



Neutral Citation Number: [2012] EWCA Crim 86

Case No: 201106761 A6

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE WOOLWICH CROWN COURT
HIS HONOUR JUDGE CRAWFORD LINDSAY QC
T20117304

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2012

Before:

LADY JUSTICE HALLETT DBE
MR JUSTICE IRWIN
and
MR JUSTICE NICOL

Between:

R
- v -
ZEPHEN ROLLINGS

Appellant

Respondent

Mr E Garnier QC HM Solicitor General & Mr L Mably for the Attorney General (instructed
by **The Crown Prosecution Service**) for the **Appellant**
Miss A Kettle-Williams (instructed by **J B Wheatley Solicitors**) for the **Respondent**

Hearing date: 25 January 2012

Approved Judgment

Lady Justice Hallett:

1. On 6 July 2011, at about 12.30 pm police officers from the Southwark Drugs and Firearms unit were preparing to execute a search warrant at a flat in Brockley, south London, the home of offender's girlfriend when they became aware that the offender was outside in a mini-cab. The officers approached the cab, and detained the offender.
2. He was wearing a small leather bag over his shoulder. The bag was searched. Inside, the police found a handgun wrapped in a yellow dust cloth. The serial number had been removed. It was a .357 Magnum calibre Smith and Wesson revolver with a six-shooting swing out cylinder in full working order. In the cylinder were two Federal Hydra-Shok .38 special calibre cartridges and three .357 magnum calibre PMP cartridges. The ammunition was live and, on test firing, the bullets were found to mushroom on impact. They were what are commonly known as "dumdum" bullets, a particularly dangerous kind.
3. The offender was arrested and cautioned. He said: 'Can you do me a favour? Please don't tell my girlfriend.' When asked whether the gun had been at her house, he replied: 'No, well only this morning.' Later that day he was interviewed under caution in the presence of his solicitor. The offender made no comment to all material questions. He was then charged. Subsequent DNA analysis of a swab taken from the gun produced a full DNA profile which matched that of the offender. The probability of such a match in the event that the DNA on the gun was from someone other than the offender was in the order of one in a billion.
4. The offender has a number of previous convictions, a reprimand and a warning. In 2005, he was reprimanded for a public order offence and warned for theft. In 2006, he was convicted of criminal damage, and given a referral order. In 2007, he was convicted of possessing cocaine and MDMA with intent to supply, and sentenced to 18 months' youth detention. In 2008, he was convicted of driving without insurance and fined. In 2009, he was convicted of possessing cocaine and made the subject of a community order.
5. On 9 September 2011, he appeared at the Woolwich Crown Court at a plea and case management hearing. He pleaded guilty to one count of possessing a prohibited weapon, contrary to section 5(1)(aba) of the Firearms Act 1968 (Count 2), and one count of possessing prohibited ammunition, contrary to section 5(1A)(f) of the same Act (Count 3). He pleaded not guilty to one count of possessing a firearm with intent to endanger life or to enable another to do so, contrary to section 16 of the FA 1968 (Count 1). On the morning of the trial, 10 November 2011, he sought a 'Goodyear indication'. Ms Kettle-Williams representing him placed the facts and proposed basis of plea before the judge His Honour Judge Crawford Lindsay QC.

6. The judge issued the necessary warnings about the possibility of a Reference by Her Majesty's Attorney General. He then indicated that the maximum sentence he would impose was in fact the minimum sentence he was bound to impose, (pursuant to the Firearms Act 1968 as amended), absent exceptional circumstances, namely 5 years' imprisonment. The offender was re-arraigned on Count 1, and pleaded guilty on the basis that he had possession of the firearm and the ammunition with the intention of enabling another to endanger life.

7. Prosecuting counsel opened the facts. Ms Kettle-Williams agreed with the judge that there was little she could add to what had already been said during the 'Goodyear indication' proceedings. She was not pressed to explain the circumstances in which the offender intended that the person to whom he supplied the gun might endanger life. With no further ado, the judge sentenced the offender to 5 years' imprisonment on Count 1, 5 years concurrent on Count 2, and 3 years concurrent on Count 3. The total sentence was therefore 5 years' imprisonment. A period of 125 days was ordered to count as time served as part of the sentence under section 240 of the Criminal Justice Act 2003. Her Majesty's Solicitor General Edward Garnier QC has applied for leave to refer the sentence to this court as being unduly lenient. We give leave.

8. The Solicitor General put the following aggravating features before us for our consideration.
 - i. The offender was found in possession of a gun and live ammunition.
 - ii. The ammunition was loaded into the gun.
 - iii. The ammunition was of a type which expanded on impact.
 - iv. The offender was in possession of the prohibited items in a residential area.

9. He suggested the following mitigating features are present:
 - v. The offender pleaded guilty.
 - vi. The gun was not discharged.
 - vii. The offender does not have previous convictions in relation to firearms offences
 - viii. The offender is a man of a relatively young age. He was 23 at the time of the offences.

However, Mr Garnier also observed that the plea to count 1 was entered on the day of trial and the evidence of his possession of the firearm and ammunition may properly be characterised as overwhelming.

10. A number of decisions relating to sentencing in firearms offences were put before us. We shall mention just three. We begin with *Tony Avis and others* 1998 2 Cr App R (S) 178 in which Lord Bingham CJ observed at page 181:

“The appropriate level of sentence for a firearms offence, as for any other offence, will depend on all the facts and circumstances relevant to the offence and the offender, and it would be wrong for this court to seek to prescribe unduly restrictive sentencing guidelines. It will, however, usually be appropriate for the sentencing court to ask itself a series of questions:

(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms.Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.

(2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.

(4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence.”

11. Having reviewed the hierarchy of firearms offences he concluded at page 186:

“ Where there are breaches of sections 4, 5, 16, 16A, 17(1) and (2), 18(1), 19 or 21, the custodial term is likely to be of considerable length, and where the four questions suggested above yield answers adverse to the offender, terms at or approaching the maximum may in a contested case be appropriate.”

12. In *Attorney General's Reference Nos 58-66 of 2002* [2003] EWCA Crim 636 the court conducted a review of a number of decisions (including *Avis*) on the appropriate level of sentence to be imposed for possession of firearms and ammunition with intention to endanger life. At paragraph 48 of the judgment the court concluded that

“in a contested case simple possession of a firearm together with ammunition with intent to endanger life merits a sentence of between seven and eight years.”

13. We turn finally to the most recent decision on this topic brought to our attention: *AG ref no 43 of 2009 (Craig Bennett); R v Grant Wilkinson* 2010 1 Cr App R (S) 100. Lord Judge CJ, giving the judgment of the court, observed:

“2. The gravity of gun crime cannot be exaggerated. Guns kill and maim, terrorise and intimidate. That is why criminals want them: that is why they use them: and that is why they organise their importation and manufacture, supply and distribution. Sentencing courts must address the fact that too many lethal weapons are too readily available: too many are carried: too many are used, always with devastating effect on individual victims and with insidious corrosive impact on the wellbeing of the local community.

“3. The purposes of sentencing are identified in section 142 of the 2003 Act. None of these purposes is pre-eminent. All apply to every case, but as a matter of sentencing reality, whenever a gun is made available for use as well as when a gun is used public protection is the paramount consideration. Deterrent and punitive sentences are required and should be imposed.”

14. Further, Lord Judge specifically endorsed the continued value of the series of questions posed by Lord Bingham in *Avis*. We shall now pose those questions in respect of this offence and this offender. The answers are mostly adverse to him. The weapon was a genuine firearm loaded and deadly. The ammunition was particularly dangerous. There was no lawful use for the gun. The offender was not simply a custodian. He intended to supply the loaded gun to a fellow criminal or criminals who required it for their criminal enterprise. The offender has not informed the court of the nature of the enterprise and we shall avoid speculation. Suffice it to say the consequences were potentially extremely grave for the victim or victims of the offence. It is fortuitous that the police stepped in when they did. He is no stranger to the courts. On the positive side, the offender is still relatively young and does not have an established record of committing firearms offences.
15. Mr Garnier provided background information to explain why it was his contention that the courts should treat those who trade in illegal firearms severely, possibly as severely as those who actually use them to commit an offence. He informed us that there is a limited supply of firearms which are moved around the criminal fraternity in such a way that several crimes may be committed with one gun. Those involved in the supply chain of

weapons play a pivotal role in keeping violent criminals in business, with all the risks that this entails for the public. He also suggested that the sentencing regime as it relates to the use of firearms has moved on considerably since the decision in *Attorney General's Reference Nos 58-66 of 2002*. In addition to Lord Judge's remarks in *Wilkinson*, there has been the introduction of the minimum 5 year term for possession of a firearm and the introduction of a 30 year starting point for offences of murder involving the use of a firearm. Thus, had this gun been used to kill, as was always possible given its lethal nature, the murderer would have been looking at the equivalent of a 60 year determinate term. Given the dangers to the public, the prevalence of gun crime and the need for deterrent and punitive sentencing, to which Lord Judge referred in *Wilkinson*, Mr Garnier submitted the sentencing range for offences of this gravity has increased significantly. We agree.

16. Given those developments, there can be no argument that the sentence of 5 years' imprisonment imposed on Count 3 for the offence of possession with intent was unduly lenient. Arguably, terms of 5 and 3 years' imprisonment were also unduly lenient for the offences of simple possession of the weapon and the ammunition (Counts 2 and 3). In the light of our decision on Count 1, we do not need to decide the point. Counts 2 and 3 were alternative charges to Count 1 and had the offender pleaded guilty to Count 1 at the outset, they would have been left on the file. In normal circumstances, the judge may well have imposed no separate penalty on those counts. Here the judge may have felt constrained by the fact that Count 2 was also subject to a minimum term (absent exceptional circumstances). Counsel did not address him or us on whether exceptional circumstances existed on Count 2 by virtue of the fact it was an alternative charge. We are not in a position, therefore, to take this aspect of the case further. Accordingly, we shall not disturb the sentences imposed on Counts 2 and 3.
17. To her credit Ms Kettle-Williams accepted that we would find, as we have, that the sentence of 5 years' imprisonment is lenient, but, in her helpful and succinct submissions, she urged us not to interfere with the sentence or to limit any increase in the term. She placed reliance on and emphasised the mitigating features put before us by Mr Garnier to which she wished to add the principle of 'double jeopardy'.
18. Her task was always going to be an uphill one. It should be remembered that the 5 year minimum term is a minimum term not a "mandatory" term (as prosecuting counsel at one stage described it in the court below) nor is it a "starting point" (in the sense used by the Sentencing Council) as the judge described it. It certainly should not have been the finishing point. This was a case of possession of a loaded firearm with intent. The gun was loaded with particularly dangerous ammunition. The consequences of the offender's actions, as we have endeavoured to explain, were potentially lethal.
19. The offender had little option but to plead guilty to possession of the weapon and the ammunition, given the circumstances of his arrest and the DNA evidence. Given the nature

of the bullets loaded in the gun some may think he had little option but to plead guilty to the more serious offence. This he did belatedly. However, we are prepared to proceed on the basis he would be entitled to credit of 10 % for his plea of guilty to the more serious offence entered as it was on the day of trial. We bear in mind that this not the first time the offender has been sentenced on these matters, but also that he was warned by the judge of the possibility of this Reference. Balancing all the aggravating and mitigating factors of the offence and offender, in our judgment the very least sentence we can impose today is one of 10 years imprisonment. We quash the sentence of 5 years imprisonment on Count 1 and substitute for it a sentence of 10 years. Time on remand will count towards the sentence as before.