

NCN: [2020] EWCA (Crim) 625

No: 202001059 A3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 1 May 2020

(VIRTUAL COURT)

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE McGOWAN

HIS HONOUR JUDGE BATE

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

ROBERT BARTELL

Ms S Przybylska appeared on behalf of the **Solicitor General**

Ms S Powis appeared on behalf of the **Offender**

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J U D G M E N T

LORD JUSTICE SIMON:

1. The Solicitor General applies for leave to refer a sentence, under section 36 of the Criminal Justice Act 1988, as being unduly lenient. The sentence was an overall term of 30 months passed on Robert Bartell ('the offender') by His Honour Judge Challinor in the Crown Court at Wolverhampton on 28 February 2020, in respect of seven charges on an indictment.
2. The offender (now aged 54) had been found in possession of four converted blank firing pistols (each prohibited weapons), together with a sawn-off shotgun, and ammunition, some of which was capable of use with the pistols. Counts 1 to 4 each charged an offence of possessing a prohibited weapon, contrary to section 5(1)(aba) of the Firearms Act, as amended. The charge on count 1 related to a Zoraki handgun; count 2 charged possession of a modified blank firing EKO handgun; count 3, a modified blank firing BBM 'Minigap' handgun; and count 4, a modified blank firing Kimor handgun. Count 5 charged a single offence of possessing ammunition without a firearms certificate, contrary to section 1(1)(b) of the Firearms Act. These were 23 9mm improvised projectiles, converted from blank firing bullets, to which section 1 of the 1968 Act applied, without the holding of a current firearms certificate. Count 6 charged a single offence of possessing prohibited ammunition contrary to section 5(1)(c) of the Firearms Act, namely a cartridge with a bullet designed to explode on or immediately before impact. Count 7 was a charge of possessing an altered firearm without a firearms certificate, contrary to section 1(1)(a) of the Firearms Act. This was a .410 calibre shotgun which had been shortened, contrary to section 4(1) of the Firearms Act 1968

without a current firearms certificate.

3. On 31 January 2020, at a plea and trial preparation hearing, the offender pleaded guilty to all seven counts and sentencing was adjourned for the preparation of a pre-sentence report. He was sentenced on 28 February on each of counts 1 to 4 to a term of two-and-a-half years' imprisonment, to be served concurrently; and on each of counts 5, 6 and 7 to concurrent terms of 18 months' imprisonment. The total was therefore a term of two-and-a-half years' imprisonment.

4. In February 2019 the offender had imported a number of blank firing pistols. He advertised two of them for sale on the Internet for £450 each in order to recoup the cost. The police seized these two weapons. They were front vented blank firearms and for that reason were prohibited although they had not been converted. In error he was charged with possessing firearms without a certificate rather than possessing prohibited firearms. He pleaded guilty. It was said in mitigation that he had no intention of converting the guns, and that he had bought and sold them with a view to making a profit. He was sentenced in the Magistrates' Court to a fine of £100 with £100 costs and the firearms were forfeited. The offender did not tell the police that he had imported firearms other than the two which had been seized and that he still had them in his possession. Furthermore, he imported two other guns in October.

5. On 28 November 2019, police searched the offender's house, in his absence, and found a box in a bedroom containing firearms, ammunition and component parts. A small shed in the back garden was being used as a workshop. This contained a table drill, disc cutter,

an assortment of tool bits, length of steel tubing and a test firing area. The police ballistic examiner confirmed that the firearms had been converted, or were in the process of being converted, to fire live ammunition. All were prohibited within the meaning of the Firearms Act 1968. The weapons were potentially lethal. The converted ammunition (count 5) was capable of use with three of the converted firearms. The offender voluntarily attended the police station later the same day. He was cautioned and said:

I am in a world of trouble over all this. I know I'll be going to prison this time as I've converted some of the weapons to real firearms. I have to own up to what I've done.

6. In interview, under caution, he admitted modifying firearms in his shed and explained his methods. He said that he had a genuine interest in firearms. He knew that his actions were illegal and that sentences were substantial, but he had an obsession and so he continued. He admitted that he had retained firearms in February 2019 during the police investigation and had since bought two others. He agreed with the ballistic examiner's conclusion.
7. In addition to the two convictions for possessing firearms without a certificate in early 2019, the offender had three dissimilar and very old convictions for criminal damage, non-dwelling burglary and common assault between 1985 and 1995, of which nothing more need be said.
8. He submitted a basis of plea asserting that he converted weapons as a hobby, the weapons were not distributed, and he had no connection with violence or organised crime. He had

never sold or given away any of the altered firearms and had no intention of doing so. It was argued on his behalf that these amounted to exceptional circumstances such that the mandatory minimum sentence of 5 years should not apply.

9. The prosecution accepted the basis of plea. The officer in the case (a Detective Constable and his supervisor, a Detective Sergeant) agreed that the offender's working area (the garden shed) had the hallmarks of a hobby rather than a professional operation. The tools he used were available from DIY shops and were neither specialist nor extensive; and there was no evidence or intelligence to suggest that the offender sold, offered for sale, loaned or hired the firearms to others. There was also no link between the offender and organised crime, and no link between the firearms and any outstanding crime. Nonetheless the prosecution maintained that the mandatory minimum sentence should apply, owing to the aggravating factors in the case and the background of the earlier firearms convictions.

10. There was a short-format pre-sentence report before the sentencing judge. This recorded that the offender was aware that his actions were against the law and his express regret. He said he had let down his partner and his elderly mother. He had been in long-term employment as an HGV driver. He was 'fascinated' by guns; and the probation officer considered that his behaviour 'verges on obsession'.

11. The offender submitted testimonials from his mother, his partner, his sister and his manager at work, referring to his kindness, gentleness and his charitable work. There was no identified victim and no community impact statement had been prepared.

12. At the sentencing hearing the prosecution relied on the factors identified in *R v Avis* [1998] 2 Cr App R(S) 178. First, the nature of the weapon: the firearms had been converted and were potentially lethal; there were four prohibited firearms; and ammunition was available that could have been used in at least three to them. Second, use: it was accepted the firearms had not been used. Third, intention: it was accepted the offender's intention was to possess the weapons himself as a hobby. Fourth, previous convictions: the offender had a recent relevant conviction and, on his own admission, knew that his conduct was illegal. It was further submitted that there was a risk to the public as the weapons could have fallen into the hands of criminals. However, no authorities relating to exceptional circumstances were drawn to the court's attention.
13. It is not clear from the sentencing remarks whether the judge found that the offender had entered a plea at the earliest opportunity and gave one-third reduction, or whether he gave the usual one-quarter reduction for a plea at the plea and trial preparation hearing. It appears that the pleas could not be entered until a final report was available for the police ballistic expert and so it may be the full one-third was allowed.
14. The judge found that exceptional circumstances meant that 'not ordinary' but not 'extraordinary' in the sense of wholly remarkable. The 'ordinary type of case usually involves a criminal background', with guns either being used or made available to criminals. The instant case was 'quite different', involving possession and a hobby with a background of fascination with guns. No specialised tools were used to convert the firearms. There was no known link to criminal gangs and no attempt to sell the converted

firearms. The offender was not 'the *ordinary* type of firearms offender'.

15. The judge questioned whether the sawn-off shotgun (the subject of count 7) ought properly to have been indicted as a prohibited firearm as it had a barrel of less than 24 inches rather than the possession of a firearm without a firearms certificate. Prosecuting counsel conceded that it should have been. The judge said it was unlikely to make any material difference to the overall sentence owing to the other counts that were subject to the mandatory minimum. Prosecution counsel agreed.

16. The judge found that there were exceptional circumstances, although the case remained a serious one bearing in mind the factors set out in *Avis*. The weapons were genuine and there were relevant previous conviction and the firearms were not securely stored. If they had been stolen they would have found a ready market. The judge identified a starting point of 5 years' imprisonment. However, taking into account exceptional circumstances that he found, the basis of plea accepted by the prosecution and credit for the offender's guilty pleas the sentence was reduced to two-and-a-half years' imprisonment on counts 1 to 4 and 18 months on the remaining counts.

17. Section 51A of the Firearms Act applied to the sentences passed under counts 1 to 4 and

6. The charges under section 5(1)(aba) and section 5(1)(d). Section 51(A2) provides:

The court shall impose an appropriate custodial sentence (or order for detention) for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so.

Section 51A(5)(a)(i) specifies the required minimum term in a case of an offender over the age of 18 as a term of 5 years.

18. For the Solicitor General, Ms Przybylska pointed out that the maximum sentence for the offences charged as counts 1 to 4 and 6 was a term of 10 years, and for the offences charged as counts 5 and 7, a term of 5 years; and that each of counts 1 to 4 and 6 were subject to the mandatory minimum term under section 51A, unless the court was of the opinion that there were exceptional circumstances relating either to the offence or the offender and that, where the mandatory sentence applied, the plea of guilty would not reduce the sentence below the mandatory minimal.

19. In the present case there was nothing exceptional in either the offence or the offender. Although the weapons had not been used and there was no intention either to use them or to transfer them to others, the weapons had been converted to operational firearms. There was ammunition which could be discharged by the firearms. There were four weapons. There was the aggravating circumstance of his recent conviction for possession of firearms; and the weapons were not securely stored and were vulnerable to being taken. In these circumstances, she submitted that the judge was plainly wrong to find that there were exceptional circumstances; and it followed that the sentences on counts 1, 4 and 6 were unduly lenient.

20. For the offender Ms Powis submitted that the judge's finding of exceptional circumstances was the equivalent of the exercise of a discretion which was open to him on the unusual facts as he found them. There was substantial mitigation. The offender

was aged 54 and, apart from the recent conviction, of effective good character. He made immediate admissions in interview. He pleaded guilty at the first opportunity and demonstrated a clear naivety in relation to the offending. There was no contact or any familiarity with criminals who might have access to the guns. This was not the case of someone who, for example, bought guns on the dark web. The offender had bought blank firing guns legitimately and adapted them with fairly basic tools. The judge's approach to the sentencing was, she submitted, measured and appropriate. He had acknowledged the danger posed by the guns; but also that the offender had adapted the weapons out of a personal interest and with no ulterior purpose. His means of adaptation were unsophisticated and consistent with the hobby of an amateur. So far as the minimum term was concerned, a holistic approach was required to the issue of whether there were exceptional circumstances. As the judge had observed, 'the ordinary case' involved a criminal background robbery, or drug trafficking or the hiding of weapons for criminals to retrieve them. This case was quite different: it was possession for personal interest only. His age, character and personality did not fit the characteristic of 'an ordinary offender' charged with this type of offence and therefore there were exceptional circumstances.

21. We have considered the submissions. It is unfortunate that, although the judge was referred to the case of *Avis*, he was not referred to two recent cases which might have assisted him in deciding whether to impose a mandatory minimum sentence. In *Nancarrow* [2019] 2 Cr App R(S) 4, this court set out at paragraph 19 a number of points which were relevant to sentencing where section 51A(2) applied. First, the purpose of a mandatory minimum is to act as a deterrent. Second, circumstances are exceptional if the

imposition of a 5-year sentence would be arbitrary and disproportionate. Third, such circumstances must be truly exceptional to avoid undermining the intention of Parliament. Fourth, the court should take a holistic approach and consider whether the collective impact of all the relevant circumstances make the case exceptional. Fifth, the court should always have regard to the four questions set out in *Avis*: what sort of weapon it was? What use was made of it? With what intention did the offender possess it? What was the offender's record? Sixth, the circumstances of the offender are important. It would be relevant, for example, if an offender were unfit to serve a 5-year sentence or if such a sentence might have a significantly adverse effect on his health. Seventh, each case is fact specific and limited assistance will be gained from referring the court to decisions in cases materially identical. Eighth, unless the judge is clearly wrong in identifying exceptional circumstances where they do not exist or clearly wrong in identifying exceptional circumstances where they do exist the court will not readily interfere.

22. The difficulty with an exceptionality test is that it does not provide any clear standard from which the exceptional case will differ. The judge described this case as neither ordinary nor wholly remarkable. In our view, that is not a helpful way of looking at the test to be applied under section 51A(2). Four firearms had been converted by the offender and ammunition was available for use in three of them. They were each potentially lethal weapons.

23. The statutory purpose which underlies the statutory minimum is deterrence: to prevent such weapons coming into the hands of criminals who will deploy them in the course of

committing the most serious crimes: murder, robbery and supplying Class A drugs in large quantities. Although his interest in them was a hobby, the offender well understood what he was doing constituted serious criminality. He understood the danger which the guns posed in the wrong hands and the lack of security in relation to their storage. As the judge noted, if a burglary had taken place, the guns had a ready purchaser in the criminal marketplace, resulting in extreme danger to the public. Furthermore, the offender had been convicted of firearms offences in relation to some of the guns he had bought earlier and which he had sold in order to acquire the guns that he intended to convert into deadly weapons.

24. The case of *Cook* [2017] EWCA Crim 1200 provides some assistance. Cook had been sentenced to an overall term of 3 years on his pleas of guilty for six offences contrary to the Firearms Act, as well as asking for 50 other offences to be taken into consideration. This court granted leave to refer the sentences and increased the term to 6 years after credit for the pleas. The case was more serious than the present but some of its features have a resonance. Cook was a collector and he had accumulated the guns over a number of years from fellow enthusiasts and family members. He knew that firearms were illegal and intended to hand them over at the next police amnesty. He was of good character and the sentencing judge found there were exceptional circumstances. This court disagreed. Cook had a legitimate interest in firearms and no intention to use the weapons for any criminal purpose. He had been of good character and made the admissions to the police. Nevertheless, the weapons had been acquired on numerous separate occasions over a number of years, were kept insecurely; and there was a real risk of the horde falling into the wrong hands. The available mitigation fell well short of exceptional circumstances.

25. In her oral submissions Ms Powis drew attention to the features of *Cook* which made it a more serious case, and we accept that it was. Nevertheless, it is clear that the interests of an amateur in a criminal hobby were not regarded as amounting to exceptional circumstances.

26. We have concluded that looking at the circumstances of the present case as a whole, the circumstances were not exceptional either in relation to the offence or the offender; and that the judge was clearly wrong to have found exceptional circumstances on the basis that it was not, in his view, the 'ordinary type of case'.

27. Ultimately the test would be whether the imposition of the minimum sentence would lead to a sentence that is arbitrary or disproportionate. However, the answer to that question must be considered in the light of the clear statutory intent that the offences to which section 51A apply must be met with strong deterrent sentences. This will mean that in some cases the sentence will be a harsh sentence and may appear particularly so where the offender has pleaded guilty.

28. In the light of these conclusions, we grant leave to the Solicitor General, quash the sentences on counts 1 to 4 and 6 and substitute sentences of 5 years on each count to be served concurrently. The other sentences will remain unaffected.