail thereafter. The remaining offences were committed nearly 18 months later and whilst effectively on bail.
7. On 3 November 2020 police officers on motor patrol on the A516 between Etwall and Burnaston in Derbyshire came across a black Audi vehicle parked in a lay-by. This was at 2.50 am. It was a semi-rural area. At first, they thought the car had been abandoned but when they looked inside they could see the appellant asleep on the rear seats. They knocked on the window to wake him up. The car was locked. He opened the door and spoke to them. He said he was having a rest and just needed to catch up on some sleep. He gave his correct name. Checks made by the police revealed that other officers needed to speak to him about other offences. He was arrested. He was searched. Some £1,758 in cash was found in his possession, in his pocket and hidden in one of the socks he was wearing. In the vehicle the police found wraps of cannabis beneath the driver's seat which gave rise to a charge of simple possession (count 6) for which no separate penalty was imposed. Also, in the car the police found a lock knife (count7), a

cannabis grinder and some digital scales.

8. Most significantly of all in a bag on the rear seat the police found a handgun and detachable magazine. As soon as they found the gun the police called for armed response officers to attend. Those officers examined the weapon and initially thought it was a BB gun. When they realised there was a magazine attached, they had to make the weapon safe. They discovered that there were a number of silver bullets loaded into the magazine. We have seen photographs of the weapon and the magazine and ammunition.
9. At the police station a more intimate search of the appellant was carried out and he was found to be hiding heroin and crack cocaine in his boxer shorts in quantities estimated to be sufficient for 97 wraps of heroin and 57 wraps of cocaine, with a total street value of £1,540. The finding of those drugs gave rise to the charges of possession with intent to supply (counts 4 and 5 on the second indictment).
10. There was expert evidence in relation to the firearm and ammunition for both prosecution and defence. The weapon was a converted Turkish manufactured self-loading pistol, originally chambered to fire 8mm calibre blank cartridges. Although it would originally have been fitted with an obstructed barrel designed to prevent the discharge of projectiles, the barrel had at some stage been drilled through. The result was an unobstructed barrel approximately 6.5mm in diameter and 7.1cm long. The overall length of the handgun was 14.7cm. This meant that it fell within the classification of a prohibited firearm under section 5(1)(aba) of the Firearms Act 1968.
11. The pistol magazine contained five converted 8mm blank cartridges. Pressed into the front of each of the cartridges was a steel ball bearing of 6mm diameter. The forensic officer test fired the handgun with one of the cartridges, which penetrated 8cm into ballistic soap which is a human tissue simulant for such experiments. This meant that the weapon had sufficient energy to cause fatal injury.
12. The appellant had a history of convictions for offences of violence but no convictions involving firearms. At the age of 16 he had been made the subject of a referral order for robbery. At the age of 17 he was sent to detention for eight months for offences of battery and theft. In 2010, aged 18, he was sentenced to a total of 12 months' detention for offences of assault occasioning actual bodily harm, theft and battery. In 2013, aged 20, he was sentenced to 28 months' detention for section 20 unlawful wounding. In September 2014 he was sentenced to 15 months' imprisonment for dangerous driving.
13. There was no pre-sentence report; nor was any such report required in the circumstances. A lengthy custodial sentence was inevitable of at least five years, given the mandatory minimum sentence for the firearms offence. No exceptional circumstances were advanced to avoid the imposition of that minimum sentence.
14. The judge was impressed by a letter from the appellant in which he expressed genuine remorse and explained his determination to make best use of his time in custody. He is clearly an intelligent young man, as the letter demonstrated, and as confirmed in testimonials from his mother and from a previous employer. Towards the end of 2020, while the first drugs matter was still hanging over him, he had obtained employment before the pandemic put an end to it..
15. The judge had the assistance of counsel in relation to the new Sentencing Council Guideline. The judge concluded that this was a Category 1A offence with a starting point of eight years' custody and a range of seven to 10 years. In reaching that conclusion he was satisfied that this was a Type 1 weapon and that there was high

culpability because the appellant intended the firearm to be used for a criminal purpose. The judge said he was bound to draw that inference even if the appellant had the gun with him only for his own protection, which was the most favourable construction he could put on the facts. It was a loaded firearm with the potential to kill. The appellant was in possession of the firearm when effectively he was living in a car and dealing drugs to support himself. The appellant's explanation was that he had been given the gun to look after following the earlier drug dealing in May 2018 when he was first arrested. The judge was also satisfied that there was Category 1 harm because there was a high risk of death or serious harm.

16. The judge considered that the appropriate sentence was nine years before credit for plea. Although the ammunition was technically not "prohibited ammunition", which would have attracted a minimum five-year sentence separately in itself, it was nevertheless genuine ammunition in every sense of the word, which meant that the applicant was in possession of a loaded firearm. The judge afforded credit of a full one-third for plea. A guilty plea had been indicated in the magistrates' court when he was sent for trial. The sentence for the firearms offence was therefore 6 years.
17. The judge said that in addition he had to sentence the appellant for dealing in class A drugs on two separate occasions. Consecutive sentences for each set of offences would have been justified but the judge said he was sufficiently impressed by the appellant's letter and by his genuine determination to change his ways that concurrent sentences of three years' imprisonment would be imposed for all the offences of class A drugs supply. As there had been an early guilty plea the inference is that the judge started at four-and-a-half years for each of those offences, that being the guideline starting point for Category 3 class A drug supply where the offender has played a significant role. The judge said the sentence of three years for the drugs offences nevertheless had to be consecutive to the sentence for the firearms offence. The sentence for the possession of the lock knife was made concurrent.
18. Pausing there, we observe that the judge was in any event bound to impose a minimum sentence of five years' imprisonment for the firearms offence without any reduction for guilty plea. The appellant received a sentence of six years for the firearms offence rather than the five years which the judge would otherwise have been obliged to impose.
19. In the grounds of appeal, Mr Cobley takes issue with the judge's conclusion that this was a Category 1A offence under the firearms guideline. He submits first that the judge was wrong to find that there was higher culpability. That involved two questions under the guideline. The first was assessment of the initial culpability category - in other words whether the pistol was a Type 1 weapon, as the judge found, or of a less serious type. The guideline states that this assessment focuses on the nature of the weapon itself only, not whether the weapon was loaded or in working order. A Type 1 weapon under the guideline is one that is designed to be capable of killing two or more people at the same time, or in rapid succession. The guideline states that this would normally include a weapon falling within section 5(1)(aba) of the Act, as this weapon did. Mr Cobley in the end, in the course of oral submissions realistically had to accept that this weapon did fall within Type 1 for that reason, although he points out that this pistol was not originally designed to be capable of killing anyone because the barrel was blocked. The barrel had however been bored through, as we have explained, and to that extent therefore had then been designed to be capable of firing ammunition of the kind found in the magazine

which, on the expert evidence, was plainly capable of killing two or more people in rapid succession.

20. The second question in assessing culpability under the guideline involved consideration of "other culpability factors". High culpability under the guideline is demonstrated under this heading if the offender intends the firearm to be used for a criminal purpose or is reckless that it would be so used. Mr Cobley submits that there was no evidence that the applicant used this weapon for a criminal purpose or intended to do so. The appellant's case was that he was merely a custodian of the weapon for others after he had lost the drugs that were recovered by the police in May 2018. In the course of his submissions to the judge, to which the judge referred somewhat cryptically in his sentencing remarks, it seems that the explanation put forward by the appellant through Mr Cobley in mitigation was that the appellant had very recently found himself having to leave home, after splitting up with his partner, and having nowhere else to go was then living in his vehicle. That is the explanation, it is said, for his being found in the lay-by at that time of night, effectively with all his worldly possessions and more importantly with all the kit required for his drug dealing. Mr Cobley submits that this was more properly "medium culpability" where the guideline refers to a firearm "loaded or held with compatible ammunition".
21. Mr Cobley next submits that the judge was wrong to find that there was Category 1 harm under the guideline. The guideline provides that harm is to be assessed by reference to "the risk of harm or disorder occurring and/or actual alarm/distress caused". The judge found that there was Category 1 harm because there was a high risk of death or serious physical injury. Mr Cobley submits that such a finding was not justified in the circumstances. The appellant was simply asleep in his car in a lay-by in a semi-rural area in the early hours of the morning in the domestic circumstances which we have just outlined, which were part of his mitigation. We should add that there was no formal basis of plea, although the judge appears to have been prepared to deal with the matter on the factual basis most favourable to the appellant.
22. Mr Cobley points out that the car was locked with the weapon secreted in a bag on the back seat and says there was no basis for the judge to find a high risk of death or serious physical harm. Nor was there a "high risk of serious disorder". Mr Cobley accepts that the overall scenario of the appellant living as a drug dealer in his car with all the equipment which went with it, means that there was some risk. He takes issue with the judge's assessment of a high risk of death or serious physical harm. He submits it was Category 2 harm.
23. If this were a Category 2B offence rather than Category 1A, which is the thrust of Mr Cobley's overall submission, the starting point under the guideline would have been six years not eight years, with a range of five to seven years, rather than seven to 10 years. Mr Cobley also submits that even if the judge was correct to put the offence into Category 1A with a starting point of eight years, there was no justification for increasing the provisional sentence further to nine years in the absence of any aggravating factors.
24. We note that in granting leave the single judge expressed the view that this ground of appeal was arguable only in respect of "harm" under the guideline, not "culpability". Nor did the single judge specifically grant leave on the second ground, totality. Mr Cobley rightly accepts that the judge plainly did have an eye to totality and said so in terms in

passing concurrent sentences for the drugs offences. He submits however that the overall sentence represented an unjust reflection of the appellant's criminality.

25. We have considered carefully all Mr Cobley's submissions, both written and oral, tenaciously and valiantly advanced before us this morning. For the reasons already explained, we think that this was undoubtedly a Type 1 weapon because the adaptation meant that it had then been designed to be able to be used as a lethal weapon and had the capacity to kill, as the expert's demonstration confirmed. As to the other culpability factors, we think the judge was correct to conclude that there was high culpability. On any view the intention was that this weapon would be used for a criminal purpose in support or in defence of drug dealing, whether by the appellant himself or by whoever it was that provided him with the weapon.
26. Turning to harm, it is important to emphasise that harm is assessed under the guideline by reference to the risk of harm or disorder occurring and/or actual alarm and distress caused - in other words a risk of harm and disorder occurring is sufficient; there does not have to be actual alarm or distress caused. The rubric in the guideline goes on to say that when considering the risk of harm, relevant considerations may include the location of the offence, the number and vulnerability of people exposed, especially children, and the accessibility and visibility of the weapon. Here the judge was satisfied that there was a high risk of death or serious physical harm from the appellant's possession of the weapon and loaded magazine. The location of the offence was a vehicle in which the appellant was living and sleeping, supporting himself by drug dealing. It may have been 2 o'clock in the morning but the reality is that this was merely a snapshot in time. He had certainly been in possession of the weapon for some considerable time when engaged in drug dealing. If, as was suggested, he had only been living in the car for a day or so, and if, as was suggested, he came into possession of the gun after his previous drug dealing was foiled 18 months earlier, it follows that he must have had the gun with him elsewhere for some time, presumably in the house in which he had been living.
27. By possessing a loaded firearm in these circumstances there must by inference have been a willingness that it should be used if necessary in support or defence of drug dealing by himself or whoever supplied it to him. That plainly carried a high risk of death or serious physical or psychological harm. As a matter of common sense, if confronted by a customer or by a rival drug dealer, the potential for use of this weapon (and indeed the lock knife) was great. Consequently from the gun there was a high risk of death or serious physical or psychological harm.
28. We are therefore satisfied that the judge correctly categorised the offence and that the correct starting point under the guideline was eight years' custody. The judge increased the provisional sentence to nine years' custody. Although the judge attached little weight to the appellant's previous convictions, they undoubtedly demonstrated a pattern of violent offending. It is also significant that he was in possession of the lock knife, presumably also for self-protection or aggression in the course of drug dealing for which a concurrent sentence was imposed. Another aggravating factor justifying an increase from the starting point was the commission of the offence whilst effectively on bail. By contrast the only factor reducing seriousness was the appellant's remorse, which was reflected in the judge's approach to totality.
29. For all these reasons, we are satisfied that the sentence of six years' imprisonment for the firearms offence was justified. In any event the judge would have been bound to impose

a sentence of five years for that offence, a difference of only 12 months. It was because of the length of the sentence for the firearms offence that the judge was prepared to reduce the sentences for all the drugs offences and make them all concurrent, whereas consecutive sentences would normally have been appropriate for the drugs offences. Taking this into account, it follows that had the judge merely imposed the minimum sentence of five years for the firearms offence, a consecutive total sentence of four years rather than three years for the drugs offences would have been entirely appropriate and there could not have been any complaint that the total sentence was other than just and proportionate.

30. For all these reasons we are satisfied that the total sentence for these serious offences was not manifestly excessive or in any way wrong in principle. On the contrary, it was just and proportionate. The appeal must therefore be dismissed.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk