



Neutral Citation Number: [2022] EWCA Crim 463

Case No: 202102226 B2 and 202103504 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NORTHAMPTON

His Honour Judge Mayo
T20200351 & T20200404

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 April 2022

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MR JUSTICE SWEENEY
and
MRS JUSTICE HEATHER WILLIAMS

Between:

REGINA
- and -
MICHAEL CHANG

Appellant

Respondent

John Lyons (instructed by **Hunt and Coombs**) for the **Appellant**
Andrew Peet (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 February 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00am on 7 April 2022.

Lord Burnett of Maldon CJ:

1. On 18 June 2021 in the Crown Court at Northampton before His Honour Judge Mayo the appellant, a police officer in the service of Cambridgeshire Constabulary, changed his plea to guilty to possession of a prohibited weapon contrary to section 5(1)(b) of the Firearms Act 1968 ("the 1968 Act"). That followed a ruling by the judge that the provision applied to the circumstances of the appellant's admitted possession of a PAVA incapacitant spray at the time in question. PAVA stands for pelargonic acid vanillylamide. It is an incapacitant spray which affects the eyes. It had been issued to the appellant as a police officer, but he kept it with him in the boot of his car when he finished his duties, contrary to instruction. His defence was that section 5 of the 1968 Act has no application at any time to Crown servants and thus police officers because by section 54 of the 1968 Act they are deemed to be Crown servants.
2. On 7 October 2021, the appellant was convicted of dangerous driving contrary to section 2 of the Road Traffic Act 1998 when he changed his plea to guilty during his trial. The incident of dangerous driving was unconnected with the firearms offence.
3. He was sentenced to a suspended sentence of ten months' imprisonment suspended for two years together with a fine of £1,000 for the firearms offence and a consecutive suspended sentence of six months' imprisonment suspended for two years for the dangerous driving. He was also disqualified from driving for 14 months and ordered to pay £4,300 prosecution costs.
4. The appellant appeals against the firearms conviction with leave. His application for leave to appeal against the total sentence of 16 months' imprisonment suspended for two years has been referred to the full court by the Registrar.

The Facts

Dangerous driving

5. On 30 March 2020 the appellant was driving an unmarked police car along the A1 motorway on his way to Peterborough Magistrates' Court for a bail hearing. He was due to arrive at 09.00 but did not leave the police station until 09.05. He was late and consequently drove at speeds of up to 114mph. He drove with sirens sounding and blue lights flashing despite the absence of an emergency to justify this. He twice called his supervising officer on his hands-free mobile phone whilst driving.
6. At 09.23, three seconds after a call connected, the appellant attempted to leave the motorway at junction 17 but left it too late and lost control. He hit the inside barrier at 100mph, crossed the carriageway in front of another vehicle and came to a halt after hitting the outside and inside barriers. There were no injuries, but the car sustained significant damage. The driver of the car he had crossed in front of made a 999 call. While she was doing so the appellant took it over saying he was a police officer. He called his supervising officer, pretending simply to have pulled over to the side of the road, to request the name of the Crown Prosecution Lawyer he was due to meet. He then called again at 09.50 when he arrived at court. He made no reference to the accident. His supervising officer discovered what had happened when the other driver reported the matter. The appellant was brought back to the police station and accepted that he should not have been using the lights and sirens, that he "put his foot down"

because he was late and had not thought about telling his supervising officer about what had happened.

Possession of a prohibited weapon

7. The appellant was a plain clothes police officer. He left Huntingdon Police Station at the end of his shift on 15 April 2020 and on his way home he stopped at a Tesco supermarket in Kettering. He had previously been issued with a PAVA incapacitant spray which he should have left in an assigned PAVA locker when he left work.
8. The appellant intended to do some shopping, He had put on some police uniform, despite being a plain clothes officer, because on a previous occasion the store had not allowed him to go to the head of a queue as a “keyworker”. This was shortly after the first Covid-related lockdown when many retailers were allowing “keyworkers” to take precedence when shopping. He then went to buy some petrol at the store’s petrol station. The appellant observed a dispute between a staff member and a Mr Davies. The appellant believed, quite wrongly, that Mr Davies was attempting to make off without paying for petrol. The appellant approached his car, stood in front of it and tried to speak to Mr Davies by pointing and shouting. When Mr Davies refused to engage with him, the appellant retrieved from his own car the belt to which the police-issue PAVA spray holster and baton were attached. Mr Davies got out of his car and began to use his mobile phone. His partner and a 14 year old nephew were passengers in the car. She got out and recorded on her phone what was going on. The appellant chased Mr Davies and sprayed him with PAVA spray, some of which blew into his partner’s face. In the meantime, the Northamptonshire police had been called. A police officer observed the appellant chasing Mr Davies with his police-issue baton and PAVA spray, before operating the spray. The incident was also captured on CCTV.

Appeal against conviction

9. Section 5(1) of the 1968 Act provides that a person commits an offence if, without authority, he has in his possession, or he purchases or acquires, a weapon of the kind listed in the subsection. This list includes “any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing” at subsection (1)(b). The appellant accepts that he had a police-issued PAVA incapacitant spray in his possession without authority and that it fell within this definition. Accordingly, the ingredients of the offence charged were established, subject to the effect of section 54 of the 1968 Act.
10. Section 54 is headed “Application of Parts I and II to Crown servants”. The current amended version, which also applied in April 2020, provides:
 - “(1) Sections 1, 2, 7 to 13 and 26A to 32 of this Act apply, subject to the modifications specified in subsection (2) of this section, to persons in the service of Her Majesty in their capacity as such so far as those provisions relate to the purchase and acquisition, but not so far as they relate to the possession, of firearms.
 - (2) The modifications referred to above are the following

(a) a person in the service of Her Majesty duly authorised in writing in that behalf may purchase or acquire firearms and ammunition for the public service without holding a certificate under this Act;

(b) a person in the naval, military or air service of Her Majesty shall, if he satisfies the chief officer of police on an application under section 26A of the Act that he is required to purchase a firearm or ammunition for his own use in his capacity as such, be entitled without payment of any fee to the grant of a firearm certificate authorising the purchase or acquisition or, as the case may be, to the grant of a shot gun certificate.

(3) For the purposes of this section and of any rule of law whereby any provisions of this Act does not bind the Crown, a person shall be deemed to be in the service of Her Majesty if he is –

- (a) a member of a police force, or
- (b) a civilian officer, or
- (ba) a community support volunteer or a policing support volunteer designated under section 38 of the Police Reform Act 2002 by the chief constable of a police force in England and Wales.
- (e) a member of the British Transport Police Force, or
- (f) a person employed by the British Transport Authority who is under the direction and control of the Chief Constable of the British Transport Police, or
- (g) a community support volunteer or a policing support volunteer designated under section 38 of the Police Reform Act 2002 (as it applies by virtue of section 238 of the Railways and Transport Safety Act 2003) by the Chief Constable of the British Transport Police Force.”

11. On behalf of the appellant, Mr Lyons submits that there is a well-established rule of statutory interpretation that the Crown is not bound by legislation absent express words or necessary implication to the contrary. That rule applies to the 1968 Act. The Crown’s exemption is extended by section 54(3)(a) to members of a police force without any limitation placed upon the circumstances in which it applies to them. Section 54(1) applies only some provisions of the 1968 Act to Crown servants; that application is limited to purchase and acquisition (not possession) and is then subject to modified arrangements for authorisation. Section 5 of the 1968 Act is not within the

provisions applied by section 54(1). It therefore follows that, as a police officer, the appellant was exempt from the offence of possessing a prohibited weapon irrespective of the capacity that he was acting in at the time and irrespective of where it came from.

12. The breadth of the submission needs to be understood. Section 5 provides that “a person commits an offence if, without authority, he has in his possession, or purchases or acquires” a range of different weapons and not only something capable of discharging noxious liquids or gas: machine guns, pump action shotguns, rocket launchers, mortars, firearms disguised as something else, missiles and much else. The authority referred to is, by subsection (3), the Secretary of State (for England and Wales) and the Scottish Ministers. The appellant submits that all Crown servants and those deemed to be so by section 54(3) are not subject to these penal provisions, even when they are not acting as Crown servants or as one of those identified in section 54(3) of the 1968 Act. The same argument would apply to other parts of the statute not mentioned in section 54(1) including section 3 (manufacturing and selling weapons), section 4 (shortening shotguns and converting things into weapons), section 4A (possession of articles for converting weapons), section 16 (possession of firearm with intent to injure), section 16A (possession of firearm with intent to cause fear of violence), section 17 (use of firearm to resist arrest), section 18 (carrying a firearm with criminal intent), section 19 (carrying a firearm in a public place), section 20 (trespassing with firearm) and much else.
13. It follows that if the submission were correct not only would, for example, all servicemen and Ministers of the Crown be at liberty always to carry arms (as would all those identified in subsection (3)) but they could with impunity do the other things with weapons criminalised by the 1968 Act. The judge was unable to accept that submission and so are we.
14. In *Lord Advocate v. Dumbarton District Council* [1990] 2 AC 580 at 597E-H, Lord Keith of Kinkel expressed agreement with the observation of Diplock LJ (as he then was) at pp. 78 to 79 in *British Broadcasting Corporation v. Johns* [1965] Ch. 32 made in the context of considering whether the BBC was exempt from taxation as an instrument of government:

“Since laws are made by rules for subjects, a general expression in a statute such as ‘any person’, descriptive of those upon whom the statute imposes obligations or restraints is not to be read as including the ruler himself. Under our more sophisticated constitution the concept of sovereignty has in the course of history come to be treated as comprising three distinct functions of a ruler: executive, legislative and judicial, though the distinction between these functions in the case, for instance, of prerogative powers and administrative tribunals is somewhat blurred. The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.”

15. In *Regina (Black) v. Secretary of State for Justice* [2017] UKSC 81; [2018] AC Baroness Hale of Richmond PSC explained that the rule did not confer an immunity from liability, but rather was a rule of statutory interpretation requiring the court to ascertain the intention of the legislation from the words used by Parliament, considering their context and purpose (para 36).
16. Acts of “the Crown” for these purposes encompasses the acts of Crown servants, most obviously those of Her Majesty’s government, as explained, for example, by Lord Diplock in *Town Investments Ltd v. Department of the Environment* [1978] ACA 359 at 380F-H. However, the acts of Crown servants that fall within this rule of statutory interpretation are those undertaken in their capacity as Crown servants. There would be no sensible rationale for the exemption to extend to the activities of Crown servants in their personal lives. In *Cooper v. Hawkins* [1904] 2 KB 164, in the context of legislation making it an offence for locomotives to exceed a prescribed speed limit, Wills J drew this distinction at p.173:

“...although it might perfectly well be that the Crown is not bound by it [the enactment], yet the circumstances might have been such that a man driving an engine which belongs to the Crown might be liable because the act of over-driving might be his own personal act. For instance, if the man were drunk, or under circumstances in which he was not performing a public duty, and was not acting in accordance with superior orders, he would be liable, although driving an engine belonging to the Crown...”

After noting that on the facts of the case there was no question of the driver doing other than performing his duty as a servant of the Crown, Lord Alverstone CJ said at 171:

“I think that, in a case which has solely reference to the use of a Crown locomotive by a Crown servant in the performance of military duties, we ought to hold that the section does not prohibit that act, and does not bind the Crown in that sense.”
(Emphasis added)

17. Similarly, in *Bank Voor Handel en Scheepvaart v. Administrator of Hungarian Property* [1954] AC 584 in the context of the principle that the Crown is exempt from taxation statutes, Lord Tucker said at p.627 that the immunity extended at least to include those officers of State and their subordinates who performed, pursuant to statutory authority, functions of public government which were formerly the prerogatives of the Crown, but “the immunity extends to such persons only so long as they are acting in the capacity described above”. Lord Keith of Avonholm (dissenting, but not on the essential nature of the exemption) said at p.635:

“The Minister performs the traditional functions of the Sovereign. It is not in his official but in his representative capacity that he claims Crown immunity. The coachman drives the Sovereign’s coach. Unlike the Sovereign, the Minister or the coachman have not complete immunity. They have immunity only in their capacity of Crown servants.”

18. On behalf of the prosecution, Mr Peet did not pursue the submission he made before the judge that the purpose of section 54(1) is to *disapply* the 1968 Act in relation to the provisions it specifies and that it otherwise binds the Crown and its servants. He was right not to do so. He submits that the appellant was not acting as a deemed Crown servant for the purposes of section 54(3) when he committed the offence with the consequence that the section 5 applied to him.
19. In our judgment, the effect of section 54 of the 1968 Act is to bring persons in the service of Her Majesty acting “in their capacity as such” within the scope of the specified provisions of the 1968 Act (modified as identified in subsection (2)) in circumstances where that would not otherwise be the case. We note the use of the word “apply” in the subsection, indicating a positive extension of the reach of the 1968 Act, rather than a disapplication. Moreover, the wording of subsection (3) provides that “for the purposes of this section *and of any rule of law whereby any provisions of this Act does not bind the Crown*” police officers and others are deemed to be Crown servants. That demonstrates that there are provisions of the Act which do not bind Crown servants when acting as such.
20. The decision of the Divisional Court on a Case Stated by justices in *Tarttelin v. Bowen* [1947] 2 All ER 837 in respect of section 5 of the Firearms Act 1937 supports this conclusion. The 1968 Act was intended to consolidate the 1937 Act and other specified enactments: see the preamble. Section 5 of the 1937 Act said:

“Notwithstanding any rule of law whereunder the provisions of this Act do not bind the Crown, so much of the foregoing provisions of this Act as relates to the purchase and acquisition, but not so much thereof as relates to the possession, of firearms and ammunition to which this part of this Act applies shall apply to persons in the service of His Majesty in their capacity as such...”

The Divisional Court held that the justices erred in treating this provision as exempting a flight lieutenant in the Royal Air Force from the offence of unlawfully possessing a firearm, in respect of a firearm that he had purchased privately. Lord Goddard CJ explained that outside the specific circumstances of purchase and acquisition referred to in section 5:

“It is just as much an offence for a member of the armed forces to be in possession of a firearm without a certificate as it is for any other subject of the Crown...unless he is carrying his arms in the way in which an armed soldier ordinarily does carry them.”

21. Section 54(3)(a) of the 1968 Act extends the scope of who is to be considered as a Crown servant for the purposes of the Crown’s exemption from statutory provisions. It does not modify the rule of statutory interpretation itself. That rule only extends to Crown servants *acting in that capacity*. Accordingly, there was no need for Parliament to specify in relation to those listed in (a) to (g) that the rule only applied to them when acting as such. The rule itself provides for that. Furthermore, the modifications elsewhere in section 54 apply to Crown servants only when acting as such. It follows that a Crown servant *not* acting as such would be subject to the full rigour of the

otherwise modified statutory provisions. It would be extraordinary if police officers acting in their official capacity could commit an offence under the 1968 Act if they failed to follow the modified provisions within section 54 but would be exempt from the modified provisions of the 1968 Act when acting in their personal capacity. That would be the effect of the appellant's submissions. Accordingly, we do not accept Mr Lyons' submission that the absence of an express limitation in subsection (3)(a) means that police officers, civilian officers, community support volunteers etc are not subject to the criminal provisions of the 1968 Act at all.

22. We conclude that section 54(3)(a) exempts a police officer from the provisions of section 5 of the 1968 Act only if the officer is acting officially as such at the relevant time. That would be a question of fact. It would not necessarily be coincident with the concept of being "on duty". Mr Lyons raised as an example armed officers at the Palace of Westminster who might retain their firearms during meal breaks. They might technically be off duty (the issue was not fully explored) but would still be acting as police officers.
23. The appellant accepted that he was not given permission to take his PAVA spray from the police station and store it in his own private car; and he did not suggest that its presence there was in any way connected to his duties as a police officer. Paragraph 2.2 of the ACPO Guidelines relating to CS and PAVA sprays indicates that individual Chief Constables will wish to establish policy and guidelines on the extent and appropriateness of issue and carriage by officers under their command. (Paragraph 2.5 having noted that the sprays are classified as prohibited weapons by virtue of section 5(1)(b) of the 1968 Act and that police officers, whilst acting in their capacity as such, are exempt from the requirements of the legislation and do not need an additional authority to possess them.) The Cambridgeshire Constabulary policy at the material time on the "Procedure for the Storage, Allocation and Disposal of PAVA" included the following at para 3.1.1: "All officers allocated with PAVA will be allocated their own locker within which they must store their PAVA canister when not on duty".
24. In the circumstances there can be no doubt that the appellant was acting outside his official capacity in having a police-issued PAVA spray in the boot of his personal motor vehicle on 15 April 2020. Section 54 of the 1968 Act provides him with no assistance in those circumstances. He was properly convicted on his guilty plea of the offence of possession of a prohibited weapon contrary to section 5(1)(b).

Application for leave to appeal against sentence

25. In our view the application for leave to appeal against sentence must be viewed as one against the totality of the overall sentence, that is 16 months' imprisonment suspended for two years. The ancillary orders are, on any view, unexceptional.
26. Both these offences display the appellant's attitude that the ordinary rules have no application to him. The dangerous driving was aggravated by what amounted to an abuse of power in seeking to take advantage of a necessary ability to drive at very high speed in an emergency to make up for a personal failing: being late. It was aggravated by the appellant's conduct in trying to cover up what had happened. The driving itself was appalling and exposed not only the appellant but others to significant risk.

27. So far as the dangerous driving was concerned, the plea of guilty came after the driver of the other vehicle had given her evidence and during the appellant's own evidence, when under cross-examination he effectively admitted all the ingredients of the offence. The judge indicated that after trial the sentence would have been one of seven months' imprisonment. He reduced that to six months to reflect the mid-trial guilty plea. That was generous.
28. In sentencing the firearms offence, the judge applied the relevant guidelines as best he could, given the unusual circumstances of the offending. He concluded that after trial the sentence would have been one of 14 months' imprisonment. In his sentencing remarks, the judge said he would allow a 25% discount for the plea. That would have delivered a sentence of 10½ months, rather than 10. The judge concluded that it was appropriate to suspend the sentence given the appellant's good character and his family circumstances.
29. Despite Mr Lyons' best endeavours, we are unable to accept that the overall sentence is arguably manifestly excessive.

Conclusion

30. Both the appeal against conviction and application for leave to appeal against sentence are dismissed.