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IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2022/02213/B2
NCN: [2023] EWCA Crim 516

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 30th March 2023

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Burnett of Maldon)

MR JUSTICE GOOSE

MR JUSTICE BENNATHAN

R E X

- v –

KALEB HAMER

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Mr M Hodgetts appeared on behalf of the Appellant

Miss K Lloyd appeared on behalf of the Crown

J U D G M E N T

Thursday 30th March 2023

THE LORD CHIEF JUSTICE: I shall ask Mr Justice Bennathan to give the judgment of the court.

MR JUSTICE BENNATHAN:

1. This appeal considers when the courts should permit the prosecution of a defendant for two charges founded on a single piece of conduct. The appellant (now aged 23) was made the subject of a Knife Crime Prevention Order ("KCPO") on 7th December 2021 by the Wood Green Crown Court. One of the four terms of that order was that the appellant must not "carry any knife or bladed article in any public place (save for an item of cutlery provided by a restaurant, café or like establishment for its customer's use for the purpose of dining in, and only for the time that he is a customer within those premises)."

2. On 25th April 2022, the appellant was in possession of a lock-knife in a box on West Green Road, in the London Borough of Haringey. The knife was found in the possession of a 14-year-old boy a short while after the appellant had passed him the knife, as had been captured on Close-Circuit Television.

3. The appellant was charged with two offences: first, having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988 (which offence has a maximum sentence of four years' imprisonment); and second, breach of a Knife Crime Prevention Order, contrary to section 29 of the Offensive Weapons Act 2019 (an offence with a maximum sentence of two years' imprisonment).

4. The relevant elements of the bladed article offence, as stated in the Criminal Justice Act 1988, are as follows.

> "**139 Offence of having article with blade or point in public place.**
>
> (1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
>
> (2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.
>
> (3) This section applies to a folding pocketknife if the cutting edge of its blade exceeds 3 inches.
>
> (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.
>
> (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him—
>
> (a) for use at work;
>
> (b) for religious reasons; or
>
> (c) as part of any national costume.
>
> …"

5. The provisions of section 29 of the Offensive Weapons Act 2019, which create the offence of breaching an order, so far as relevant state:

> "A person commits an offence if, without reasonable excuse, the person breaches a knife crime prevention order or an interim knife crime prevention order."

6. On 16th June 2022, the appellant appeared at the Crown Court at Wood Green before His Honour Judge Ezzat for a plea and trial preparation hearing. It was argued on his behalf that a guilty plea to count 2 (the breach of the order) should resolve the case as the further count added nothing and was founded on the same conduct. His Honour Judge Ezzat rejected those submissions. He commented that their effect would be to render the court's previous order (the KCPO) otiose. The appellant then entered guilty pleas to both counts.

7. The appellant subsequently applied to vacate his guilty plea to count 1 and the case was listed before His Honour Judge Dodd KC on 22nd July 2022. Judge Dodd had the benefit of written submissions from both sides and heard argument, before ruling that he was satisfied that they were separate and distinct offences and that there was no basis to vacate either guilty plea. The case was then adjourned for sentence to allow for the preparation of a pre-sentence report.

8. On 8th September 2022, Her Honour Judge Deacon KC sentenced the appellant to 15 months' imprisonment on count 1 (possession of a bladed article) and six months' imprisonment on count 2 (the breach of the KCPO). Those two sentences were ordered to run concurrently with one another, thus resulting in a total sentence of 15 months' imprisonment. Various other consequential orders were made, which are not germane to this appeal. There is no appeal against the sentence passed, save to the extent that it is argued on the appellant's behalf that he should have been sentenced for only one or other of the offences.

9. The single judge gave leave to appeal against conviction, and we have been greatly assisted by the written and oral submissions of both Mr Hodgetts for the appellant and Ms

Lloyd for the respondent. We summarise the rival submissions.

10. On behalf of the appellant it is submitted that his case falls within a line of authority whereby the appellate courts have held that a defendant should not stand to be convicted of two alternative offences. In *R (Dyer) v Watford Magistrates Court* [2013] EWHC 547 (Admin), the court held that the appellant should not have been convicted of both racially aggravated causing fear or provocation of violence and of causing fear or provocation of violence, wherein both convictions were founded on the same conduct. In the course of his judgment, Laws LJ said:

> "This claimant stands convicted twice for a single wrong. That is unfair and disproportionate. It is not a matter of being punished twice. The double conviction is of itself unfair. It must be basic to our system of criminal justice that a person's criminal record should reflect what he has done, no more and no less. That is fair and proportionate. To convict him twice for a single wrong offends this basic rule."

11. The appellant also relies on other authorities to similar effect, including *R v McEvilly* [2008] EWCA Crim 1162 and *R v Ismail* [2019] EWCA Crim 290. In *McEvilly* the defendant was indicted for the same act with attempted murder, wounding with intent to do grievous bodily harm and unlawful wounding. He pleaded guilty to the last offence and, that plea not being acceptable to the prosecution, was then tried on the first two counts. The jury convicted him of wounding with intent and then, after a short delay, also of attempted murder. The Court of Appeal vacated the guilty plea and quashed the lesser conviction. In *Ismail* the defendant pleaded guilty to counts of possession of a firearm and ammunition with intent to endanger life, and also to counts of simple possession of the same firearm and ammunition. The Court of Appeal presided over by my Lord, the Lord Chief Justice,

quashed the sentences imposed on those latter simple possession counts and instead ordered those counts to lie on the file on the usual terms.

12. The respondent accepts the principle articulated on the Appellant's behalf but argues that it has no application to the facts of his case. In her submissions, Ms Lloyd argues that the appellant's conduct had two distinct and separate aspects: the substantive offence and the breach of the earlier court order. She relies on the judgment of Sir Igor Judge, President of the Queen's Bench Division (as he then was) in *R v H, Stevens and Lovegrove* [2006] 2 Cr App R (S) 68. In that case at [27] Sir Igor stated that "the breach is a distinct offence in its own right". On the facts of that case, the appellant was not (as far as the report reveals) sentenced for any other offence attaching to the conduct that amounted to the breach, but nevertheless, it is argued, that comment by so senior a judge is telling.

Discussion

13. The courts' refusal to permit an accused to be convicted twice for the same offence is long established. In *Connelly v DPP* [1964] AC 1254 Lord Morris, delivering the main speech, traced the concepts of autrefois acquit and convict back to the late eighteenth century. As their Lordships made clear in *Connelly*, those concepts applied only to two prosecutions for an identical offence, but the House went on to identify a broader principle whereby the criminal courts have the power to prevent a prosecution for the same conduct where such a course would be unjust or oppressive.

14. The question we have to determine is whether the events in this appellant's case fall within the category of being unjust, oppressive and duplicitous, or whether the two offences, although founded on the same course of conduct, are so legally distinct that they can both

properly be pursued by the prosecution. In our view, the latter is the correct view for a number of reasons.

15. First, although the two charges arose from the same actions by the appellant, the two offences are legally distinct. The first is a substantive criminal act; the second, a breach of a previous court order. It is apparent that the two offences have similarities but also a number of differences. The terms of the defences are different; the defences have different burdens of proof, one excludes knives below a certain size, while the other does not; and there are specified factual exclusions found in one that are not within the other. It follows that while it is entirely possible to act in a way so as to commit both offences simultaneously, as the appellant in this case has demonstrated, there are also courses of conduct that would commit one but not both offences. The second offence is, in the words of Sir Igor Judge in *Stevens*, "a distinct offence in its own right".

16. Second, there is direct authority from this court that addresses the situation where, as here, a single course of conduct violates two distinct laws. In *R v Hartnett* [2003] EWCA Crim 345, the court dealt with an appeal in which the appellant had been convicted both of driving with excess alcohol and of dangerous driving, founded on the same event. The court allowed the appeal in part because of a technical failing connected to the committal for sentence on the lesser charge, but Lord Phillips CJ, giving the judgment of the court stated that, but for that failing, there was nothing improper about the two offences being charged and pursued, even though they relied on the same acts by the accused. *Hartnett* was discussed and approved by Hughes LJ (as he then was) in *R v Arnold* [2008] 2 Cr App R 37 at [31 onwards]. In both of those decisions this court made clear that the courts retain the power to stay as an abuse, or adapt the trial proceedings, where the deployment of multiple

charges have led to unfairness. However, that is not the situation in this appellant's case.

17. Third, there are practical objections to the conclusion urged upon us on the appellant's behalf. As His Honour Judge Ezzat observed in dismissing this argument below, the effect would be to undermine and devalue orders such as the KCPO. We would add that where, as here, an offender has breached a court order, there is a need for that breach to be established and recorded, as any judge dealing with such an offender in the future ought to know that on a previous occasion an order has been ignored. As Laws LJ said in the passage we have already recited:

> "It must be basic to our system of criminal justice that a person's criminal record should reflect what he has done, no more and no less."

18. Before concluding, we would comment that in passing sentence in a case such as this, the judge has to keep totality in mind. Totality might be addressed by imposing consecutive sentences but modifying their terms or by-passing concurrent sentences but treating the lesser as an aggravating factor in the sentence for the greater. The latter was the course followed by the sentencing judge in the appellant's case, and her approach was an entirely proper one.

19. For all these reasons, this appeal against conviction is dismissed.

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