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2018/03731/A3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 30th January 2019

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE SWEENEY

and

MR JUSTICE SOOLE

R E G I N A

- v -

MOHAMMED SHAHEL HUSSAIN

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Mr M J Knowles appeared on behalf of the Applicant

J U D G M E N T
(Approved)

Wednesday 30th January 2019

LORD JUSTICE FLAUX: I shall ask Mr Justice Soole to give the judgment of the court.

MR JUSTICE SOOLE:

1. Upon reference by the single judge, the applicant applies for leave to appeal in respect of the sentences imposed on him in the Crown Court at Manchester on 13th August 2018. Detention in a young offender institution for a total period of six years two months was imposed, together with other orders, including disqualification from driving for seven years and one month. We grant leave.

2. At the time of these offences in October and November 2017 the appellant was aged 18. He had already acquired a bad record, including for driving offences: two convictions of dangerous driving, for which he had received a detention and training order; two convictions for driving while disqualified; two convictions for making off without payment and theft by shoplifting.

3. The further offences for which he was sentenced were in three groups. The first was on 17th October 2017. He drove a Vauxhall Vectra vehicle while disqualified and uninsured. He went to a petrol station. Together with his passenger he filled up canisters with fuel to the value of £113 and made off without payment. He was arrested, charged and released on bail. Following his pleas, he was committed for sentence by the magistrates' court for this group of offences.

4. The second group occurred one month later, on 16th November 2017. The appellant was seen driving a stolen Audi A5 car at about 12.30am in the centre lane of the M62, travelling at 80mph. As the police went in pursuit, the appellant increased his speed to over 110mph,

moving between lanes as he did so. The police attempted to block the car from leaving the motorway by a slip road. The passenger alighted and fell to the ground. The appellant performed a U-turn and set off the wrong way down the M62, forcing lorries to take evasive action. The vehicle was eventually brought to a stop. He was arrested, charged with dangerous driving, driving while disqualified and uninsured, and he was again released on bail.

5. The third group occurred two days later, on 18th November. At about 10.19am he was seen driving a Vauxhall Vectra along Ashton Road. The police signalled to stop. He refused and the police pursued him. He went on to the Oldham Road, where the speed limit was 30mph. He accelerated and overtook traffic on the opposite carriageway at speeds of up to 68mph, undertook slow moving vehicles, drove through a red light at the junction and almost collided with a vehicle. Continuing down Oldham Road, he pulled on to the opposite carriageway and at speeds of up to 60mph caused other vehicles to take evasive action and pull into the bus lane. He approached the lights at the junction on the wrong side of the carriageway and went through a second red light. He drove towards Ashton town centre, mounted the pavement and drove along it before turning right towards the police station, weaving in and out of slow moving traffic. He approached another junction, weaving between parked cars and forcing a pedal cycle to move out of the way, before driving through another red light. On the Manchester Road, he drove on the opposing carriageway through a fourth red light, before moving back to the correct carriageway. A police vehicle rammed the Vectra, but the appellant reversed and drove around it. He then drove the wrong way down the motorway. At this point the pursuit had lasted about six minutes.

6. Shortly afterwards, the Vectra was found abandoned. The appellant, who was hiding in a nearby bush, was arrested. The vehicle was searched. Under the driver's seat the police found a stun gun disguised as a mobile phone. The appellant's passenger was also arrested near the

scene, but was not charged.

7. When challenged about the stun gun, the appellant said that it was not his. He told the police that he had not wanted to stop because his friend had had a taser on him. His friend had shown it to him a few days before. He could not explain why the taser was under the driver's seat.

8. The stun gun was forensically examined and found to be an electronic stun device, constructed as a non-functional iPhone. It was a prohibited weapon constituting a disguised firearm. The device was disabled by the investigating officer prior to examination. In consequence, it was not test-fired. It was not possible to state what voltage would have been emitted or whether it was functioning at the time it was seized. Thus it was accepted that there was no evidence of it having been used.

9. The appellant was charged with possessing a disguised firearm, contrary to section 5(1A)(a) of the Firearms Act 1968, dangerous driving and driving while disqualified. The firearms offence attracts a minimum term of five years' imprisonment or detention for those over 18 at the date of the offence, unless the court is of opinion that there are exceptional circumstances relating to the offence or to the offender which would justify its not doing so.

10. In respect of the second and third group of offences, save the firearms charge, the appellant entered or indicated pleas of guilty at an early stage. He pleaded not guilty to the firearms of charge, but on the morning of the trial, 9th July 2018, entered a plea of guilty. This was on a basis of plea which was not challenged by the Crown. The basis of plea stated that before this incident the appellant had seen the stun gun in the possession of the man who was subsequently his passenger; that he thought it was a novelty or joke item and did not know that it was a taser; that at the time he failed to stop for the police his passenger had said that he had a taser on him

and did not want to be caught in possession of it; that his main reason for driving away was an attempt to get away from the police because he was driving while disqualified and without insurance, and had used drugs; that he was never in physical possession of the stun gun and did not see it at any time on the date of the offence; and that accordingly he did not place it under the driver's seat. He accepted that he came into joint possession of the stun gun, but only at the point when his passenger told him about the taser and he still continued to try to get away from the police.

11. Contrary to the appropriate practice identified by this court in *R v Roger* [2016] EWCA Crim 801 at [121], the appellant, through his advocate, did not submit any written statement of matters relied upon by way of exceptional circumstances to justify a sentence of less than five years' custody for the firearms offence. Instead, sentence proceeded on the unchallenged basis of plea. The Crown did not seek a *Newton* hearing. In his sentencing remarks the judge made clear that he would sentence consistently with the basis of plea.

12. Whilst in our judgment the appellant may consider himself fortunate that his basis of plea was unchallenged, this appeal must proceed on that same basis.

13. In the course of mitigation, counsel for the appellant submitted that this was a case of exceptional circumstances. He submitted that, it being a stun gun, it was not a lethal weapon; that it did not belong to the appellant and he was never in physical possession of it; that his legal possession of it was of a technical nature because it was in his car; that in any event the possession was of short duration; that the appellant had had no intention to possess or use it in the future; and that he had no previous convictions for offences relating to weapons or violence.

14. Before the judge, counsel pointed to decisions of this court, including *R v McMahon* [2018]

EWCA Crim 1296 and *R v Rehman* [2005] EWCA Crim 2056. *McMahon* concerned the discovery in the appellant's bedroom of a stun gun disguised as a torch. There was no evidence that it had ever been used and it was not capable of achieving a lethal outcome. The accepted basis of plea was that the item had been given as a present by a friend who subsequently died; that he kept it for sentimental reasons, but also in the event that he should need a torch; that he never used the stun gun feature; and that he did not know it was illegal to be in possession of such an item. His only previous conviction of possible relevance was for possession of an offensive weapon (not a firearm) in a public place. In *Rehman* this court gave guidance which included that circumstances are to be regarded as exceptional where the minimum sentence would result in an arbitrary and disproportionate sentence. In the light of that guidance and the basis of plea, this court in *McMahon* substituted for the minimum term a sentence of 30 months' imprisonment.

15. As to the circumstances of the appellant in this case, counsel pointed the judge to the report of a Chartered Forensic Psychologist, which diagnosed a learning disability with an IQ of less than 70, and the report of an intermediary.

16. The pre-sentence report referred to the appellant's emotional, behavioural and social difficulties and vulnerability to negative peer pressure. It recommended a community order, but counsel realistically acknowledged that a custodial sentence was inevitable.

17. The judge took express account of those decisions, together with the leading decision in *R v Avis* [1998] 2 Cr App R(S) 178. This identifies the four questions which are usually appropriate when sentencing for firearms offences, namely: (1) What sort of weapon is involved? (2) What, if any, use has been made of the firearm? (3) With what intention, if any, did the defendant possess or use the firearm? (4) What is the defendant's record – and in particular whether there

is an established record of committing firearms offences or crimes of violence?

18. The judge reminded himself that each case is fact specific. He concluded that there were no exceptional circumstances. He stated that, first, the appellant was well aware of the stun gun being in his vehicle at the time; secondly, that he had taken concerted and extremely dangerous action to avoid detection in relation to his possession of the stun gun and its recovery by the police; thirdly, that he was on bail at the time for no fewer than two sets of offences; fourthly, that he knew that driving a motor vehicle at that time was an offence of at the very least driving while disqualified; and that it was in the circumstances of committing that offence that he was in possession of the firearm. The judge accepted that the appellant had certain difficulties in his life, as illustrated by the reports. However, he said that these had been previously indicated to the court and that it would be quite wrong, that the appellant should be able to behave with impunity, asking once more for the court to give consideration to those features of his life and find exceptional circumstances. The judge stated that the appellant's previous convictions aggravated the offending because they showed a particular willingness to avoid apprehension for criminal offences and behaviour which caused significant risk of harm to others. He referred in particular to the previous convictions for dangerous driving.

19. In determining the overall sentences, the judge then took account of the personal mitigation identified in the expert and pre-sentence reports, the appellant's young age, the principle of totality and the pleas of guilty. In consequence of his conclusion that there were no exceptional circumstances, the sentence for the firearms offence was five years' detention. The sentences for the associated offences on that indictment, T20177621, dangerous driving and driving while disqualified, were respectively twelve and two months' detention, to run concurrently. On the indictment for the events of 16th November 2017, T20180361, the sentence for dangerous driving was twelve months' detention, to run consecutively, and for driving while disqualified,

two months' detention concurrent. On the committal for sentence for the events of 17th October 2017, S20170699, the sentences were two months' detention consecutive for theft; two months' detention concurrent for driving while disqualified; and no separate penalty for driving without insurance. The total sentence of detention was, thus, six years and two months. The appellant was disqualified from driving for a total period of seven years and one month, subject to an extended driving test.

20. In his central submission on behalf of the appellant, Mr Michael Knowles submits that the judge gave insufficient weight to the matters raised by him in support of the argument that in the case of the firearms offence there were exceptional circumstances which justified departure from the minimum term. In giving his reasons for rejecting that case, the judge had failed to take account of, or alternatively give any sufficient weight to, the factors relied on in submissions: in particular, as to the type of weapon, the limited nature of the possession, the lack of intention to possess or use in the future, and the lack of convictions for offences of violence.

21. We consider that the judge would have been assisted in the sentencing exercise if he had been referred by counsel for the prosecution and for the defence to other decisions of this court which concerned the issue of exceptional circumstances in the context of disguised guns. We refer in particular to the decisions in *R v Withers* [2015] EWCA Crim 132, *R v Rogers* (already cited), and *R v Paterson* (CA Ref 2017/01783/A1) of 8th November 2017. In *Withers* the stun gun was disguised as a mobile phone. It was found in the bedside cabinet in the appellant's flat. She had had problems with intruders. A friend gave the device to her which she accepted for her protection. The court considered a number of stun gun cases; the four questions identified in *R v Avis*; and the *Rehman* test of an arbitrary and disproportionate sentence. In doing so, the court reiterated that the decision in any case is fact specific. It answered the four *Avis* questions as: (1) the weapon did not shoot bullets; (2) no used had been made of it; (3) the intention was only to

use it to make it buzz, to frighten away an intruder; and (4) the previous convictions were not relevant to the offending. The minimum sentence was quashed and a term of two years' imprisonment substituted.

22. In *Rogers* the first question was answered in much the same way. It had been in the possession of the appellant for only five days. It was not used, save to demonstrate on himself to a friend what it did, albeit in a crowded public place. It had been bought as a novelty item. The previous convictions were of no relevance. A sentence of two and a half years' imprisonment was substituted for the minimum term.

23. In *Paterson* the court considered the decision in *Rogers* and noted that there had been no written statement of exceptional circumstances put before the court; nor had the judge been asked to hold any form of *Newton* hearing. On the particular facts the court concluded that exceptional circumstances were not demonstrated.

24. In our judgment, the present case turns on the terms of the unchallenged basis of plea. Those undisputed facts provided support for the submissions of counsel before the judge that this was a case of exceptional circumstances. In giving his reasons for finding that there were no exceptional circumstances, the judge did not truly deal with those submissions. If he had done so, he should have reached a conclusion in favour of the appellant. Putting the matter another way, if the four *Avis* questions are posed, the answers point in one direction. We emphasise that this is a conclusion very much on the facts of this particular case and the terms of the unchallenged basis of plea.

25. We also reiterate the guidance, confirmed most recently in *R v Boyle* [2018] EWCA Crim 2035 and specifically cited in the 2019 Sentencing Referencer at page 229 that:

> "The proper approach to sentencing in a minimum sentence firearms case is to determine the length of the sentence by reference to the relevant principles and authorities and then to consider whether that provisional sentence infringes the prescribed minimum. There can be no reduction in sentence for a guilty plea if the effect is to violate that prescribed minimum … Once a judge concludes that exceptional circumstances justifying departure from the minimum sentence of five years exist, sentence is at large and credit for guilty plea can be afforded in the usual way [20]."

26. In our judgment, the appropriate sentence before credit for the guilty plea was three years' detention. There should be a credit of ten per cent for the plea on the day of trial, leading to a sentence of 32 months. All the other sentences of detention were fully merited, not least against the background of the appellant's repeated and very dangerous driving, and should not be disturbed. This produces a total sentence of 32, plus twelve, plus two, equals 46 months' detention, which properly takes account of the principle of totality.

27. Following a reference by the Registrar, the appellant also submits that the disqualification from driving, the order for an extended test and the committal for sentence were each unlawful. We agree. As to disqualification, the judge made an order which disqualified the appellant from driving for four years, plus half of the total custodial term which he had imposed, i.e. three years and one month, producing a total disqualification period of seven years and one month.

28. That order did not identify the offences to which the disqualification of four years applied; nor in extending the period did it distinguish between the provisions of section 35A and section 35B of the Road Traffic Offenders Act 1988. Under section 35A, the extension period relates only to the motoring offences for which custody and disqualification had been imposed, and not half the global custodial term: see *R v Needham* [2016] EWCA Crim 455 at [21]. Under section 35B, if the court also sentences an offender to custody in respect of any other offence for which

disqualification was not imposed, the court may consider a further uplift on the disqualification period, so as not to diminish the effect of disqualification in the light of the length of the total custodial term: see *Needham* at [25] to [30].

29. The judge's order did not distinguish between the extension period and any further uplift. The order must therefore be corrected and the correction must take account of the reduced sentence on the firearms offence. We quash the existing disqualification order and replace it with the following. As to the discretionary disqualification period, in this case the appellant had twice within the three years before the commission of these offences been disqualified from driving for a period of at least 56 days and therefore the mandatory minimum disqualification on this occasion was two years. We impose a period of four years' disqualification concurrent on each of the two offences of dangerous driving.

30. As to the extension period under section 35A, this is one-half of the two consecutive sentences of twelve months for the offences of dangerous driving, namely, twelve months.

31. As to section 35B, the net total of the other custodial sentence is 22 months – i.e. 32, plus two, minus twelve months. We impose an uplift of one-half, i.e. eleven months. This produces a total disqualification period of four years, plus twelve months, plus eleven months, equals five years eleven months.

32. As to the extended driving test, this cannot be ordered if such an order is already in force: see section 36(7) of the 1988 Act. The appellant had already been made the subject of such an order in February 2017. Accordingly the further order made by the judge must be quashed.

33. The final matter concerns the committal for sentence by the magistrates' court. According

to its records, the offences of theft, driving while disqualified and using a vehicle without insurance were committed for sentence pursuant to section 6 of the Powers of Criminal Courts (Sentencing) Act 2000. These offences were all summary matters. The offence of theft fell within the special provisions for theft by shoplifting where the value of goods is below £200. As the Registrar points out, the power to commit for sentence pursuant to section 6, applies only where the defendant has already been committed for sentence in respect of one or more offences under one of the principal provisions in the 2000 Act. In this case there had been no such committal. The other matters had been sent for trial pursuant to section 51 of the Crime and Disorder Act 1998. Accordingly the committal for sentence in respect of these three offences was defective, as it was outside the powers of the magistrates' court.

34. In the circumstances the court will deal with the matter on the basis identified in *R v James* [2017] EWCA Crim 1367, namely: (1) for this purpose, reconstitute itself as a Divisional Court of the Queen's Bench Division; (2) grant the appellant permission to apply for judicial review and thereafter dispense with all further procedural requirements; (3) quash the sentences that were imposed in respect of the summary offences; and (4) re-sentence.

35. For the latter purpose, my Lord, Flaux LJ, is reconstituted as a District Judge (Magistrates' Court) pursuant to the provisions of section 66 of the Courts Act 2003 and sentences in the same terms as the judge.

36. The appeal is allowed to the extent we have indicated.

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proceedings or part thereof.

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