IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203276/B5-202300529/B5

Neutral Citation Number:
[2023] EWCA Crim 1649

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday 19 December 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE HILLIARD

HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX

V

RAYMOND FREDERICK NUGENT

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MR C MOLL appeared on behalf of the Applicant.

J U D G M E N T

1. MR JUSTICE HILLIARD: On 14 October 2022, in the Crown Court at Snaresbrook, the appellant (then aged 73) was convicted of 45 offences contrary to the Firearms Act 1968. He had earlier pleaded guilty to two further offences, counts 46 and 47.
2. On 20 January 2023, he was sentenced to a number of terms of imprisonment, all to run concurrently, as follows. Counts 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25 and 27, 14 counts of converting a weapon contrary to section 4(3) of the 1968 Act, 12 months' imprisonment on each count. Counts 2, 4, 6, 8, 12, 14, 16, 20, 22, 24 and 26, eleven counts of possessing a prohibited weapon contrary to section 5(1)(aba), 5½ years' imprisonment on each count. Counts 10 and 18, possessing a prohibited weapon, contrary to section 5(1)(aba), 6 years' imprisonment on each count. Count 28, possessing a prohibited weapon, contrary to section 5(1)(b), 7 years and 6 months' imprisonment. Count 29, conversion of a weapon, contrary to section 4(3), 2 years' imprisonment. Count 30, possessing a prohibited weapon, contrary to section 5(1) (b), 7 years and 6 months' imprisonment. Counts 32, 34, 36, 38 and 40, possessing a prohibited weapon, contrary to section 5(1) (b), 5 years' imprisonment on each count. Counts 31, 33, 35, 37 and 39, manufacturing a firearm, contrary to section 5(2)A, 3 years' imprisonment on each count. Counts 41, 42, 43 and 44, possessing ammunition without a certificate, contrary to section 1(1)(b), no separate penalty. Count 45, possessing an article capable of being used to convert an imitation firearm into a firearm, contrary to section 4A, 9 months' imprisonment. Count 46, possessing a prohibited weapon contrary to section 5(1) (b), no separate penalty. Count 47, possessing ammunition without a certificate, contrary to section 1(1) (b), no separate penalty.
3. Thus, the total sentence was one of 7½ years' imprisonment. Orders were made for forfeiture and for payment of the statutory surcharge. In addition, the appellant had spent

98 days on a qualifying curfew. Half that number (so 49 days) is and must be specified as the number of days to count towards his sentence, so that they do count towards his sentence. Those days were not specified in the Crown Court, but we specify them now.

4. He now appeals against sentence with the leave of the single judge and renews his application for leave to appeal against conviction after refusal by the single judge.

5. The facts of the case were as follows. The appellant lived in Barking with his wife of over 50 years. He had no previous convictions and had worked as either an electrician or a satellite installer before retiring. He had a long-standing interest in guns and had been a member of the Romford Gun Club and was granted a firearms licence in 2015. On 20 November 2018, police attended his address with a search warrant. A number of items were found. In his study were a number of small mobile safes secreted in the bookshelves. The safes were locked but not attached to the wall. Within those safes were over 20 guns. A firearms expert, Mr O'Rourke, examined a number of items seized. He said that some exhibits were firearms and some were not for the purpose of the Firearms Act 1968. He examined the guns and test fired them. Tests included a test of lethality, which had been set by Parliament as the discharge of a projectile at a muzzle energy of more than one joule. He had examined a number of converted blank firing guns and gave evidence that a good amount of engineering experience was required to do the conversions that had occurred in the present case. For example, in relation to the exhibit in counts 1 and 2, the experts said that the gun was an Italian Bruni blank firing self-loading semi-automatic pistol of 8-millimetre calibre with a detachable magazine. Originally it would fire a blank. However, the obstructed barrel had been cut off and replaced with an unobstructed barrel, and it was capable of firing a cartridge at a muzzle energy in excess of one joule. Thus, it was no longer an imitation having been

successfully converted and was now a prohibited firearm due to its dimensions. There was no commercially available bulleted ammunition for it and a person would have to make their own. However, blank cartridges were easily available. The appellant said he had purchased the gun for £97 and decided to improve it by changing the barrel and removing the obstructions so that it looked nicer when looking down the barrel. He thought it was an ornament which did not fire conventional bullets, only blanks. He created his own bullets to go with the gun but did not think they would work.

6. The expert conducted similar tests in relation to the other exhibits which featured on the indictment and found that they were all firearms including the weapon in count 5 which had the appearance of an antique. The conversions included unblocking the barrels, drilling barrels and filling the vents. One gun was originally a non-firing replica and would not have fired blanks. However, it had been converted into a firearm by altering the barrels and firing mechanism, via modifications to the trigger and hammer (count 13). Another gun had been reactivated which required considerable engineering knowledge (count 29). The appellant said that he purchased the guns from Gunseekers or Free Ads and had converted them. Some were hard to convert, such as the gun in count 3. He did not view them as firearms because most could not fire manufactured ammunition. Count 5, for example, he classed as an antique. It was a blank firer, not a replica and had never been designed to fire real ammunition. His alterations were to make the guns look more realistic because he viewed them as ornaments. He did not fire the guns.

7. With the exception of ammunition recovered from the gun cabinet, which was covered by the appellant's certificate and not indicted, the ammunition found had also been converted from blanks. In relation to counts 41, 42 and 43, the bullets had been

successfully discharged in the laboratory from some of the firearms featured on the indictment. They were modified with steel ball bearings. The appellant said he made them to look like real bullets for his enjoyment but had no intention of firing them.

8. The prosecution case was that all the firearms indicted were prohibited firearms within the meaning of the Firearms Act and none of them were antiques. The appellant's case was that he was restoring the guns, had never fired them, did not know if any of them was capable of firing a projectile, and had no malicious intent. When he had them, they were not firearms and were imitations or, in relation to count 6, 14 and 16, they were antiques and exempt from the Firearms Act. The guns were not able to fire missiles with a kinetic energy of more than one joule and it was only because the expert had specialist skills and equipment that the guns were able to fire with the required lethality.
9. He gave evidence that his interest in guns began in childhood. His father was in the military police and owned a gun, as did his uncle. He had air rifles and was a member of a gun club in the 1970s. In 1994 he had visited Florida on a holiday and attended a shooting range. He had pleaded guilty to possession of a live round which was a memento from the holiday. When he semi-retired he began to buy books on guns and their origins and watched YouTube videos. He would purchase blank guns and tried to make them look more realistic. He considered them ornaments and that restoring them was a challenge. He did not think they were capable of firing conventional live ammunition. He accepted that the Firearms Act applied to him but, so far as he was concerned, none of his guns was a firearm - they were toys. He considered the possibility of burglary, but his house had CCTV, was alarmed and the guns were in hidden safes/cabinets and the bullets stored separately. He tinkered with his guns on his own and kept them in safes because he did not want his wife to find them as she would complain

about the price. The issue for the jury was whether the items were firearms or not.

10. Counsel for the appellant submitted that there was no case to answer in respect of counts 7, 8, 19, 20, 29 and 30, on the basis that the guns had been catastrophically damaged when fired during laboratory testing. Further, that in relation to the manufacturing counts the law could not be retrospectively applied and there was no evidence that the appellant made the items on or after 14 July 2014, when manufacturing became an offence.

11. The judge said that Mr O'Rourke agreed that catastrophic damage had been caused to some of the firearms on testing. However, the guns had been capable of firing a projectile with muzzle energy in excess of one joule. In relation to counts 29 and 30, the gun was not working when an officer was asked to operate it in the witness box. However, it had also been tested in the laboratory, and the tests were videoed. It was a matter for the jury whether the guns were working firearms at the time that they were in the possession of the appellant. The judge said that the manufacturing counts, that is counts 31, 33, 35, 37 and 39, were effectively the appellant's homemade guns. The jury would be entitled to look at all the information the appellant had given about guns, including his interview from November 2018, when he said he had been "a gun nut" over a period of around 4 years, had collected them since about 2015, had created a list of his guns (the earliest date on it being 28 October 2014), and his gun licence was dated from 13 July 2015. Thus, he said, a properly directed jury could take the view that the guns were made after late 2014.

12. Counsel for the appellant also submitted that the items were imitation firearms and that the statutory defence provided by section 1(5) of the Firearms Act 1982 should be left to the jury, namely that:

> "In any proceedings brought by virtue of this section for an offence

> under the 1968 Act involving an imitation firearm to which this Act applies, it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm to which section 1 of that Act applies."

13. The Crown argued that the appellant was a skilled amateur engineer, who purchased numerous blank firing guns, replica and deactivated guns and systematically converted them into real firearms, using a number of methods including replacing blocked barrels, filling in vents, reconstructing breech blocks and firing pins, and in relation to deactivated guns, reversing all extensive deactivations. In addition, he had manufactured bullets and guns from scratch. An expert said that all the items subject to charge were lethal barrelled weapons capable of firing a missile with kinetic energy of more than one joule. The appellant's case was that he undertook the conversions but did so to restore the guns to their original state for looks and to keep as ornaments. He never fired them, and he never intended any of the guns to become working firearms.
14. The judge ruled that the defence in section 1(5) did not apply. There was no allegation of possessing an imitation firearm. The issue in relation to the possession counts was whether the jury could be sure that each or any of the items were firearms or not. If the jury took the view that any of the items might not be firearms but remained imitation, whether readily convertible or not, then he was entitled to a complete acquittal.
15. When he summed up, the judge told the jury that a firearm was defined as a lethal barrelled weapon of any description from which a shot, bullet or other missile, with kinetic energy of more than one joule at the muzzle of the weapon, can be discharged. He said that the item must be a firearm at the time the accused had it in his possession and not after it had been tested by the expert. He said that an item did not cease to be a

firearm simply because it required some minor attention or repair before it could be fired. If it required a minor, non-specialist repair before it fired, then it was still a firearm. However, if the expert would not have been able to discharge a projectile, at the required kinetic energy level from the item without specialist skill or without the use of specialist tools which were not in common use, for anything other than safety or protection, then the item would not be a firearm at the time and the expert's specialist intervention would constitute a conversion of a non-firing item. Whether an item was a firearm or not was a question of fact for the jury. He explained that the defence case was that they had only been able to fire a missile at the necessary muzzle energy because of specialist skill and equipment deployed by the laboratory expert. The judge also directed the jury that an antique firearm would be exempt from the Firearms Act if it was possessed as a curiosity or an ornament. He told the jury they could only convict on a count of manufacturing a weapon if they were sure that the manufacture had taken place after 14 July 2014.

16. When he passed sentence, the judge said that it was a very difficult case. The appellant was then aged 73. He had initially asked for a Goodyear indication which the judge had given. The judge said that the sentence would not have exceeded 6 years' imprisonment, and that there would have been a small amount of credit for late pleas of guilty. Now there would be credit for the two offences he had pleaded guilty to. However, the totality of the offences would render those sentences academic.

17. The judge said that the appellant was the owner of several legitimately owned firearms and some ammunition and was a respected member of a shooting and gun club. However, his hobby became an obsession. Some of the indicted guns were of low power when tested. However, some generated significantly more than one joule of energy. For example, the German Anschutz in counts 5 and 6 measured 13 joules. The Bruni in

counts 11 and 12 penetrated 29 centimetres into the testing gel and another penetrated 38 centimetres deep. Of his manufactured guns, one measured 76.3 joules, not dissimilar to a conventional firearm, and another 104 joules, comparable to a longer barrelled, commercially available gun.

18. It was accepted that there was no commercial element to his actions. It was a hobby. The judge accepted that he had not fired the guns and had no intention to fire them or supply them to criminals or use them for any additional criminal purpose. However, he said that the guns were all capable of falling into criminal hands. Although in locked safes, none was bolted to the floor or wall. If burgled, criminals would have gained access to guns and ammunition.

19. There were three significant pieces of evidence, said the judge, given during the trial. The judge felt that the appellant had rather reluctantly acknowledged that the Firearms Act applied to him. Secondly, he demonstrated disapproval of the Firearms (Amendment) Act 1997 and said it was "really bad because Tony Blair took away people's rights and gave them peanuts for their own guns". Thirdly, he kept his hobby a secret from his wife, and from his granddaughter who shared his firearms hobby and had a firearms licence of her own, demonstrating, said the judge, that he knew he was acting in a criminal way. The prohibited weapons counts carried a minimum mandatory sentence of 5 years' imprisonment unless there were exceptional circumstances relating to the offence or offender which would justify a different course. The judge found no exceptional circumstances.

20. Having heard the evidence, the judge said he found the case to be significantly more serious than he had at the time of the Goodyear indication and culpability was higher. The judge referred to the applicable sentencing guidelines and to the principle of totality.

His mitigation was that he was 73 years old, with no previous convictions. He was a man of positive good character with a plethora of character references. There was a delay in his case caused by the pandemic and backlogs. It had taken over 4 years since his arrest to conclude the proceedings. He had been a working man his whole life and was a family man who had been married for a long time. There was a psychiatric report from Dr El-Fadl who also gave evidence. He said that the appellant had traits highly suggestive of Asperger's Syndrome. Whilst there was some impairment in his ability to exercise appropriate judgment and make rational choices, the judge thought that the impairment was limited because he had demonstrated that he did fully understand the nature and consequences of his actions during the trial. The judge said that he took into account that the appellant had some health issues and Dr El-Fadl thought that he would be a vulnerable prisoner in custody. His wife also had health concerns and relied on him for care. Whilst there was some reduction in culpability and his conditions meant that prison would be hard for him, those factors were insufficient to constitute exceptional circumstances. The overall sentence would be 9 years' imprisonment reduced to 7½ years to take account of mitigation.

21. The appellant originally advanced a single ground of appeal against conviction to the effect that the judge ought to have left the defence in section 1(5) of the Firearms Act 1982 to the jury. We can take this point shortly. Mr Moll has drawn attention to R v Bewley [2012] EWCA Crim 1457. The Court of Appeal considered the effect upon section 57 of the Firearms Act 1968 which defines "firearm" and "imitation firearm" of section 1 of the Firearms Act 1982. The starting pistol involved in that case could only be fired in very unusual conditions, by mounting it in a vice or clamp, using a special pellet and hitting it with a mallet or punch. Moses LJ said that such a weapon would only

be a firearm within the 1968 Act if it could be converted into a weapon from which a missile could be discharged without any special skill or the necessity for specialist equipment - see section 1(6) of the 1982 Act. In the particular circumstances, the item was an imitation firearm within the meaning of section 57(4). However, the Court said that if a minor repair was all that was needed for a missile to be discharged, the gun would be a firearm.

22. Bewley was considered in R v Heddell [2016] EWCA Crim 443. The appellant had been convicted of possessing a prohibited firearm contrary to section 5(1)(aba) of the Firearms Act 1968. The item in question was a replica sub-machine gun which the prosecution alleged had been converted to be capable of firing live ammunition and was a firearm pursuant to section 57 of the 1968 Act. It was a simple task to remove a steel bolt which would enable the gun to fire live rounds. The defence case was that the replica as seized was incapable of discharging a missile so that it was not a firearm. When interviewed, the appellant had said that he was unaware of the ease with which the item could be converted to fire live ammunition. Accordingly, it was argued that he had a defence by section 1(5) of the 1982 Act.

23. The issue left to the jury in Heddell was whether they could be sure that since so little needed to be done to enable the replica to fire missiles, it was in fact a firearm within the meaning of section 57(1). The Court in Heddell pointed out that the firearm in Bewley could only be fired in very unusual conditions in contrast with the gun in Heddell. The Court said that the 1982 Act did not itself create any offence. What it did was to widen the scope of the 1968 Act so as to cover imitation firearms which are readily convertible into firearms. Section 1(6) defines the circumstances in which an imitation firearm shall be regarded as being readily convertible. The Court did not regard Bewley as affecting

the position where an item which already satisfied the definition of a firearm within section 57(1) requires some minor repair or alteration before it can be discharged. The trial judge in Heddell, as in this case, left the jury to resolve the factual question of whether the item in question was proved to be a firearm or not.

24. The Court of Appeal in Heddell held that the judge was right to have done so. The appellant had not been deprived of a defence under section 1(5) of the 1982 Act. If the prosecution had not proved that the item was a firearm, then the appellant would have been entitled to be acquitted. The same applies in this case.

25. In our judgment, the decision in Heddell means that this ground of appeal is not arguable, notwithstanding Mr Moll's efforts to distinguish it and his application to amplify his grounds of appeal so as, for example, to rely upon debates in Parliament before the 1982 Act became law. We decline to allow the grounds of appeal to be amended in this or any respect. In our judgment, the position is clear, and there is no need to look at any more material.

26. Mr Moll also sought to amplify the grounds of appeal to argue the point he took in the Crown Court about the sufficiency of evidence as to the date of manufacture in the manufacturing counts. It is too late to do this, but we are in any event satisfied that the judge was right to rule as he did.

27. Finally, Mr Moll has applied to amend his grounds of appeal so as to include a challenge to the way the judge dealt with the issue of lethality. It is sufficient to say that this is also too late and without merit. It was not disputed that the appellant was in possession of all the items when the police searched his address in 2018. The law at that time provided a clear test of lethality and the judge directed the jury in accordance with it. Accordingly, for these reasons, we are satisfied that there are no arguable grounds of appeal against

conviction and this renewed application must be refused.

28. We turn now to the appeal against conviction. In his helpful submissions, Mr Moll argues that the total sentence was arbitrary and disproportionate and that the judge attached insufficient weight to some matters and too much weight to others. He urges us to conclude that there were exceptional circumstances which mean that the judge ought not to have imposed the minimum term of 5 years' imprisonment in respect of any of the counts of possessing a prohibited weapon. Alternatively, that the sentences were simply too long. He has drawn our attention to a number of authorities including R v Nancarrow [2019] 2 Cr App R(S) 4, where this Court set out eight points of relevance where a mandatory minimum sentence was under consideration in circumstances such as these. They are as follows:

1. The purpose of such a sentence was deterrence.
2. Circumstances are exceptional if the imposition of a 5-year sentence would be arbitrary and disproportionate.
3. Such circumstances must be truly exceptional to avoid undermining the intention of Parliament.
4. The court should consider whether the collective impact of all the circumstances made the case exceptional.
5. The court should always have regard to the four questions 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?
6. An offender's circumstances are relevant. For example, if a 5-year sentence might have a significantly adverse effect on his health.
7. Each case is fact specific.

8. The Court of Appeal will be slow to interfere, unless the judge is clearly wrong in identifying whether exceptional circumstances do or do not exist.

29. Mr Moll referred to R v Shaw [2011] EWCA Crim 167, where 5 years' imprisonment was reduced to 3 for an appellant who had pleaded guilty to possessing four weapons including a sawn-off shotgun, where a 5-year minimum sentence was required in the absence of exceptional circumstances. He was also in possession of ammunition. He was 76 years of age. He had very significant health problems, much more severe than this appellant, which the court found "did tip the balance in a finding of exceptional circumstances in his favour" when taken with other features.

30. On this appellant's behalf, reliance is placed on his age, positive good character, attested to in a number of references (including a helpful and informative one from his granddaughter), the delay between arrest and sentence, the fact that there was at least some security surrounding the firearms, the evidence from the psychiatrist and the ill-health of his wife who he cared for. It is argued that the judge attached too much weight to the appellant's opinion that handgun owners had not been properly compensated when the Firearms (Amendment) Act 1997 came into force, to the fact that the appellant was slow to answer a question when cross-examined about whether he thought the Firearms Act applied to him, and to his failure to tell his granddaughter about his guns.

31. We have given these submissions very careful consideration. The judge was right to describe the case as presenting a very difficult sentencing exercise. He approached the matter with care and considered the applicable sentencing guidelines and whether or not exceptional circumstances could be said to be present. The appellant had collected more than 20 firearms, some of which could have been carried away if anyone had found them.

The gun in count 28 was capable of discharging projectiles in full-automatic mode. The gun in count 30 was capable of killing two or more people at the same time or in rapid succession. The judge said that the gun in count 28 had a starting point in the guidelines of 5½ years' imprisonment; all the other possession of weapons counts had a starting point of 5 years' imprisonment. Whilst the appellant was entitled to his own view about the Firearms (Amendment) Act 1997, and there may have been a number of reasons why he was slow to answer a particular question, the judge concluded that the appellant had not told his granddaughter about his collection because he knew he was acting in a criminal way. The judge had the advantage of having heard the evidence in the trial, which we have not, and this was a conclusion he was entitled to come to.

32. When account is taken of all the circumstances of the case, it cannot, in our judgment, be said that there were exceptional circumstances here, so as to mean that the minimum penalty would have been arbitrary and disproportionate. The appellant had collected over 20 firearms and ammunition over time, he had converted them into working weapons, kept them in less than secure conditions and knew what he was doing was against the law.

33. Nonetheless, we do acknowledge that there were some strong mitigating features to set against the aggravating features which we have identified. Having given the matter careful consideration, we think that they ought to have resulted in a shorter overall sentence. It can be said that the appellant's psychiatric make-up predisposed him to the almost obsessive way in which he behaved, and we acknowledge that it will make serving a custodial sentence even harder for him than it would be for anyone in their 70s and of an otherwise positively good character. We also bear in mind the large amount of time which passed between the appellant's arrest and the eventual disposal of the case,

the inevitable strain that that put him under and the care that he gave his wife.

34. In all these circumstances, it seems to us that all the sentences in excess of 5 years' imprisonment were manifestly excessive and that they should be reduced. We quash the sentences on all those counts and substitute for them sentences of 5 years' imprisonment. The relevant counts are counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28 and 30. Thus the overall sentence becomes one of 5 years' imprisonment rather than 7½ years. To that extent, this appeal against sentence is allowed and the days we specified earlier will also count towards that sentence.

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