IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT MAIDSTONE

HIS HONOUR JUDGE ST JOHN-STEVENS T20207085

CASE NO 202400204/A1

Neutral Citation Number: **[2024] EWCA Crim 1517**

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 2 July 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE HILLIARD
HIS HONOUR JUDGE DEAN KC
RECORDER OF MANCHESTER
(Sitting as a Judge of the CACD)

REX
V
COLIN STEPHEN NOURSE

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MISS A LEWIS KC appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE POPPLEWELL:

1. The appellant and his brother Christopher stood trial in the Crown Court at Maidstone, before His Honour Judge St John-Stevens and a jury, on charges of (1) attempted murder and (2) possession of a firearm with intent to endanger life, contrary to section 16 of the Firearms Act 1968. His brother was convicted of attempted murder. The appellant was acquitted of attempted murder but convicted of the firearms offence. He was sentenced to an extended sentence of 18 years' imprisonment, comprising a 14-year custodial term and four years extended licence. In addition, the judge made a deprivation order in relation to the appellant's Mercedes car in which he had fled from the scene of the crime.

2. The appellant appeals with leave of the single judge against the imposition of an extended sentence and against the deprivation order. No challenge is made to the length of the 14-year custodial term.

3. The appellant is aged 42. In 2013 he was involved in a motor traffic accident in which his left leg was damaged. Following a number of operations over the next five years it was eventually amputated below the knee and the appellant wore a prosthesis. He was awarded compensation of £1 million in 2019, part of which he used to start a business selling his own bespoke designed motor cycles. A number of these were locked up in a community car park behind a block of flats where he lived in Greenhithe. He had had concerns about people trying to steal them and had installed CCTV.

4. On the evening of 8 March 2020 a group of individuals made an attempt to steal the motor cycles, one being seen on CCTV with an angle grinder attempting to cut through a padlock. The appellant and his brother left the flat in order to confront them. They each took a loaded handgun. In the appellant's case it was a 14mm Glock pistol; in his brother's case it was a 9mm Smith and Wesson. The appellant knew that his brother was carrying the Smith and Wesson and that he might use it to endanger life. His brother fired six shots, two of which went through the arm of one of the thieves. The appellant fired a total of nine shots from the Glock. It was accepted at the time of his sentencing that he took his gun intending to fire it in the direction of the thieves and with the intention of endangering life.

5. After the shooting the appellant drove off in the Mercedes and his brother drove off in an Audi. They went to his brother's house at Penge. The Glock was in due course recovered from under a parked car a short distance away from that address.

6. The appellant answered no comment to all questions in interview and pleaded not guilty.

7. Following his conviction a pre-sentence report was prepared. At the age of 42 he had 15 convictions for 31 offences. They were mostly for low level acquisitive crime and for driving offences. There was only one offence of violence, namely battery, for which a community order had been imposed.

8. The pre-sentence report recorded the appellant saying that he had acted impulsively,

which the author of the report regarded as disingenuous. The diagnostic tools which were applied indicated that he was to be assessed as having a low risk of re-offending; the author discounted that assessment as not taking into account the severity and impact of the offence. The author assessed him as posing a high risk of serious harm to the public.

9. In full and careful sentencing remarks, the judge identified the appropriate custodial term in accordance with the Sentencing Council Guideline. In doing so he said that the offence "was if not planned, contemplated as a reaction to individuals stealing motor bikes that they knew had and feared would happen again." The judge referred to the personal mitigation advanced, including references from family members, which attested to the appellant being a "proud and caring family man" and "perhaps those around you can't quite believe what's happened, perhaps that is also your position as well". The judge referred to the appellant's admission of the offence in the pre-sentence report and that at times the appellant had said that he could not understand, looking back, why or how it had happened. The judge said that he had gained an insight from the appellant's behaviour in court during the trial which led him, the judge, to conclude that there was now real remorse about what had happened and that despite not having pleaded guilty he had appreciated now, looking back, what might have happened in terms of far more serious consequences. At the end of his sentencing remarks the judge said that he was clear from all that he had seen of the appellant, and read about him, that he genuinely wished he could turn back the clock and that he genuinely could not quite understand why he did what he did. This was not just because of the impact on himself but because of the effect on his family and loved ones.

10. The judge addressed the issue of dangerousness, that is whether there was a significant risk of serious harm to members of the public from the commission of further offences, in accordance with the judgment of this court in R v Burkinsas [2014] 2 Cr.App.R (S) 45, to which he referred; and concluded that there was. The judge then considered whether a life sentence was required, and in concluding that it was not, said: "I am not sure that there is a risk that is likely to carry on long into the future and I am not satisfied that it is so serious that a sentence of life imprisonment is required." He then asked himself whether a determinate sentence would be sufficient and said that it would not be, without at that stage any further reasoning. He accordingly resolved to impose an extended sentence.

11. In relation to deprivation of the car, the judge identified that there was power to make a deprivation order (under section 153 of the Sentencing Act 2020) where property is used to commit or facilitate an offence. He said that the Mercedes had been used to facilitate this offence by being used to drive the appellant from the scene. No criticism is made of that conclusion. The judge said that it was clear from the authorities that a deprivation order can be imposed by way of punishment. He characterised the argument of Miss Lewis KC, who appeared below on the appellant's behalf, as in this court, as being that it would be unfair to deprive the appellant's family of both the Mercedes and the Audi which were owned by the appellant. The judge considered the proportionate solution to be to make a deprivation order for the Mercedes but not the Audi, both of which were owned by the appellant, on the basis that the family would have use of the Audi.

The extended sentence

12. The grounds advanced are that the judge erred in finding the applicant dangerous; alternatively, that the judge erred in finding that a determinate sentence would not adequately meet any risk of harm to the public. It is said that the judge failed to take into account or have sufficient regard to the following matters. First, the lack of previous convictions for violence or any pattern of violent offending. Secondly, a remorse and insight which the judge recognised in his sentencing remarks. Thirdly, the low risk of further offending reflected in the application of the Probation Service diagnostic tools, as reflected in the pre-sentence report, albeit that the author of that report did not concur with that assessment on the basis that the tools did not take into consideration the severity and impact of the index offence. Fourthly, the appellant's personal circumstances recorded in the sentencing remarks. And fifthly, the fact that the appellant had been granted bail and had been on bail for some 800 days during which there had been no offending.

13. We think that there is force in these submissions, particularly the first two. The judge said that he was clear from all he had seen of the appellant and read about him that he genuinely wished he could turn back the clock and that he genuinely could not quite understand why he had done what he had done. He showed both remorse and insight. Moreover, although the test of dangerousness falls to be applied at the time of sentencing on the hypothesis that the defendant would not be in custody, and looks to the immediate future, rather than by way of assessment of the risk prospectively at the point of release from prison, an assessment of the risk at the time of release is, on any view, relevant to the subsequent question of whether a determinate sentence would be sufficient for the

protection of the public: see *R v Smith* [2011] UKSC 37, [2011] 1 WLR 1795, [2012] 1 Cr.App.R (S) 83 at paragraph 15, *R v J(M)* [2012] EWCA Crim 132, [2012] 2 Cr.App.R (S) 73 at paragraphs 26 to 27, and *R v Baker and Richards* [2020] EWCA Crim. 176, [2020] 2 Cr.App.R (S) 23, at paragraphs 33 to 36.

14. For this appellant release without licence conditions, in the absence of an extended sentence, would not occur for another 14 years. The judge himself recognised, when declining to impose a life sentence, that such risk as there was would not last a long time. For these reasons, we conclude that in this case an extended sentence could not be justified.

Deprivation order

15. The relevant principles were considered in the decision of this court in *R v De Jesus (Pedro)* [2015] 2 Cr.App.R (S) 44, in which the previous case law was considered. Where the deprivation is not for the purposes of taking an illegal item out of circulation but by way of punishment, it must be proportionate in the context of the total sentence imposed. It is not normally proportionate to impose a significant financial penalty in addition to a lengthy prison sentence.

16. The judge did not have a current valuation for the Mercedes at the date of sentencing, but it must have been worth tens of thousands of pounds because it was purchased in 2019 for £78,000 from the compensation received by the appellant for his accident. Deprivation therefore involved a significant financial penalty which in addition to the lengthy prison sentence imposed was disproportionate and wrong in principle.

Conclusion

17. Accordingly, we will quash the extended sentence and substitute a determinate sentence of 14 years' imprisonment. We will also quash the deprivation order in relation to the Mercedes. To that extent the appeal is allowed.

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

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