NCN: [2019] EWCA (Crim) 45
No: 201805167/C2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 15 January 2019

B e f o r e:

LORD JUSTICE SIMON

MRS JUSTICE MCGOWAN DBE

HIS HONOUR JUDGE BURBIDGE QC
(Sitting as a Judge of the CACD)

R E G I N A
v
D

PROSECUTION APPEAL UNDER S.58 CRIMINAL JUSTICE ACT 2003

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd 165 Fleet Street, London EC4A 2DY Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr R Mandel appeared on behalf of the **Appellant Crown**

Miss J Smart appeared on behalf of the **Respondent Defendant**

J U D G M E N T

LORD JUSTICE SIMON:

1. The provisions of section 71 of the Criminal Justice Act 2003 apply to these proceedings. By virtue of those provisions, no publication may include a report of these proceedings, save for the specified basic facts, until the conclusion of a trial, unless the court orders that the provisions are not to apply. Since the application involves an issue of law, the restrictions will be lifted so that the decision may be reported with anonymity afforded to the respondent.

2. This is a prosecution appeal under section 58 of the Criminal Justice Act 2003 from a ruling made by His Honour Judge Ader on 12 December 2018 in the Wood Green Crown Court. The ruling concerned count 3 of an indictment, the respondent (the defendant) having pleaded guilty to count 1, possession of a class B drug contrary to section 5(2) of the Misuse of Drugs Act 1971 and count 2, obstructing a constable in the exercise of his powers, contrary to section 23(4)(a) of the 1971 Act.

3. Count 3 charged an offence of having an article with a blade or point in a public place without lawful excuse, contrary to section 139(1) of the Criminal Justice Act 1988. The article in question was a foldable cut-throat razor with a blade of less than two inches.

4. Section 139 of the Criminal Justice Act 1988 provides:

> (1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
>
> (2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.

> (3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.
>
> (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.

5. Subsection (5) provides that it shall be a defence for a person charged to prove that he had the article with him (a) for use at work.

6. The judge ruled that the item referred to in the indictment fell within the definition of "a folding pocketknife" and consequently was excluded from the prohibition by reason of the provisions of section 139(3) since the cutting edge was less than 3 inches long.

7. Following an adjournment in accordance with section 58(4)(a)(ii) of the Criminal Justice Act 2003, the prosecution informed the court of its intention to appeal and gave the requisite assurance pursuant to section 58(8) of the 2003 Act. Leave was granted by the judge.

8. On 6 June 2018 the defendant had been stopped by police in the street and was subjected to a search pursuant to the Misuse of Drugs Act 1971. Police officers found in his trouser pocket a folding (and folded down) cut-throat razor. There was no dispute that the cutting edge was less than two inches and that there was no locking mechanism for securing the blade. We will return later to a fuller description of the item.

9. He was arrested and in his police interview asserted that he had the article on him in connection with his apprenticeship as a barber. He served a Defence statement in

support of the case that he had a reasonable excuse for having the article.

10. The ruling came about because the defence submitted that the folding cut-throat razor was not an article that fell within the prohibition in section 139. It was submitted by the prosecution that the article was a razor and therefore was not a pocket knife to which the exclusion in section 139(3) applied. Mr Mandel also argued that the item was not only a bladed article, but was potentially lethal in the wrong hands, and for this reason it was appropriate to invoke the mischief rule of statutory interpretation to see why Parliament made it an offence to carry a bladed article. It was submitted by Miss Smart that the statutory prohibition was intended to prevent the carrying of fixed bladed knives in a public place and she cited authority in support of this proposition. She argued that the item was a folded bladed article which fell within the exception under the Act.

11. The judge ruled that while the authorities offered no assistance on the question of whether a cut-throat razor was a folding knife as defined in section 139, as a matter of commonsense the item in this case was a bladed article. It would fit into a pocket, it had a blade that folded simply into and out of the handle, but could not be fixed. In the absence of any authority to the contrary it fell within the definition of folding pocket knife and, as it had a blade that was less than three inches, it was excluded from the prohibition of carrying it in a public place under section 139(3).

12. We have seen the article in question. It is a small razor on an extended metal shaft, sharpened to the degree necessary for use as a razor. It folds into a plastic handle and can be kept open by pressing the thumb on a metal flange. It could be used to inflict

serious cutting injuries in the wrong hands.

13. On this appeal the parties referred to three authorities: a decision of this court *Deegan* [1998] 2 Cr.App.R 121 and two decisions of the Divisional Court: *Harris v DPP* and *Fehmi v DPP* [1993] 1 WLR 82, and more recently on 14 November 2018 *Sharma v DPP* [2018] EWHC 3330 (Admin). Mr Mandel submitted that on its plain meaning a cut-throat razor is not a knife and therefore not a pocketknife. The judge had erred in determining that the razor was a pocketknife and his approach was contrary to the "literal" or "plain meaning" approach to statutory interpretation. He argued that treating a razor as a pocketknife would allow someone to carry a cut-throat razor in a public place without having to justify such possession. Parliament, he submitted, could not have intended this. As in the Crown Court, he invited the court to apply the "mischief" approach to interpretation of the statutory provision.

14. Miss Smart submitted that the starting point should be that if a court has any doubt as to the meaning of a provision imposing criminal liability, it should apply the presumption that Parliament intended the meaning that was most favourable to the accused. She referred the court to a passage in the Law Commission Report on the Interpretation of Statutes laid before Parliament on 9 June 1999 and particularly paragraph 34 where the report refers to the presumption of Parliamentary intent with a reference to *Wright v Ford Motor Company* [1967] 1 QB 230. She submitted that the purpose of section 139 of the Criminal Justice Act 1988 was to prevent the carrying of fixed blade articles in public places. In order to fall within the statutory exemption for a "folding pocketknife" the article in question must have three distinct characteristics. First, the cutting edge of the

blade must not exceed three inches. Second, the article must not be capable of being locked in place. If it is capable of being locked in place this creates a fixed blade article which is the article which Parliament intended should be prescribed. Third, the blade must be immediately foldable by simple pressure to one side of the blade and there cannot be any other process, for example the pressing of a button. The article in the present case, she submitted, had all these characteristics and therefore fell within the exemption. She drew attention to a passage in *Sharma v DPP* at paragraph 11 in which Leggatt LJ observed:

> ... Giving a sensible and purposive interpretation to section 139, the requirement that the blade should be immediately foldable at all times reflects the mischief at which the provision is aimed because an article with a blade which is capable of being secured in position so that it cannot be immediately folded simply by pressing the blade clearly in general has a greater potential to be used as a weapon than one whose blade is immediately foldable in that way.

15. Since Parliament chose not to define "folding pocketknife", Miss Smart submitted that it was not sufficient for the prosecution to show that an article that was an immediately foldable cut-throat razor, whose blade did not exceed three inches, was not a "knife". If Parliament intended to exclude this type of item it should have made it clear.

16. We start with a few preliminary observations. First, we would accept that a penal statute is to be construed strictly in favour of those who may be prosecuted under them -- see for example Lord Simonds in *London and North Eastern Railway Company v Berriman* [1946] AC 278 at 313 to 314:

> A man is not to be put in peril upon an ambiguity, however much ... the purpose of the Act appeals to the predilection of the court.

17. Second, in two of the three cases referred to by counsel and the judge, the court had the advantage of seeing the article in question, as we have in this case. It has enabled us to form a view as to the nature of the blade in the present case, but of course we have not seen the articles in issue in the other cases, although Mr Mandel showed us a photograph of the article which was in issue in the case of *Sharma v DPP*.

18. Third, in *Harris and Fehmi* the issue was whether a folding knife had to be readily and immediately foldable at all times or whether it was sufficient for the purpose of the proviso in subsection (3) that it could be folded by the pressing of a button. The court concluded that it was the former, see the judgment of McCowan LJ at page 87F:

> To be a folding pocketknife the knife has to be readily and indeed immediately foldable at all times, simply by the folding process. A knife of the type with which these appeals are concerned is not in this category because, in the first place, there is a stage, namely, when it has been opened, when it is not immediately foldable simply by the folding process and, secondly, it requires that further process, namely, the pressing of the button.

19. Fourth, in *Deegan* the appellant had been found in possession of a pocketknife which was capable of being locked in an open position and also being folded once the mechanism had been operated to unlock the blade. The blade did not exceed three inches. The judge had ruled that it was a bladed article and was not a folding pocketknife. He gave permission to appeal on the basis that the Divisional Court in *Harris and Fehmi* had not been aware of the record of ministerial statements in the course of the Parliamentary debates about what became section 139 of the 1988 Act. The Court of Appeal considered the ministerial statements in the light of the decision in *Pepper (Inspector of*

Taxes) v Hart [1993] AC 593 but concluded that they were not sufficiently clear to throw light on how section 139 should be interpreted. The reason was that although there were references to locking pocketknives, what was meant by that phrase was not made sufficiently clear: see page 128. The conclusion was that the Divisional Court case of *Harris and Fehmi* was correctly decided.

20. Fifth, *Sharma* concerned a different type of article described by Leggatt LJ at paragraph 7. The magistrates convicted the defendant and the Crown Court dismissed an appeal but stated a case for the High Court. The Divisional Court dismissed the appeal. The essence of the decision is to be found at paragraph 14:

> ... what is meant by a 'folding pocketknife' cannot reasonably depend on judgments about the strength or otherwise of the relevant mechanism. The interpretation that has been given to this expression in the case law is clear and straightforward and turns, in my view, on whether the blade of the knife was immediately foldable at all times simply by applying pressure to the blade. That is not true of the knife in this case. I therefore have no doubt that the Crown Court was correct to conclude that it was not a folding pocketknife within the meaning of section 138(2) and (3) of the Criminal Justice Act 1988 and hence that it was an article to which section 139(1) applied. Accordingly, I would dismiss the appeal.

21. Section 139(1) defines the offence by reference to possession of "an article" in a public place. Subsection (2) provides that an article to which subsection (1) applies is one which has a blade or is sharply pointed, unless it is a folding pocketknife. Subsection (3) qualifies the folding pocketknife exception. It is not to be regarded as a folding pocketknife for this purpose if the blade exceeds three inches. The cases to which we have referred were cases where the article in question was argued to be a pocketknife within the exception of subsection (2) as qualified by subsection (3). It was common

ground in each case that the article fell within the definition of pocketknife.

22. However, the issue here is whether the article can properly be regarded as a pocketknife. In our view it plainly cannot. A pocketknife is not an apt description of a cut-throat razor. The items have distinct characteristics, as reflected both in their descriptive names and in their functions. A razor is an article of sufficient sharpness to be used to shave. That would not be normally done by a pocketknife.

23. We are satisfied that the ruling was wrong in law and we will make an order under section 61(4) of the Criminal Justice Act 2003 for proceedings to be resumed in respect of count 3.