IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202200798/A4

Neutral citation number:[2022] EWCA Crim 1836

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 24 November 2022

Before:

LORD JUSTICE BEAN
MRS JUSTICE FARBEY DBE
HIS HONOUR JUDGE FORSTER KC
(Sitting as a Judge of the CACD)

REX
V
CONRAD HOWARTH

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MISS K O'RAGHALLAIGH appeared on behalf of the Applicant

MR M BROOK appeared on behalf of the Crown

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J U D G M E N T

MRS JUSTICE FARBEY:

1. On 31 December 2021 in the Central Criminal Court before Sweeney J, the appellant, who is now aged 42, pleaded guilty to possession of a document containing terrorist information, contrary to section 58(1)(b) of the Terrorism Act 2000 (count 1). The document was the Anarchist's Cookbook.

2. On 15 February 2022 in the Crown Court at Manchester before HHJ Field KC, the appellant was sentenced to a special custodial sentence for an offender of particular concern pursuant to section 278 of the Sentencing Act 2020. The sentence comprised a custodial term of 54 months together with an extended licence period of 12 months, making a total of five-and-a-half years. The judge imposed the notification requirements set out in Part 4 of the Counter-Terrorism Act 2008 for a period of 10 years.

3. At the same time the judge imposed a concurrent sentence of two months' imprisonment for possession of extreme pornographic material, contrary to section 63 of the Criminal Justice and Immigration Act 2008. That sentence is not relevant to this appeal.

4. On his behalf, Miss Kate O'Raghallaigh has today renewed the appellant's application for leave to appeal against sentence after refusal by the single judge. We indicated during the course of the hearing that we would grant leave and we went on to hear the appeal. On the appeal we heard submissions from Miss O'Raghallaigh and from Mr Matthew Brook on behalf of the respondent. We are grateful to both counsel for their thoughtful submissions.

The facts

5. On 13 February 2020 the appellant was arrested for burglary. He was not in the event charged with burglary but his home was searched. Various electronic devices, including a Samsung telephone, were seized. When he was arrested police officers observed a large anti-Islamic drawing with Nazi symbols showing a white male strangling another male holding a Quran. The drawing contained Islamophobic slogans.

6. The appellant's Samsung phone was examined and found to have on it three digitally identical PDF documents called the Anarchist's Cookbook 4.14. The files were stored within two different folder paths within the handsets. The first file had a creation date of 21 August 2018 with a time of 1.20 pm and within the path route was software used to access the "dark internet". The software enables the user to mask his or her IP address. It also deletes the records of which websites have been visited.

7. The second copy of the same document was created on the same date at 3.07 pm. The third

copy was created on 18 October 2019. There was no evidence that the appellant viewed the Anarchist's Cookbook after 26 December 2019.

8. The Anarchist's Cookbook is a publication which contains information that would be of use to a terrorist. It includes information on weapons and booby traps. It includes recipes on how to make and utilise explosives. It includes instructions on how to make detonators.

9. The police recovered a large amount of other material demonstrating that the appellant had extreme anti-Islamic and antisemitic views. The material included hand-drawn posters and imagery, as well as digital imagery. There is no need to describe this vile and hateful material in any detail. It included internet searches for, and screen shots of, extreme right wing propaganda relating to, for example, the proscribed group National Action and its successor Atom Waffen Division (also proscribed). The material showed that the appellant supported the neo-Nazi group Combat 18.

10. The appellant had convictions for 58 previous offences. He had no previous convictions for terrorism offences.

Sentencing remarks

11. In his careful sentencing remarks, the judge placed the appellant's offending within Category 2B of the relevant sentencing guideline. The starting point was therefore four years' custody and the category range was three to five years. He directed himself that the maximum sentence had recently increased from 10 to 15 years and that it was therefore necessary to uplift the sentence to take account of that increase which was not reflected in the existing sentencing guideline. He considered that the appellant's use of software that would hide his identity was an aggravating factor. It was a further aggravating factor that the appellant had retained the Anarchist's Cookbook (i.e. failed to delete it) for over three years (albeit that that precise period of time was stated in error). The appellant had kept the document and so had increased the risk that it would fall into the wrong hands. The appellant's previous convictions aggravated the offence to a limited degree as he had no convictions for terrorist offences.

12. The judge observed that there was little mitigation but made plain that he had read everything in the pre-sentence report that could assist the appellant. He concluded that the least sentence he could impose before discount for the guilty plea was six years' imprisonment. Applying a 25 per cent discount for the plea, the sentence was reduced to 54 months. He did not consider that an extended licence period was required under the statutory provisions for dangerous offenders but imposed an additional 12-month licence period under the provisions for offenders of particular concern. As we have already said, the overall sentence was therefore five-and-a-half years.

The grounds of appeal

13. Miss O'Raghallaigh makes two principal points. First, she submits that the judge should not have raised the four-year starting point indicated in the guideline as then in force. While this

court has held that it is permissible in more serious cases to take account of legislative changes to sentences, such an approach is not warranted in the present case which lacked the sort of seriousness envisaged by the case law: see Attorney General's Reference (R v Nugent) [2021] EWCA Crim 1535, [2022] 1 Cr.App.R (S) 60. The judge had in any event failed to specify the uplift. Secondly, the appellant's failure to delete the document should not have been treated as an aggravating factor and represented double-counting.

Analysis and conclusions

14. By virtue of section 7(3) of the Counter-Terrorism and Border Security Act 2019 the maximum sentence for an offence under section 58 of the 2000 Act was increased from 10 years to 15 years with effect from 12 April 2019. The Sentencing Council has since then revised the relevant sentencing guideline to reflect the legislative change. But the revised guideline, which has had effect since 1 October 2022, post-dated the imposition of the sentence in the present case.

15. At the time of the appellant's sentence the original guideline, introduced in April 2018, was in force. The guideline had been amended to the extent that it drew attention to the increase to the maximum sentence and expressly stated that the increase had not been reflected in the sentence levels of the guideline.

16. As it happens, the revised guideline raised the starting points and category ranges for more serious section 58 offences but retained the pre-existing starting points and category ranges for less serious offences. In short, the starting points and category ranges for Category 2B offences and downwards (Category 2C and all Category 3 offences) remained the same.

17. In sentencing the appellant the judge was under a duty to consider the original sentencing guideline which was then in force. As explained by Hughes LJ (as he then was) in R v Boakye and others [2012] EWCA Crim 838 at paragraph 17:

> "Guidelines such as these make essentially prospective and not retrospective changes to sentencing practice. They apply to sentencing which takes place after, but not before, they come into operation."

18. In Nugent this court considered an appeal against sentence for multiple offences under sections 58 and 2 of the Terrorism Act 2000 after the increase to the maximum sentences to both those sections effected by the 2019 Act. The relevant sentencing guidelines for each offence had not at the time been revised. Giving the judgment of the court, Edis LJ described the section 2 offending (the dissemination of terrorist publications) as "serious of its kind" (paragraph 35) as it had involved the use of encrypted social media to incite others holding extreme right wing views to take action to bring about the destruction of large numbers of people who live in the United Kingdom. The offender had distributed the material that had formed the subject of the section 58 offences and had distributed ideological materials to online channels and groups.

19. Edis LJ held at paragraph 24 that where a maximum sentence has been very substantially

changed and the sentencing guideline has yet to be updated the sentencing court should "reflect that fact, where necessary, by departing from the guideline in the interests of justice and impose a sentence in the more serious cases which reflects that change." The court in that case increased the overall custodial term of the special custodial sentence for the section 2 offences from 42 months to six years; but it left the concurrent sentences for the section 58 offences undisturbed as they had been taken into account in assessing the section 2 sentences.

20. Miss O'Raghallaigh emphasises that Edis LJ referred to a departure from the existing guideline in "the more serious cases" and that the sentences for the lesser offences were left unchanged. She submits that the rise in maximum sentence was more relevant to offences at the top of the scale rather than to less serious offences, such as the appellant's, where the maximum sentence was of far less relevance. Miss O'Raghallaigh submits that in these circumstances the judge should not have imposed a custodial term that went beyond the top of the range for Category 2B, i.e. five years.

21. Mr Brook acknowledges an unusual feature of this case, namely that since the judge passed sentence the Sentencing Council has published a revised guideline for terrorism offences in which some starting points and category ranges have been increased but those applicable to section 58 Category 2B offences have remained unaltered. Although the revised guideline had not been published by the time the judge passed sentence, Mr Brook concedes that it would be wrong for this court to shut its eyes to the fact that the guideline figures have remained the same.

22. The only question for this court is whether the sentence was excessive. The judge was plainly correct to place the offence in Category 2B under the guideline as then in force. The starting point was therefore four years' custody with a range of three to five years' custody. At the time the guideline specified two Culpability B factors which may be summarised as (i) the material was likely to be useful to a person committing or preparing an act of terrorism and the offender had terrorist motivations; and (ii) the offender repeatedly accessed extremist material. The judge was satisfied that both Culpability B factors were satisfied. On established sentencing principles the presence of more than one culpability factor made the offence more serious and warranted an upward adjustment from the starting point.

23. The judge was entitled to treat the length of time over which the document was stored on the appellant's phone as an aggravating factor for the reasons that he gave: keeping the document increased the risk that it would be used for terrorist purposes by someone who got hold of it. He was entitled to conclude that the use of software that would hide the appellant's identity was an additional and serious aggravating factor. The judge very properly gave some but limited weight to the appellant's lengthy criminal record which did not include terrorism offences but did include offences of violence and public order offences.

24. The judge did not specify the uplift that he applied to reflect the greater maximum sentence by then in force, preferring to reach a compendious uplift to reflect the greater maximum and the aggravating factors. Given that sentencing is not a mathematical exercise, we do not think that he was bound to specify the particular uplift as opposed to considering the justice of the case as a whole.

25. This was serious offending and the appellant could expect to be punished severely. In our judgment the combination of more than one culpability factor and the other serious aggravating factors identified by the judge justified a very significant upward adjustment from the starting point for a Category 2B offence. Applying the Sentencing Council Guideline without reference to the amendment to the statutory maximum, the seriousness of the offence would in our view have justified an increase to the top of the category range but not beyond it.

26. In light of Mr Brook's concession and in light of all the facts of this case, we accept that it would be wrong to uphold the judge's sentence to the extent that the custodial term fell outside the category range before the discount for the guilty plea. We will quash the sentence on count 1 and substitute in its place a special custodial sentence of 45 months (i.e. five years reduced by 25 per cent for the guilty plea) and a one year extended licence. To this extent this appeal is allowed.