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2017/05249/B3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 2nd November 2018

B e f o r e:

LORD JUSTICE GROSS

MR JUSTICE MARTIN SPENCER

and

HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

EDRHAINE OKUGBENI

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Mr S Vanstone appeared on behalf of the Appellant

J U D G M E N T
(Approved)

Friday 2nd November 2018

LORD JUSTICE GROSS: I shall ask Mr Justice Martin Spencer to give the judgment of the court.

MR JUSTICE MARTIN SPENCER:

1. This is an appeal against a sentence of fourteen months' detention and training order imposed by His Honour Judge Dawson in the Crown Court at Inner London on 10th November2017 for a single offence of possessing ammunition without a firearm certificate, contrary to section 1(1)(b) of the Firearms Act 1968. This sentence was ordered to be served consecutively to a ten month detention and training order which the appellant was already serving, having been imposed at the South London Juvenile Court on 8th September 2017 for an offence of affray and an offence of threatening behaviour with an offensive weapon in a public place.

2. The facts out of which this conviction arises are as follows. On the evening of 5th April 2017 a group of young men, including the appellant and his brother, Dowan, were seen on CCTV acting suspiciously outside and around the back gate of the home where they lived. In the rear garden was the cover of a motorcycle, under which was a shoe box. It later transpired that it contained ammunition. The shoe box was retrieved by the brother Dowan who handed it to the appellant, who in turn handed it to a third person, a co-defendant Soyemi. Soyemi then walked away from the address to a parked Ford Fiesta motorcar.

3. Police units attended the vicinity of the address and reported that the shoe box could be seen in the boot of the Fiesta. Approximately fifteen rounds of ammunition were recovered from the shoe box and a further 38 rounds of ammunition were found in the Fiesta after it was seized.

4. The appellant and his brother were convicted of the offence of possessing ammunition without a firearm certificate following a trial. It was not a necessary ingredient of the offence that the appellant knew what was in the shoe box. However, in his sentencing remarks the learned judge said:

> "… given what could be seen on the CCTV, it was obvious from the body language that certainly something serious was going on and there was absolutely no reason not to think that all the three men at least knew exactly what was going on, that this was ammunition which was being handed around. … it is highly unlikely that they would be handling a shoe box without having some idea of what was going on, given the particular circumstances of the CCTV, which is pretty telling if one observes it in detail and with the knowledge of what was actually in the box."

5. In this regard the learned judge, who had presided over the trial, had the advantage of observing the CCTV and hearing the evidence in detail. He was in a good position to conclude that the appellant knew that the shoe box contained ammunition. In those circumstances, as the learned judge observed, and as my Lord, Gross LJ has just observed, this was a serious matter. The judge said:

> "The matter is serious because although it is argued, and quite properly argued, that this is possession of ammunition and no gun ever came to light, the obvious point and the obvious issue here is

> that live ammunition has no particular value to anyone unless somewhere in the vicinity at some time and probably fairly close by in either time or proximity, there is a firearm in which to place the ammunition. Ammunition is quite useless without a firearm and so, although it is true to say that no firearm has ever been detected, the fact is that the combination of a firearm and this live ammunition creates a very dangerous situation in a suburban part of South London and so there can be no doubt at all that from the public point of view, this is a serious matter …"

6. The appellant was born on 23rd May 2000 and was therefore 16 years of age at the time the offence was committed and 17 at the time of his conviction and sentence. He is now aged 18. He was initially sentenced by the learned judge to an 18 month detention and training order, which was ordered to run consecutively to the ten month detention and training order. That is the sentence which he was serving. Unfortunately, that was not a lawful sentence. Section 101(4) of the Powers of Criminal Courts (Sentencing) Act 2000 provides:

> "A court shall not make in respect of an offender a detention and training order the effect of which would be that he would be subject to detention and training orders for a term which exceeds 24 months."

The effect of the learned judge's order was to make the appellant subject to a detention and training order for a term of 28 months.

7. Subsection (5) of section 101 provides:

> "Where the term of the detention and training orders to which an offender would otherwise be subject exceeds 24 months, the excess shall be treated as remitted."

Therefore, had the judge done nothing more, subsection (5) would have operated to remit the excess four months and turned the total term of the detention and training order into a 24 month order.

8. However, on 10th November 2017 the learned judge returned to this case, having realised his error, and re-sentenced the appellant under the slip rule. It appears that he had been alerted to his error by the prison authorities. Thus, he said:

> "… what it does seem (and I think the prison are right here) is that the total sentence aggregated cannot go beyond 24 months. I imposed eighteen on top of the ten months he was serving already, so I think the answer is that, subject to any representations you make, I will impose it as a fourteen month consecutive sentence, which will bring the total he is serving to 24 months …"

9. Unfortunately, the learned judge thereby compounded his error by imposing a further unlawful sentence, because section 101(1) of the 2000 Act provides:

> "Subject to subsection (2) below, the term of a detention and training order made in respect of an offence … shall be 4, 6, 8,

10, 12, 18 or 24 months."

It will be apparent that the 14 month detention and training order imposed by the learned judge was none of those periods. It seems that the intention of the judge was that the appellant should be subject to a total detention and training order of 24 months – the maximum. But the only way he could have achieved that would have been by doing nothing in relation to his original unlawful sentence. Then, as we have pointed out, 24 months would have been substituted for the 28 months he originally imposed by virtue of the operation of subsection (5). As it is, he imposed a sentence which he was not empowered to imposed and it is therefore clear that this appeal must be allowed.

10. On behalf of the appellant, in his written submissions it is argued by Mr Vanstone that:

> "The judge's failure to pass a correct detention and training order shows that he did not, on at least two occasions, read the basic provisions demonstrates no proper or real regard to the principles of youth sentencing. He was directed to the relevant principles and powers on the first occasion."

We do not subscribe to that remark; and the one by no means follows from the other.

11. Reliance is placed by the appellant on two pre-sentence reports which were before the court, the second of which set out the dangers of an overly lengthy sentence on a young man of 17 years of age. Reliance is also placed on the fact that the appellant appeared to have gone off the rails shortly after his father's death. In his written submissions, Mr Vanstone argues that the starting point for an adult of an offence of this nature on these facts might be twelve months' custody, and that the sentence for a youth should be between one-half and two-thirds of that, that is, a sentence of six to eight months' custody. He further submitted that the overall effect of the totality should be considered. To his credit, Mr Vanstone does not pursue that with any vigour before this court today.

12. Before March 2017, the appellant was of good character. On 17th March 2017 he was found in possession of Class A and Class B drugs and a knife in a public place. He was bailed for that offence. The next offence in time is the offence of possessing ammunition, which was committed on 5th April 2017, less than a month later and whilst on bail. He was further remanded on bail on 8th April. He appeared before the Avon and Somerset Juvenile Court on 12th June, when a referral order of nine months was made for possession of the controlled drugs and possession of the knife in a public place. He remained on bail in relation to the instant offence. Then, on 7th August 2017, he committed an offence of affray and threatening behaviour with an offensive weapon in a public place. That matter came before the South London Juvenile Court on 8th September 2017 when he was sentenced to the first ten month detention and training order. Thus, the instant offence was committed whilst on bail for the offences of possession of controlled drugs and possession of a knife in a public place; and the offences of affray and threatening behaviour with an offensive weapon in a public place were in turn committed whilst on bail for the instant offence and during the period of the referral order which had been imposed on 12th June.

13. The above history illustrates clearly the extent to which the appellant did indeed go off the rails in the course of 2017. He committed serious offences which merited custodial sentences. As the learned judge observed, the offence of possessing ammunition without a certificate is regarded as extremely serious and its commission whilst on bail merited not merely a further custodial sentence, but one which was consecutive to the sentence which had been imposed on

8th September.

14. We have no doubt that had the appellant been sentenced for this offence at the same time as he was sentenced for the affray and the threatening behaviour with an offensive weapon in a public place, the total detention and training order would have been for a period of 24 months, and that would not have been appealable.

15. As it is, we quash the fourteen month detention and training order imposed by the learned judge on 10th November and we substitute a twelve month detention and training order. Not only is twelve months one of the periods allowed under section 101(1), but it also means that the total period of the detention and training order (22 months) does not exceed the maximum of 24 months.

16. Accordingly, and to this limited extent this appeal against sentence is allowed.
