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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1278



No. 20203237 A1

Royal Courts of Justice

Tuesday, 17 October 2023

Before:

LORD JUSTICE WILLIAM DAVIS

MR JUSTICE JOHNSON

HER HONOUR JUDGE SHANT KC

(The Recorder of Nottingham)

REX

v

ORION COWAN

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MR A KIRKE appeared on behalf of the Applicant.

MR K MOORE (instructed by Shaw Graham Kersh) appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE DAVIS: Her Honour Judge Shant KC, the Recorder of Nottingham, will give the judgment of the Court.

HHJ SHANT:

- 1 On 21 August 2023, having pleaded guilty before the Central London Magistrates' Court, the applicant, then aged 19, was committed for sentence pursuant to s.14 of the Sentencing Act 2020 in respect of offence 1, and pursuant to section 20 of the Sentencing Act 2020 in respect of offence 2. He also pleaded guilty to a charge of possession of cannabis, but this offence was dealt with by way of a fine in the lower court.
- 2 On 30 August 2023 in the Crown Court at Guildford before Mr Recorder Jones KC, the applicant, then 19, was sentenced as follows: offence 1 – possession of an offensive weapon contrary to section 1(1) of the Prevention of Crime Act 1953, to which he pleaded guilty, he received a sentence of five months in a young offender institution. For offence 2 – failing to surrender without reasonable cause to custody contrary to s.6(1) of the Bail Act 1976, again a matter to which he pleaded guilty, he received a sentence of one month in a young offender institution consecutive to the five months making a total sentence of six months in a young offender institution. There was a statutory victim surcharge and an order was made for the forfeiture and destruction of the weapon that was seized, i.e. the knuckleduster.
- 3 Offence 1 was committed after 28 June 2022, the day on which s.124 of the Police, Crime, Sentencing and Courts Act 2022 came into force. Therefore, s.315(2)(a) of the Sentencing Act 2020 sets out the appropriate test for determining if the mandatory minimum sentence applies. The applicant was convicted of an offence for possessing the offensive weapon contrary to s.1(1) of the Prevention of Crime Act 1953. This offence, as we have stated, was committed after 28 June 2022, so the mandatory minimum term provisions of s.315 of the Sentencing Act 2020 apply.
- 4 At the date of the offence the applicant was aged 18. He had been convicted of at least one relevant offence on 5 September 2016, that is possession of a bladed article. In accordance with s.315(3) of the Sentencing Act 2020, the Recorder was obliged to impose an appropriate custodial sentence of six months in a young offender institution. This applied unless the court was of the opinion that there were exceptional circumstances which (a) related to the previous offence or to the offender; and (b) justified not doing so. Section 73(3)(a) of the Sentencing Act 2020 allows a credit for a guilty plea to be applied provided it does not reduce the appropriate custodial sentence below 80 per cent.
- 5 The applicant was sentenced at the court below without a report, and we do not regard it as necessary to get a report for this hearing. The applicant applies for leave to appeal against sentence following a referral of the matter to the full court by the Registrar.

The Facts.

- 6 On 21 July 2022 at around 6.25 p.m. the applicant alighted at Woking train station where there was a police operation in relation to scanning passengers for controlled substances with the assistance of a passive drugs dog. Officers noted the applicant sought to avoid this and stopped him. The applicant was found in possession of a small amount of herbal cannabis, and a set of knuckledusters. When interviewed he suggested that the knuckleduster was something that he used as a bottle opener. The applicant then failed to

attend a court hearing on 13 June 2023 at Guildford Magistrates' Court having been released on bail earlier on 25 April.

- 7 The prosecution put the case in Category 2C. This was Category 2 as none of the features of Category 1 apply. It was a culpability C offence as it was possession of a weapon other than a bladed article, or a highly dangerous weapon, not used to threaten or cause fear. Therefore, the starting point was a medium level community order and a range of low level to high level community order on this matter.
- 8 The Recorder rejected the applicant's submission that there were exceptional circumstances justifying not imposing the minimum term of six months with 20 per cent credit for a plea. In his brief sentencing remarks he said:

"You were bailed and failed to appear at the court as required, and so you have pleaded guilty to failing to surrender to bail. I will give you full credit for the early guilty pleas that you have entered and it therefore means that, given that this is a minimum sentence case, the minimum must, nonetheless, be 80 per cent notwithstanding those guilty pleas.

On your behalf, Mr Kirke has said that there are exceptional circumstances as to why the requirement laid down by Parliament that you receive a minimum sentence of six months in a young offender institution should not apply. He says that the exceptional circumstances are that your previous offence was seven years or more ago. He says you were 18 when you were arrested and you are currently on a community order for different offences, namely possessing drugs with intent to supply. In my judgment there is nothing exceptional about those circumstances, they could apply to anybody and they are not the kind of exceptional circumstances envisaged in the legislation. Accordingly, I am not able to depart from the statutory requirement that a minimum sentence be imposed.

Accordingly, in respect of the offence of carrying an offensive weapon the sentence is one of five months in a young offender institution. In respect of the offence of failing to surrender to bail the sentence is that of one month in a young offender institution, those sentences to run consecutively. Credit will be given for the time served already in respect of the second of those two matters."

- 9 There are four grounds of appeal against sentence, namely:
- (1) The sentencing exercise ought to have been transferred to Chelmsford Crown Court in order to consider totality, bearing in mind Mr Cowan's current community order for possessing a class B drug with intent to supply.
 - (2) The learned Recorder erred in imposing a mandatory minimum sentence for the offence of possession of an offensive weapon.
 - (3) An excessive sentence was passed in respect of the failure to surrender; and

- (4) The Recorder failed to give credit for an early guilty plea and he gave no discount for mitigation.

10 We turn to the grounds in turn. Ground 1: we agree that the Recorder should have transferred the sentence to Chelmsford Crown Court so that one court could deal with all matters and have regard to totality. Ground 2: Since 28 June 2022 the sentencing guidelines for possession of an offensive weapon provide guidance as to what amounts to exceptional circumstances in this context. This guidance can be found in the dropdown box at stage 3. The brief sentencing remarks do not reveal whether the Recorder had regard to this guidance as he should have done. This guidance supersedes previous authorities and should be considered in all cases of this kind where the court has to give consideration to whether: "exceptional circumstances" apply. The guidance states:

"In considering whether there are exceptional circumstances that would justify not imposing the minimum term the court must have regard to:

- the particular circumstances which relate to any of the offences; and
- the particular circumstances of the offender.

Either of which may give rise to exceptional circumstances."

The principles to be applied are stated as follows:

"Principles.

The circumstances must truly be exceptional. Circumstances are exceptional if the imposition of the minimum term would result in an arbitrary and disproportionate sentence.

It is important that courts adhere to the statutory requirements and do not too readily accept the circumstances are exceptional. A factor is unlikely to be regarded as exceptional if it would apply to a significant number of cases.

The court should look at all of the circumstances of the case taken together. A single striking factor may amount to exceptional circumstances, or it may be the collective impact of all of the relevant circumstances. The seriousness of the previous offence(s) and the period of time that has elapsed between offences will be a relevant consideration.

The mere presence of one or more of the following should not in itself be regarded as exceptional:

- One or more lower culpability factors.
- One or more mitigating factors.

- A plea of guilty."

- 11 In our judgment, there are three relevant circumstances to be considered. The first is that the period of time that has elapsed between the offences. This is stated in the guidelines to be a relevant consideration. In this case, the gap between the previous and present offending is a period of six years. Secondly, in this case the applicant was aged only 12 at the time of the previous offending and was dealt with by way of a referral order. He was exceptionally young at the time of the previous conviction. Thirdly, it is of some relevance that this conviction, unlike the previous, is not for the possession of a bladed article but for the possession of an offensive weapon, i.e. the knuckleduster.
- 12 The guidance provides for consideration of collective impact of all the relevant circumstances. In our judgment, the collective impact of the three circumstances set out above is that they can be described, in the circumstances of this case, to be truly exceptional, justifying not imposing the minimum term of six months. The imposition of a six months' sentence before credit for a plea is applied for the offence of possession of an offensive weapon in these circumstances can be described as 'arbitrary and disproportionate', therefore we find that the sentence imposed was manifestly excessive.
- 13 Ground 3: the Recorder imposed a sentence of one month consecutive for failing to surrender. This was after the applicant being bailed on 25 April 2023, in these proceedings, by Guildford Magistrates' Court with a date to appear at court on 13 June 2023 when he failed to do so. The Recorder does not appear to have had any assistance from either counsel as to where they stated this offence fell in the guidelines. Indeed, his attention was not drawn to the guidelines at all. The Recorder passed a sentence of one month: "giving full credit for the early pleas". This must, therefore, have been a sentence of six weeks before one-third credit for a plea. This offence fell into culpability A as it was a deliberate attempt to evade or delay justice. It was a Category 3 offence as it did not cause substantial delay or interference with the administration of justice. This had a starting point of 14 days, and a range of low level community order and six weeks' custody. There was an aggravating feature that the applicant was the subject of a community order, however that was balanced by considerable personal mitigation, so a sentence of one month's custody was manifestly excessive. Notionally the order should have been one of 14 days with one-third credit for a plea, making a sentence of nine days. However, the minimum term of detention in a young offender institution is 21 days: section 263(2) of the Sentencing Act 2020. Given the overall circumstances of the applicant's case, the appropriate course would have been to impose no separate penalty.
- 14 Ground 4: this ground deals with insufficient credit being given for the possession of an offensive weapon offence. Since the Recorder found that a minimum term should be imposed any reduction was limited to 20 per cent of the sentence of six months. The reduction of 20 per cent would have been 1.2 months rather than one month, but for the purposes of this appeal, given our judgment on ground 2 it is not necessary to explore this ground further.
- 15 In the circumstances of this case, therefore, we give leave to the applicant to appeal against the sentence in both cases.
- 16 The appropriate sentence for possession of an offensive weapon would have been one of low level community order. Given the fact that the applicant has already served seven weeks in custody it would be inappropriate for us to now pass a community order. We therefore quash the sentence of five months and replace it with a sentence of six weeks. For the reasons we have already given the sentence in respect of failing to surrender will be

quashed and no separate penalty will be imposed. This will allow the applicant's immediate release. To that extent this appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.