APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 85
HCA/2017

Lady Paton
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

ALLAN JOHN TURNBULL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Gilbride Adv; Bruce Short & Co (Dundee), Solicitors
Respondent: Harper Sol Adv, AD; Crown Agent

1 December 2017

Introduction

[1] The appellant is 30 years old. On 24 May 2017, he appeared at a trial diet on indictment in the Sheriff Court at Dundee. A plea of guilty to charge 5 on that indictment had been tendered and accepted at a first diet. At the trial diet he tendered a plea of guilty

to charge 4, which was accepted by the Crown, as were his pleas of not guilty to the remaining charges.

[2] Charge 4 was a charge of being in possession of a stun gun disguised as a torch, contrary to the Firearms Act 1968 section 5(1A)(a). Charge 5 concerned the production of three cannabis plants and some loose cannabis material. It was not suggested that there was any link between the two charges. Section 51A of the Firearms Act, as amended, requires the court to impose a minimum sentence of 5 years' imprisonment for a contravention of section 5(1A)(a) of the Act:

> "unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify it in not doing so".

The Offence

[3] In his report to this court the sheriff informed us that the stun gun referred to in charge 4 was recovered by police from a rucksack in the accused's bedroom in his mother's house. It was found to be a dual function electronic stun gun and torch, in good working condition, with an audible and visible display of sparks occurring between the electrodes when activated.

[4] On the appellant's behalf it was submitted to the sheriff that the stun gun had been purchased around two years earlier by the appellant over the internet for about £12. He bought it partly out of curiosity. On receipt he tested it on himself giving himself an electric shock. Thereafter he put in the rucksack where it had remained until being seized by the police. The sheriff was also informed that the appellant's mother had long-term health problems and relied on him for assistance.

[5] It was submitted that the circumstances of the appellant's possession of a stun gun were not eloquent of the presentation of danger to the public, there being no suggestion that

the appellant intended to make any use of the item and in particular no suggestion that he intended to make use of it in the context of other criminal activity. Taking a holistic view, the sheriff was asked to conclude that the imposition of the statutory minimum sentence would be arbitrary and disproportionate.

Sentence

[6] Having considered the terms of the Criminal Justice Social Work Report which he ordered, the sheriff noted that the appellant had informed the author of that report that he accepted he was in possession of an unlawful weapon and that he knew he possessed the stun gun unlawfully. In assessing sentence the sheriff accordingly proceeded upon the basis that:

- The appellant had purchased a disguised stun gun on the internet out of curiosity.
- That he had wilfully and deliberately acquired the disguised stun gun knowing it to be such.
- That he had tried it on himself but had not otherwise used it.
- He had stored it in a bag in his bedroom where it had remained for around two years before being seized.
- He knew that it was unlawful to possess the stun gun, whether or not it was taken into a public place.

[7] The sheriff also took account of the fact that the appellant had a very limited record of previous convictions with no analogous matters, the low to medium risk of reoffending as set out in the Criminal Justice Social Work Report and the fact that his mother had long-term health problems and relied upon him for assistance.

[8] Having assessed all of these matters, the sheriff took account of the cases of *Morton* v *HM Advocate* 2017 SCCR 297 and *Cochrane* v *HM Advocate* 2011 SCCR 63. Having done so, he concluded that the present case did not fall outside the norm and that exceptional circumstances justifying departure from the minimum sentence were not made out. He accordingly imposed a sentence of 5 years' imprisonment on charge 4 and a concurrent sentence of 5 months' imprisonment on charge 5. The sentences were ordered to run from 24 May 2017.

The Appeal

[9] The appellant was granted leave to appeal on a ground which argued that the sheriff erred in concluding that exceptional circumstances were not present such as would permit him to depart from the minimum sentence.

[10] In presenting the appeal Mr Gilbride reiterated the circumstances of the appellant's possession of the stun gun. He sought to emphasise that there was no suggestion that the item had ever been used by the appellant, or taken by him into a public place. He submitted that in the absence of any aggravating features of this sort it could be seen that the policy and intention of Parliament, to protect the public by requiring a minimum sentence of imprisonment, was not engaged. It would therefore be arbitrary and disproportionate to impose a sentence of the length selected by the sheriff.

[11] Whilst recognising that each case would necessarily depend upon its own facts and circumstances, Mr Gilbride drew our attention to the case of *R* v *Jake Simon McCleary* [2014] EWCA Crim 302. He submitted that the circumstances of that case, in which the court had found, contrary to the sentencing judge's opinion, that exceptional circumstances were

present, were similar to those in the appellant's case. He submitted that the decision in *Mccleary* supported his contention that the sheriff in the present case had fallen into error.

Discussion

[12] Parliament's policy in enacting the minimum sentencing provisions of the Firearms Act was to send out a deterrent message (*R* v *Zakir Rehman* [2006] 1 Cr App R (S)77; *Morton* v *HM Advocate* 2017 SCCR 217). In considering the rational for that policy in the case of *Rehman* the Lord Chief Justice observed at paragraph 12:

> "So far as we can determine the rationale of Parliament, the policy was to treat the offence as requiring a minimum term unless there were exceptional circumstances, not necessarily because the offender would be a danger in the future, but to send out the deterrent message to which we have already referred. The mere possession of firearms can create dangers to the public. The possession of a firearm might result in that firearm going into circulation. It can then come into possession of someone other than the particular offender for example by theft in whose hands the firearm would be a danger to the public. Parliament has therefore said that usually the consequence of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five years, irrespective of the circumstances of the offence or the offender, unless they pass the exceptional threshold to which the section refers."

In our opinion, the submissions presented on the appellant's behalf failed to give adequate weight to the restricted circumstances in which a sentencer would be entitled to depart from Parliament's declared intention. The absence of aggravations would not constitute exceptionality. It is not the presence of mitigating circumstances which matters, but the presence of mitigating circumstances such as can permit the sentencer to conclude that there are exceptional circumstances relating to the offence or the offender.

[13] In the present case the appellant was found to be in possession of a disguised stun gun which was charged and was operational. Contrary to the submission presented on his behalf, it had been used, albeit on himself. He was therefore well aware of its function and

effect. The fact that the item was charged, was operational and had been used, were each factors of the present case which were absent in the case of *McCleary* founded upon by the appellant. The appellant in that case was also younger.

[14] The appellant explained to the author of the social work report that he had moved house on a number of occasions throughout the time that the stun gun had been in his rucksack. Again, contrary to the submission on his behalf, this appears to demonstrate that the item had been in a public place on a number of occasions and it shows that there was a risk of the stun gun falling into the hands of another. We are therefore satisfied that the present case can be distinguished from the case of *McCleary* in the ways which we have mentioned.

[25] In our opinion, the circumstances of the present case were serious and fell within the type of offending behaviour which Parliament intended to prevent. It does not seem to us that the case falls outside the range of cases which Parliament can be taken to have had in mind as the norm, and we do not agree that the imposition of the statutory minimum sentence can be said to be arbitrary and disproportionate in the appellant's case. We are satisfied that the sheriff was correct to conclude that nothing which was placed before him took the appellant's case into the exceptional category which would entitle him to impose a sentence of less than 5 years' imprisonment. The appeal is therefore refused.