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IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202304480/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 17 April 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MORRIS
HIS HONOUR JUDGE PETER JOHNSON
(Sitting as a Judge of the CACD)

REX
V
JAYDAH LUKE-SMITH

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR A BELL appeared on behalf of the Applicant
MR M BROOK KC appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: On 31 October 2022 in the Crown Court at Birmingham, Jaydah Luke-Smith, who is now aged 27, pleaded guilty to two counts of possessing a prohibited firearm and two counts of possession of ammunition. She provided a basis of plea to which we shall refer shortly. She had co-accused whose cases were adjourned for trial. Her sentence had to await the outcome of that trial. In due course the co-accused were tried and convicted.
2. The trial judge, His Honour Judge Inman KC, the Recorder of Birmingham, determined that Luke-Smith's basis of plea gave rise to issues which he had to resolve before he could pass sentence. The possession of prohibited firearms carries a mandatory minimum sentence of five years. If Luke-Smith was to avoid that mandatory minimum sentence she had to show exceptional circumstances. The Recorder considered he needed to determine some issues of fact. On 21 September 2023 he held a Newton hearing in order to reach a conclusion. He provided a detailed ruling at the conclusion of that hearing.
3. The core facts were not in dispute. There were two loaded handguns, which were revolvers, fully-loaded, ready for use, found by the police in a sports bag in a wardrobe in Miss Jaydah Luke-Smith's bedroom. The bag had been taken to her home the previous day to the guns being found in October 2021 by a man called Jordan Turner. He was one of the people who was to be tried by the Recorder and was in due course convicted.
4. Miss Jaydah Luke-Smith's basis of plea was that she was wholly unaware that the bag contained two loaded guns. The Recorder noted that the prosecution accepted that was the position. They agreed that she had no actual knowledge of the contents of the bag. The case against her was that she was used by Jordan Turner as someone who would be a

safe custodian of the guns, Jordan Turner being fully confident that she would not involve herself with the bag or its contents.

5. The Recorder had received written submissions in relation to the issue of exceptional circumstances. It was in the light of those submissions that he concluded he needed to hear oral evidence from Miss Jaydah Luke-Smith. She was given the opportunity to give evidence, an opportunity which she took.
6. It is unnecessary for us to set out the detail of that evidence. What matters are the conclusions reached by the Recorder. It cannot be said, and has not been said, that his conclusions were other than founded properly on the evidence he had heard. There were two essential conclusions. First, in relation to what she said about her knowledge of Jordan Turner, he did not accept her evidence. Her evidence had been that she had never known what he had been in prison for during the time when they had been in a relationship. The Recorder rejected that as incredible. He was satisfied that in 2019 and 2020 she knew the nature of Jordan's prior criminal conduct and activities. That meant she knew that he had been convicted of conspiracy to supply class A drugs and, more significantly, convicted of possession of a prohibited weapon namely a handgun, that conviction being sustained in March 2017.
7. The second conclusion that the Recorder reached was that, whilst he accepted Miss Jaydah Luke-Smith's evidence that she did not ask what was in the bag, the reason she did not do so is because she was suspicious as to why the bag had been brought in a taxi to her flat. She had suspicions that what was contained in the bag related to the man's criminal activities. Since her knowledge of the man's criminal activities included knowledge of the fact that he was somebody who had in the past been in possession of firearms, that suspicion was of significance.

8. There was a delay between that hearing and sentence. Sentence was imposed on 23 November 2023. The Recorder provided detailed sentencing remarks rehearsing the core facts and the findings he had already made about Miss Luke-Smith's state of mind.
9. He then turned to the Sentencing Council's Guidelines in relation to the offence. Both of the counts related to type one weapons. It was a case of medium culpability because both of the firearms were loaded. He assessed harm by reference to her possession of the weapons, not by how dangerous they were in the possession of the man who had brought them to the house. Plainly his purpose in having the guns involved at the very least the potential of risk to life. In her case he was satisfied there was no risk of her using the guns, therefore harm was in the lowest category, Category 3. That led on the guideline before any consideration of exceptional circumstances to a starting point of five years and six months' custody with a sentencing range of five to seven years' custody.
10. The judge noted that he was dealing with two loaded firearms, which was a factor that had to be reflected. In addition, the house where the bag was stored was a house in which Miss Jaydah Luke-Smith resided with her very young son. The fact that firearms were in a house where there was a toddler was in itself an aggravating factor. Against that background the judge concluded that the minimum sentence would need to be in the region of six years' imprisonment.
11. He identified significant mitigating factors. Miss Jaydah Luke-Smith at that time had no convictions at all. She had led up to then a completely blameless life. She had been studying for a degree and bringing up a young child. Although she had possession of these firearms they were being held on behalf of someone who was exploiting her regard for him and her general character. The Recorder was satisfied that there was true remorse

on the part of Miss Luke-Smith.

12. He therefore concluded that there was significant mitigation which would result in a marked reduction in sentence were it not for the mandatory minimum term. He cited an observation in the case of Peers [2022] 2 Cr.App.R (S) 4 as follows:

"... he personal circumstances of this appellant explain why she was chosen to keep this dangerous weapon. There was nothing exceptional or even unusual about the decision [in this case] to leave the appellant with his gun. She was precisely the sort of person chosen as a storekeeper by those who trade in and use illegal weapons. If this court were to hold that the appellant's personal circumstances were exceptional, then the point and purpose of this legislation, and the statutory minimum term, would immediately be lost."

13. Nonetheless, with that warning in mind the judge turned to step 3 in the guideline which required him to consider whether there were exceptional circumstances. He had found that she was unaware of the contents of the bag; thus she was not aware that it contained two loaded guns. Notwithstanding the fact that she had suspicions due to her knowledge of the man who had left the bag with her, the Recorder was satisfied that there were exceptional circumstances meaning that the mandatory minimum term did not have to be imposed. He returned to the starting point under the guidelines to which he had already referred, namely six years. By reference to the various mitigating factors including the long delay in the proceedings, the judge determined that sentence after trial would be three years' imprisonment. An intimation of plea sufficient to amount to a clear indication had been given in the Magistrates' Court. Miss Jaydah Luke-Smith was entitled to a reduction of one-third from the sentence that otherwise would have been imposed. That resulted in a sentence of two years' imprisonment.

14. The judge indicated he had also considered paragraph 14 of the Sentencing Council

Guideline. Paragraph 14 under a heading "Where exceptional circumstances are found" reads as follows:

"The court may find it useful to refer to the range of sentences under culpability A of Table 2 (Offences not subject to the statutory minimum sentence) in step 2 above. The court should impose a sentence that is appropriate to the individual case."

15. At the hearing before him no one had been able to find a case in which that particular paragraph had been considered. He considered it in the absence of any authority. He said that Table 2 referred to offences of being in the possession of weapons not of the type subject to the statutory minimum sentence. Such weapons were considerably less dangerous than the weapons with which he was dealing. He noted that the top of the category range for the sort of offence that might fall within Table A as guided by paragraph 14 would be two years' custody. He noted that exceptional circumstances apply to a very large range of circumstances. He said the case he was dealing with involved culpability towards the highest end because of the loaded weapons. He decided, having regard to Table 2, that a sentence of two years' imprisonment was appropriate given the particular circumstances of the case.

16. He moved finally to consider the issue of whether the sentence could be suspended. He was clearly fully aware of the imposition guideline. Amongst other things he had made reference to the fact that the defendant had the care of a very young child for whom arrangements in fact had been made. He said this:

"... a relevant factor is ... that it would not be appropriate to suspend the sentence [because] appropriate punishment can [only] be achieved by immediate custody."

The Recorder was satisfied that this was such a case. He noted that the culpability of Miss Jaydah Luke-Smith was much reduced but it was not extinguished.

17. Miss Luke-Smith applied for leave to appeal against that sentence. The Registrar has referred her application to the full court. Counsel who appeared in the court below have appeared before us. Mr Anthony Bell represented Miss Luke-Smith. We are grateful both to him and to Mr Matthew Brook KC (who appeared on behalf of the prosecution) for the assistance they have given us.
18. Given the issues that arise in the case, we are satisfied that there is an arguable appeal and we shall grant leave. We shall refer to Miss Jaydah Luke-Smith as the appellant. The fact that the appeal is arguable does not mean that it will succeed.
19. There are two grounds of appeal. First, the Recorder erred in not applying Table 2 of the Guideline as advised in paragraph 14 to which we have referred. Second, in any event it was an error not to suspend the sentence imposed.
20. In relation to the first ground, it is submitted that, although paragraph 14 is not mandatory, it does indicate the approach expected by the Sentencing Council to offenders to whom exceptional circumstances apply. In this case a Category 3 case under Table 2 has a starting point of 12 months' custody before adjustment for aggravating and mitigating factors and reduction for plea. That is the length of sentence to which the Recorder should have directed his mind. That would have resulted in a sentence of around six months' imprisonment after taking mitigation and reduction for plea into account. The reference in paragraph 14 to the court imposing a sentence "that is appropriate to the individual case" should be read in the context of the reference to Table 2. There was nothing in this case, it is argued, that warranted an upward adjustment to three years before reduction for plea. Mr Bell has invited us to give guidance on how

paragraph 14 should be used by judges sentencing this sort of offence.

21. The Recorder when sentencing said that he had not been able to find a case in which this court had considered the operation of paragraph 14. No such case had been provided to him by counsel. In fact the point was considered by this court in *Otero* [2023] EWCA Crim 981. Judgment was handed down in August 2023. The judgment in *Otero* deals with the issue of paragraph 14 of the guideline at [22] and following. We summarise what was said as follows. Paragraph 14 does not oblige the court to refer to the sentencing range in Table 2. The language of the paragraph is discretionary. However, there is a statutory duty under section 52(2) of the Sentencing Code 2020 requiring the court to give reasons for whatever sentence is imposed. A judge sentencing somebody to whom exceptional circumstances applied had to explain the basis of the sentence. That would include whether the sentence was fixed by reference to Table 2 and, if it was not, why that was the position. *Otero* did not set out the circumstances in which a judge ought to refer to or to apply the sentencing range in Table 2. That would involve an inflexible approach to a fact-sensitive exercise of a discretion.
22. The facts in *Otero* were very far removed from this case. They were highly unusual. The judge in sentencing had explained that, having regard to all the circumstances, the category range which Table 2 provided was inadequate to reflect the gravity of the offending. This court accepted that this was a proper basis on which not to apply the range of sentences under Table 2.
23. Mr Bell in submissions invites us to go further. He asks rhetorically: "What is paragraph 14 for?" He answers his own rhetorical question by saying: "It is to direct judges to the range of sentences in Table 2 and to take that range as their starting point." He accepts that nothing said by this court in *Otero* supports that argument. We do not

consider that the argument has merit. Had the Sentencing Council wished to indicate that sentencing judges had an kind of obligation to begin with the ranges set out in Table 2, the Council would have said so. The language of paragraph 14 is one of pure discretion. The only mandatory provision in relation to cases where exceptional circumstances are found is in paragraph 13 of the guideline. That requires the court to impose a shorter custodial sentence than the statutory minimum. Beyond that no direction is given.

24. Exceptional circumstances can cover a multitude of circumstances. Paragraph 14 indicates a sentence must be imposed which is appropriate to the individual case. Whether the range of sentencing in Table 2 is appropriate will depend on the assessment in each individual case by the sentencing judge of all of the circumstances. Mr Bell invited us to give guidance as to the kind of case in which a judge should refer to Table 2. In what kind of case should the sentence be restricted to the ranges in Table 2? Conversely, in which cases would it not be appropriate to do so? We are not prepared to give such guidance. It is not possible to give guidance of that kind in the exercise of a discretion where the circumstances are so variable. It is not without significance that the Sentencing Council did not attempt to set out what might be relevant factors in exercising the discretion.

25. In this case the judge referred to the dangerousness of the weapons and to the heightened culpability and used those factors as the reason for not applying the sentencing range in Table 2. That was a permissible approach. There may be other circumstances which mean that such an approach would be reasonable. Since the range of circumstances is so wide and so variable, we consider that it is impossible to lay down any guideline as to when Table 2 should and should not be used. In this instance the judge gave a sufficient explanation of his sentencing decision. It was one that in our judgment justified a

sentence which did not apply the range in Table 2.

26. In the light of his decision not to apply the range in Table 2, the judge went back to the starting point for a case where no exceptional circumstances exist. He then reduced the sentence very considerably from that point given that the circumstances were exceptional. We acknowledge that, in the absence of exceptional circumstances, the starting points in the guideline are based a minimum term of five years' custody. That does not render them irrelevant to a sentencing exercise of the kind in which the Recorder was engaged. Possession of a lethal firearm is a grave offence irrespective of the existence of a minimum term.
27. The second point raised by Mr Bell is that this is a case in which the judge by reference to the imposition guideline should have suspended the sentence. He cannot argue that the judge failed to apply the guideline and/or failed to take into account the relevant issues. He argues that this is a case where appropriate punishment, if it were needed at all, has now been served because Miss Jaydah Luke-Smith has been in prison now for five months.
28. We are a court of review. We review sentences if they are manifestly excessive or wrong in principle. The sentence of two years' imprisonment was clearly not manifestly excessive. Was it wrong in principle to order that sentence to be served immediately? We do not consider it was. The judge determined that appropriate punishment could only be achieved by immediate custody. That was his judgment; the judgment we may say of a criminal judge of almost unrivalled experience and expertise. It is not a judgment with which we feel we can properly interfere.
29. We acknowledge the extraordinarily difficult position in which this appellant found herself but these were very dangerous weapons which were plainly intended to go back

into the hands of somebody who himself was a dangerous individual. In those circumstances, notwithstanding the fact we have given leave to appeal, we dismiss the appeal.

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Lower Ground Floor, 46 Chancery Lane, London, WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk