

NCN: [2019] EWCA 856 (Crim)
No: 201704196 A2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 2 May 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE LAVENDER

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

R E G I N A

v

MUZAFFER ALI

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Ms A Weekes QC appeared on behalf of the **Appellant**

Mr J E Cox appeared on behalf of the **Crown**

J U D G M E N T

LORD JUSTICE SIMON:

1. This is an appeal against a sentence of life imprisonment imposed on the appellant in the Crown Court sitting at St Albans on 17 August 2017. The sentence was imposed by His Honour Judge Carroll following a trial which had concluded with guilty verdicts on four counts on 17 July. Count 1 charged a conspiracy to evade the prohibition on the importation of prohibited firearms, contrary to section 1(1) of the Criminal Law Act. Count 2 charged a conspiracy to evade the prohibition on the importation of ammunition. Count 3 was an offence of transferring a prohibited firearm, contrary to section 5(2A)(b) of the Firearms Act 1968. Count 4 was an offence of transferring ammunition to another, contrary to section 3(2) of the 1968 Act.
2. In respect of these crimes he was sentenced on count 1 to a term of life imprisonment with a specified minimum term of 10 years and nine and a half months, on count 2 to the term of 5 years' imprisonment concurrent, on count 3 to a term of 12 years concurrent and on count 4 to a term of 5 years current.
3. The appellant was granted leave to challenge the sentence on count 1 by the single judge and he appears on this appeal represented by Ms Weekes QC, who was not counsel at trial nor at the sentencing hearing.
4. There were a number of co-defendants of whom it is necessary to mention seven: Haroon Khatab, convicted on counts 1 and 2, Khalid Hussain, who was also convicted on counts 1 and 2, Sajid Khan convicted on counts 1 to 4 and Faisal Mahmood who was convicted on counts 3 and 4. Yasser Majid, Ikram Zaman and Ayanleh Hosh were all

acquitted on counts 1 and 2.

5. The crimes involved the importation of firearms and ammunition into the United Kingdom on two occasions between February and May 2016. In total, four self-loading pistols and a fully automatic sub-machine gun were seized by the police along with ammunition for each of the firearms.
6. The appellant was the head of a Luton based organised crime group ("OCG"). On 22 February 2016, he travelled by car to Haarlem in the Netherlands with Majid. They were followed later that day by Khatab and Hussain in another vehicle. During that time the appellant remained in regular contact with a Dutch mobile telephone number.
7. On 23 February, possession of firearms and ammunition was secured. Khatab was responsible for transporting them back to the United Kingdom so that they could be passed onto another OCG in Leicester. The appellant and his associates were in telephone contact with each other before, during and after the trip.
8. On 2 March, following contact between the appellant and the head of the Leicester OCG, a man named Singh, a member of that group, travelled to Luton and collected the weapons from the appellant's group. The firearms were passed to him by Mahmood. Singh was stopped by the police as he returned to Leicester. A brown taped package was recovered from underneath the passenger seat of his vehicle and was found to contain three military standard FEG 9-millimetre calibre self-loading pistols and 21 rounds of compatible ammunition. All were fully functional.

9. On 4 May 2016, Khatab travelled again with Hussain to the Netherlands. They were followed later the same day by the appellant, Khan, Zuman and Hosh. The appellant had again been in contact with a Dutch telephone number. Meetings took place in Amsterdam during which further firearms and ammunition were supplied to the appellant's group. The weapons were concealed in Khatab's vehicle.

10. He was stopped on 15 May as he was about to return to the United Kingdom via the Channel Tunnel. His vehicle was searched and it was discovered that a panel to the right of the steering wheel and an air vent had been removed. In the area behind the dashboard a package was found wrapped in black tape. It contained a Beretta self-loading pistol, two compatible magazines loaded with a total of 14 rounds of ammunition, a further 36 rounds of compatible ammunition and a Skorpion sub-machine gun capable of automatic fire with a magazine containing 20 compatible rounds of ammunition.

11. The appellant was arrested on 1 June. Evidence of a heavy turnover of mobile telephones was recovered from his house, along with a signal blocker and thousands of pounds in cash. He gave untruthful answers to questions asked in interview.

12. He was aged 39 at the date of sentence and had seven convictions between August 1988 and February 1999. These included robbery in 1995 for which he received a sentence of 3 years' youth detention, and possession an offensive weapon in a public place in 1999 for which he was fined.

13. In passing sentence, the judge referred to a number of cases to which we will refer later in

this judgment. For present purposes we refer to these by name without further citation.

14. During the course of what were clear and thorough sentencing remarks he observed that the offences were of the utmost gravity. The starting point in the sentencing exercise was to bear in mind the remarks in *Wilkinson* identifying the gravity of gun crime and the requirements for deterrent and punitive sentences. *Wilkinson* also indicated that the fact that someone was an importer or supplier and was not someone who pulled any trigger or discharged any firearm or caused serious injury himself did not resolve the issue of future dangerousness in his favour.
15. The judge also referred to and took into account *Attorney General's Reference No. 128 of 2015 (Stephenson)*. The case of *Saunders* confirmed that even where section 225 of the Criminal Justice Act 2003 did not apply because the offence was not a specified offence, the discretion to impose a life sentence remained available. The principles for such a discretionary life sentence derived from *Hodgson* and *Chapman* were whether the offence was serious enough to merit a very long sentence, whether there was a likelihood of further offending and the gravity of such further offending.
16. The conspiracy existed between 1 January and 31 May 2016. The firearms were all military grade firearms in full working order. There was one fully automatic machine gun, four semiautomatic pistols and a total of 91 rounds of compatible live ammunition. The weapons were clearly intend to be used by the purchaser in the furtherance of serious crime. The weapons and ammunition were sourced from overseas and imported into the United Kingdom for onward sale to others. There were two identifiable importations,

one of which was delivered to a criminal group in Leicester.

17. The organisation of the appellant's group was complex and sophisticated and the offences required a significant degree of determined planning. The appellant was the leader of the group. In addition to having overseas contacts capable of sourcing the weapons, the conspiracy had involved a high level of planning to effect the importation, as well as to organise and carry into effect the onward distribution of the firearms and ammunition to other criminal groups. This included storage at a safe house protected by guard dogs, as well as meetings between co-conspirators and overseas suppliers and between the defendants and the United Kingdom purchasers.

18. The degree and determination to put these firearms and ammunition into circulation was demonstrated when the appellant's group immediately set about a further importation after police had intercepted the first importation. Numerous steps were taken by the group to minimise the likelihood of being detected or prosecuted, including signal jammers and the use of numerous "dirty" telephones, the appellant using 17 of these, as well as hired cars. The conspirators were, in the words of the judge, 'forensically aware'.

19. It was highly relevant in assessing the degree of culpability and future risk of serious harm that at a very late stage in the trial the appellant had served a defence statement in which he admitted being involved in the importation of drugs and onward drug dealing within the United Kingdom, and that his defence became that he was a drugs importer and not a firearms importer. Although the appellant did this for his own tactical reasons, the judge was satisfied that his admission to the drugs offending was true.

20. Looking at the totality of the evidence, including that of a co-defendant Majid, which was not challenged on the appellant's behalf at trial, the judge found that the appellant was head of an organised crime group that imported substantial and commercial quantities (in multi-kilograms) of class A drugs for dealing within the United Kingdom and grew cannabis within the United Kingdom in commercial quantities. The appellant had expanded his range of criminal activities through established contacts abroad into the importation of firearms and ammunition, which he was willing to sell on to any willing buyer.

21. The appellant sought the highest profit for himself that he could achieve from the sale of the weapons. He did so with utter disregard for the fact that these lethal military grade weapons were designed and intended for nothing other than the disruption of life. It was clear from his lifestyle that he was financially successful in his criminality, including ownership of multiple properties, cars and significant quantities of cash. He was clearly able to bankroll the costs of the enterprise. This was against a background of having no discernible legitimate means of earning.

22. The appellant had continued to exert control over his criminal group when in custody, including the use of threats and violence in an attempt to force others to run a defence that he approved of. He was a dominating, bullying and highly manipulative man and a very serious and determined, dangerous high-level criminal.

23. In respect of the *Avis* questions, these were military grade firearms. All the pistols were semiautomatic and the machine gun was fully automatic. They were all prohibited

weapons with no lawful legitimate purpose. The only function was to cause death or serious injury. Each weapon came with magazines loaded with live ammunition. They were all in proper functioning order. The only limited mitigation was that they were heavily packaged and not immediately available for use. The firearms were intercepted by the police before they could be put to criminal purpose but were contraband of considerable value. Although not yet used to cause death or injury, there could have been no other intended purpose; and the conspirators were willing to transfer the firearms with complete indifference to the likely harm caused in return for maximum personal financial gain.

24. The appellant had continued to deny his crimes, having admitted his involvement in drugs offending at a very late stage, later suggesting that he was only involved in class B drugs not class A. That was another example of how he had twisted and turned at every stage to minimise his own culpability. He had made his living for an extended period of time out of serious criminality and as the leader of the Luton OCG had played the principal role in the importation of all the firearms and ammunition and making arrangements for the onward distribution.

25. The judge noted the appellant's antecedent history and found him to be a dangerous individual. So far as personal mitigation was concerned, there was none. The judge was satisfied that a discretionary life sentence was appropriate. It was offending of the utmost gravity. His criminal contacts ranged far and wide both within the United Kingdom and beyond and he had shown a willingness to use them. His criminal enterprises included high-level commercial importation of class A drugs and production of class B drugs

within the United Kingdom and their onward sale. His tendency to violence had been demonstrated even at court with his reaction to the acquittal of some of his co-defendants, and his resulting threats to them from the dock. There was a high likelihood of him committing further offences which would continue indefinitely. At the level of criminality he had operated at, the level of any further offending was likely to be very serious. A life sentence was not only warranted but required so as to protect the public and was therefore imposed.

26. The minimum term took into account 440 days on remand. It was a term of 10 years and nine and a half months on count 1 with other sentences, as we have already set out, running concurrently. The minimum term was, as the judge later explained, based on a 24-year starting point.

27. Ms Weekes made a number of submissions but they fall into two overarching arguments. First, the judge erred in answering the questions posed by *R v Avis & Ors* [1998] 2 Cr App R (S) 178 in assessing the seriousness of the firearm offending. Secondly, he also erred in his approach to the imposition of a discretionary life sentence in a case to which, as the judge accepted, section 225 of the Criminal Justice Act 2003 did not apply.

28. Dealing with the first point, the four questions posed by *Avis & Ors*. First, what sort of weapon was involved? Ms Weekes accepted that this was a conspiracy that involved the importation of a number of lethal weapons with the ammunition to use them. However, she relied on the point accepted by the judge that the weapons were all heavily packaged and so not immediately available for use.

29. Second, what, if any, use had been made of the firearms?

30. Third, with what intention did the defendant possess or use the firearm? Here, no use was made. The intent of the conspirators was that they would be sold to other criminals. She submitted that the selling of guns and ammunition for profit rather than using them or retaining them for use was not the type of offending that justified a life sentence.

31. Fourth, what was the defendant's record? She submitted that the seriousness of the offending increases if the offender has a record for either firearms offences or crimes of violence. She pointed out that there was no explicit reference to the appellant's record, and in any event his one conviction for robbery took place when he was a juvenile. There was here no aggravation of a violent record.

32. Dealing with the second point, the imposition of a discretionary life sentence when section 225 did not apply, Ms Weekes accepted that a very long sentence was justified. However, she submitted that this was not an offence which had consequences of the utmost gravity. She accepted that the judge had jurisdiction to pass a life sentence outside the cases where a mandatory sentence was required or where the provisions of the 2003 Criminal Justice Act applied and that the judge went through the relevant steps in considering whether he should impose a life sentence. However, she made five points.

33. First, she challenged the judge's assessment of the degree of risk of future harm in the way he did since there was no basis for treating the appellant as a commercial importer of class A drugs. His revised defence statement amounted to no more than an admission

that he was a commercial importer of class B drugs. In these circumstances, it was wrong to rely on the evidence of a co-accused that he been asked to assist in the supply and sale of class A and class B drugs. As she put it in oral submissions, it does not necessarily follow that although multi-kilogram class A drugs were sold, the distributor was necessarily an importer of those drugs. There had been no admission by the appellant about class A drugs in his defence statement, he had given no comment answers in interview and had not given evidence at trial.

34. Secondly, Ms Weekes relied on the case of *R v Hodgson* (1968) 52 Cr App R 113 in support of the proposition that a relevant consideration for the imposition of a life sentence was the likelihood or otherwise that the offender would commit firearms offences in the future. In any event, she submitted, since he was an importer of the guns which were handed over to others, the offences were not "specially injurious to members of the public".

35. Thirdly, she argued that the judge had been wrong to take into account the appellant's conduct during the trial and his reaction to the acquittal of co-defendants. It had been a cut-throat defence and there was no evidence of violence from the dock or prior to that.

36. Fourth, in any event a life sentence was not justified. As was made clear in *R v Saunders & Edwards* [2013] EWCA Crim 1028 at paragraph 19, a life sentence is a sentence of last resort. Here, an extended sentence would have been the appropriate sentence providing both punitive and deterrent effect. She accepted in her oral submissions that in fact an extended sentence was not available; and so she repeated her submission that a long

determinate sentence would have been the correct sentence here.

37. Fifthly, in addition, and supporting the second point, she submitted that in cases where a life sentence was imposed for importing firearms, there was nearly always a charge of possession with intent to endanger life, which highlighted the nexus between the firearm and its use in such cases. That had not been a charge made against the appellant, rightly in view of the circumstances.

38. Her overarching submission was therefore that unless a long determinate sentence was wholly inappropriate, a life sentence should not have been imposed.

39. We have considered these submissions. Since the decision in the well-known case of *Avis*, which concerned general guidance in relation to the seriousness of firearms offences, this court has provided guidance directed specifically to the importation of firearms in the case of *Attorney General's Reference No 43 of 2009 (Bennett)* and *R v Wilkinson* [2010] 1 Cr App R (S) 100. In that case, Lord Judge CJ reviewed the four *Avis* questions in the light of both the statutory changes that had been made since *Avis* was decided and the increasing concern about the use of guns to commit serious crimes. At paragraph 2 the court said this:

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.

40. At paragraph 3 he added this:

... 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.

41. At paragraph 27 the court said this:

Where however the statutory intent involving danger to life has been established, and it is clear that the firearms were subsequently used with homicidal intent by others to whom they were supplied or who obtained them in the criminal firearms market, the sentences on the importer or supplier should always reflect these dreadful consequences. In the context of section 225 of the 2003 Act the fact that the importer or supplier is not an individual who pulled any trigger, or discharged any firearm, or caused serious injury himself, does not resolve the issue of future dangerousness in his favour. Criminals who are prepared to deal in such lethal weapons invariably represent a serious public danger, and it cannot be assumed that the danger they represent will have dissipated when the determinate element of their sentences has been completed. We therefore supplement the guidance in *Avis* and others by emphasising that for criminals involved in this level of gun crime along with very lengthy determinate sentences, indeterminate sentences, whether discretionary imprisonment for life or IPP, inevitably arise for consideration. We shall apply this guidance to the present appeals.

42. The offence charged under count 1 is not a specified offence within the meaning of Schedule 15 of the Criminal Justice Act 2003, a matter that had been noted by the court at paragraph 25. However, it is clear that a discretionary life sentence can be imposed where the offending does not fall within the ambit of a mandatory life sentence, an automatic life sentence under section 224A or a discretionary life sentence under section 225 of the Criminal Justice Act 2003. This is clear from the case of *R v Saunders & Ors* [2014] 1 Cr App R (S) 258 at paragraph 11, where Lord Judge CJ, referring to the type of case which might deserve a life sentence, said this:

Some of these offences may involve a significant risk of serious harm to the public, but are not included within the list of 'specified' offences in the dangerousness provisions in the 2003 Act.

43. See also paragraph 15.

44. The court gave the example where a discretionary life sentence might be imposed of a case of an offender who committed repeated offences of very serious drug supply, adding at paragraph 12:

In reality, the occasions when [this] form of discretionary life sentence is likely to be imposed will be rare ...

45. In *R v Burinskas* [2014] 1 WLR 4209 at paragraph 6(ii), this court, presided over by Lord Thomas of Cwmgiedd LCJ, reaffirmed the availability of discretionary life sentences in cases which fell outside mandatory or statutorily defined life sentences. No doubt such cases will be rare but a test of rarity or exceptionality does not help in defining the circumstances in which a life sentence is appropriate.

46. In *Attorney General's Reference 128-141 of 2015 and 8-10 of 2016* (Stephenson) [2016] 2 Cr App R (S) 72, this court, Lord Thomas again presiding, was concerned with sentences for firearms offences which the Attorney General contended were unduly lenient. Two points emerge from that case which are of potential relevance for present purposes. First, the Anti-social Behaviour, Crime and Policing Act 2014 had amended section 5 of the Firearms Act 1968 by inserting the new section 5(2A), whose effect from 14 July 2014 was to provide a new sentence of transferring prohibited weapons. The offence carried a maximum penalty of life imprisonment: see paragraph 3(v).

47. Second, the court expressed the view that offending by the leader of a gang importing firearms may justify determinate sentences of more than 25 years: see paragraph 7(i).

48. Whether to impose a 'discretionary' life sentence, in contradistinction to the statutory life sentence under section 225 of the Criminal Justice Act 2003, involves consideration of some earlier cases, as the sentencing judge recognised.

49. In *R v Hodgson* (1968) 52 Cr App R 113 at 114, this court set out three conditions which, if satisfied, would justify a life sentence:

(1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence.

50. In *Attorney General's Reference 32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261, the court considered the second and third of the conditions in *Hodgson* and particularly the reference to "unstable character"; and at page 268 reformulated the test in the form of two conditions:

The first is that the offender should have been convicted of a very serious offence. If he (or she) has not, then there can be no question of imposing a life sentence. But the second condition is that there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence.

51. See also *R v Chapman* [2000] Cr App R (S) 378 at page 3, again Lord Bingham CJ, where the court identified the second condition in *Whittaker* as focusing on "the likelihood of further offending and the obvious risk if such offending took place".

52. In the present case, the judge focused his approach by reference to the conditions set out in *Hodgson* while referring explicitly to the case of *Chapman*. First, he considered

whether the seriousness of the offending justified a very long sentence. Second, if so, whether there was a likelihood of further offending. Third, the potential injurious consequences of such offending.

53. As to the first point, it is clear that the offending justified a very long sentence and no complaint is or could be made of the judge's notional determinate sentence of 24 years.

54. As to the second point, the judge was entitled to the view that the appellant was dangerous in the ordinary meaning of the word rather than as defined in the 2003 Act. He was the head of an organised crime group involved in different and developing areas of criminality. We regard the suggestion that it was unlikely he would commit further firearms offences in the future as untenable in view of the offences committed and in the light of the facts as the judge found them to be.

55. As to the third point, the extracts from the cases to which we have referred, in particular *Wilkinson* and *Stephenson*, make clear how this type of offending impacts on the public. The argument that since he was an importer of guns which were handed over to others the offences were not "specially injurious to members of the public" is completely unsustainable.

56. In our view, the two condition test in *Whittaker* and *Chapman* should be applied rather than the threefold test in *Hodgson*.

57. In the present case, the judge's sentencing remarks explicitly referred to the likelihood of

further offending and the obvious risk if such offending took place. At page 10D of the sentencing remarks, he said this:

I am entirely certain that there is a high likelihood of Ali committing further offences, and such a risk will continue indefinitely. At the level of criminality he has operated until now, I am satisfied that the gravity of any further offending by Ali is likely to be very serious indeed. In his case, in my judgment, a life sentence is not only warranted but indeed is needed to properly protect the public from the risk of further serious harm, until the Parole Board has adjudged him safe...

58. In our view, that conclusion was fully open to the judge, who had presided over the trial, and in the light of the facts as he found them.

59. The appellant was at the head of a conspiracy to import firearms on two occasions. The firearms could have been used either directly to commit further crimes of the utmost seriousness or to instill fear in pursuit of criminal activities. The conspirators would benefit not only from the payment for the weapons but also doubtless from a reputation for being able to supply guns. The conspirators had arranged for a second importation within 3 months of the first importation, notwithstanding the police activity which had thwarted the first importation. The nature of the offending gave proper grounds for believing that the offender would pose a serious threat to the public for a period which could not be reliably estimated.

60. In the light of our conclusion that the judge did not err in his general approach to the imposition of a life sentence on count 1, we can take Ms Weekes remaining points more briefly.

61. As to point 1, the judge was plainly entitled to view the totality of the evidence as it emerged at trial when assessing the question that arose when considering whether to impose a life sentence.
62. As to point 3, we would accept that an offender's conduct when a verdict is returned should not lightly be taken against him. The stress of the moment must be allowed for. However, the judge's view of the appellant's dominance within the OCG was a view that depended on the totality of the material that emerged during the course of the trial, to which he was entitled to have regard.
63. Point 5 is the submission that where a life sentence has been imposed for importing firearms there has nearly always been an additional charge of possession with intent to endanger life, highlighting the nexus between the firearm and their use in such cases. As to that submission, we would simply observe that the proposition does not lie easily with the change in the law which imposed a maximum sentence of life imprisonment for an offence under section 5(2A) of the Firearms Act 1968.
64. For these reasons, we are satisfied that the sentence was neither wrong in principle nor resulted in a sentence which was manifestly excessive.
65. Accordingly, the appeal will be dismissed.