IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202200924/A4
[2022] EWCA CRIM 1074

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 15 July 2022

Before:

LADY JUSTICE SIMLER DBE

MRS JUSTICE CUTTS DBE

HIS HONOUR JUDGE MICHAEL CHAMBERS QC
RECORDER OF WOLVERHAMPTON
(Sitting as a Judge of the CACD)

REGINA
V
ALAN FRANCIS ROBERTS

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MR N JOHNSON QC appeared on behalf of the Appellant.

J U D G M E N T

LADY JUSTICE SIMLER:

Introduction

1. On 18 January 2022 in the Crown Court at Liverpool before Martin Spencer J and a jury, the appellant was convicted of wounding with intent, contrary to section 18 of the Offences Against the Person Act 1861 (count 5) and possessing a firearm with intent to endanger life, contrary to section 16 of the Firearms Act 1968 (count 6). He was acquitted of attempted murder (count 4). The judge sentenced him on 25 February 2022 to concurrent terms of imprisonment of seven years on count 5 and 12 years on count 6. There was a co-accused, James Freeman, who pleaded guilty to wounding with intent to cause grievous bodily harm and to possession of a firearm with intent to endanger life. He was sentenced to an extended determinate sentence of 18 years and six months, comprising a custodial term of 14½ years and an extension period of four years, the judge having found him to be *dangerous*. The appellant now appeals against sentence with leave of the single judge and has had the benefit of representation from Mr Johnson QC, to whom we are grateful.

The facts

2. The offences took place on 17 May 2021 at The Old Bank public house in the Huyton area of Liverpool. The appellant was in the patio area of the pub with his partner when James Freeman approached on an electric bike. Freeman was wearing a black coat with his hood up and his face concealed. On seeing Freeman approach the appellant appeared spooked. He pulled his own hood up and ran inside the pub. Freeman was armed with a loaded semi-automatic pistol. He got off the bike and ran into the pub following the appellant. The appellant waited just inside the door and as soon as Freeman entered there was a tussle between the two men. During the tussle Freeman discharged the weapon injuring the appellant in the groin. The tussle continued and spilled out onto the patio area.

Customers at the pub intervened and Freeman was overpowered. He was kicked and punched to the ground. The appellant took the firearm from Freeman and tried to shoot him with it. The weapon appeared to misfire. The appellant then pulled back the slide on the gun and ejected the misfired cartridge. He then shot Freeman twice in the chest at close range, before making off on the bike that Freeman had arrived on. In doing so he took the gun away with him and was able to dispose of it in circumstances where it has never been found.

3. Freeman having been shot managed to stagger away and an ambulance was called. Neither shot proved fatal and at hospital it was discovered that one bullet lodged near his heart and one in his lung. Neither was removed as there was no immediate risk of complication. The bullets are likely to be surrounded by dense scar tissue over time but with no further consequences likely. Freeman gave a *no comment* interview to police.

4. Two hours after the shooting the appellant attended hospital. He was treated for two minor injuries next to the pelvic bone which were assumed to be fragments of gunshot. The weapon, as we have said, was not recovered. He gave a *no comment* interview after providing a prepared statement asserting that throughout this incident he acted in lawful self-defence. That defence was maintained at trial but was rejected by the jury and the appellant was ultimately convicted of the two offences already described but acquitted of attempted murder.

5. The appellant was born on 4 February 1992. He had 12 previous convictions for 33 offences between 2005 and 2021. Those convictions included possession of class C drugs, attempted robbery, robbery, intimidation of a witness, converting criminal property, sexual assault and battery. In 2009 he had received a sentence of 78 months' detention in a young offender institution for attempted robbery, robbery and possessing an imitation firearm

while committing an offence. The judge proceeded to sentence the appellant without a pre-sentence report. In the circumstances of this case a report was unnecessary then and is not now necessary. The judge had five character references for the appellant and we too have read those references.

The sentence

6. The judge took the offence of possession of a firearm with intent to endanger life as the lead offence and passed a concurrent sentence for the wounding of Freeman. He accepted that the assault was incidental to the firearm offence and that it was the commission of the assault which was the evidence from which the jury had inferred the intention to endanger life. Unlike in Freeman's case, he therefore accepted that the possession of the firearm with intent to endanger life and the wounding with intent were so bound up with each other that the latter did not in fact aggravate the former. The judge went on to conclude however, and notwithstanding the submissions made on behalf of the appellant, that the firearm offence fell into category 2A with a starting point of 14 years' imprisonment. He identified the appellant's previous convictions as statutory aggravating factors increasing seriousness, noting that the appellant had no previous firearms convictions. He did not find the appellant to be dangerous. Having taken the starting point of 14 years, he increased it to reflect the aggravating factors but then reduced the sentence to reflect the mitigation and in particular, the fact that the appellant was initially the victim, had not instigated the violence and was initially fighting for his life reacting to the actions of Freeman.

The appeal

7. In written submissions that were developed orally on behalf of the appellant, Mr Johnson QC submitted that this was a highly unusual case: the appellant was the target of a

terrifying attack by a masked gunman, at a time when he was at a pub without any weapon, enjoying the day and certainly contemplating no violence. Having been confronted by the masked gunman he managed to disarm him, reacting coolly in the face of what must have been terrifying and having been shot in the leg. Mr Johnson submitted that the incident was different from almost any other offence of having a firearm with intent to endanger life, because in almost every other case encountered by the courts of this kind, the case involves a significant degree of mature reflection, reflected in the process inevitably undergone in order to obtain a firearm in the first place. That is a factor of significance in other cases because of the importance of deterrence in sentencing. It was absent here: there was no planning, no time for any significant reflection, and this is underscored by the shortness of time between the initial arrival of Freeman and the discharge of the gun into his chest. The firearm was available as a direct consequence of the appellant being the victim of an attack by Freeman. He was entitled to defend himself and would in all likelihood have been shot much more seriously, if not killed, had he not done so.

8. Mr Johnson submitted that this was a case of excessive self-defence, a feature reflected in the Definitive Guideline by reference to the absence of planning or time for reflection. He submitted that the judge was in error in placing this case in category A. It was a unique case and should, for all of those reasons, have been placed within category B of the Guideline.

9. Not only was the judge in error for failing to recognise the exceptionally unusual circumstances in which these offences were committed, but he failed to balance the features of culpability in category A with the lack of planning and all that went with it in category C. Had he done so, Mr Johnson submitted, he would have taken a starting point for category 2B rather than the starting point he took. In consequence, the total sentence

was manifestly excessive.

Discussion

10. The appellant does not challenge the judge's conclusion that harm was category 2 in this case. The Sentencing Council's Definitive Guideline effective from 1 January 2021 and applicable in this case, makes clear that to determine culpability the court should determine the offence category with reference only to the factors listed in the tables and should weigh all applicable factors set out in the relevant table. The Guideline goes on:

> "Where there are characteristics present which fall under different levels of culpability the court should balance these characteristics to reach a fair assessment of the offender's culpability."

11. Here, high culpability A was evidenced by the fact that the firearm was discharged. There were no other relevant factors identified in that category. The factors identified in the Guideline reflecting lower culpability C, are, so far as relevant in this case, limited to "little or no planning or unsophisticated offending". In terms of medium culpability B, the relevant consideration here was:

> "Other cases that fall between categories A and C because:
> • Factors are present in A and C which balance each other out and/or
> • The offender's culpability falls between the factors described in A and C."

12. As we have said, the judge concluded that culpability was category A because of the use of a highly dangerous weapon. He rejected the submission that this was a case of excessive self-defence though he accepted that the appellant was acting in response to extreme violence. He continued:

> "In the end though what I cannot get away from is that you shot James Freeman with his own gun, thus you knew, as I find, that he was no longer a danger to you because you had his gun and I do not believe for a moment your evidence at the trial that you thought or feared he was reaching for a

second gun and my interpretation of the jury's verdict is that they too were sure that this evidence was untrue."

13. We do not accept Mr Johnson's submission that the judge's sentencing remarks reflect that he ignored or lost sight of the fact that there were also characteristics which might have pointed to placing the appellant in a lower category in this case.

14. As this court has said repeatedly, application of the Guideline is not a mechanistic exercise. Nor is it a simple question of balancing the number of factors in one category against the number of factors in another. Rather, in what is an evaluative exercise the factors must be assessed in the context of the facts of the individual case in order to determine where the balance lies and to what extent a factor in one category reduces the impact of another in a different category. Here, we do not accept that the two factors balanced each other out on the facts of this case and nor did the appellant's culpability fall between higher and lesser culpability. It is clear that the judge regarded the discharge of the firearm in the circumstances he described as much the most serious determining factor in this case, with the absence of planning of very little relevance in context. We can see no error in that approach. In particular, although Freeman was initially the aggressor, the appellant defended himself and was, as Mr Johnson described it, fighting for his life and in the course of the tussle was wounded by the discharge of the gun. But the struggle continued and spilled out onto the patio area where Freeman was overpowered. Having been kicked and punched to the floor and lying on the floor, the appellant took the gun from him and from that point onwards, as the judge found, the appellant knew he was no longer in danger, knew that he no longer needed to defend himself, knew that Freeman had been disarmed and could simply have waited for the police to arrive and hand the gun over to them. Instead of doing that, as the judge observed, he took the law into his own hands, attempted to shoot Freeman and, the gun having misfired, put another bullet into the

chamber shooting Freeman twice in the chest at close range as an act, as the judge found it to be, of retaliation and revenge. The judge presided over the trial and was in the best position to make an assessment of the appellant's culpability. He had ample evidence for his conclusions and we see no basis for interfering with them. Moreover, having taken the starting point of 14 years and made an upward adjustment from 14 years to reflect the statutory aggravating features that undoubtedly were present in this case, the judge made a downward adjustment to reach the ultimate sentence of 12 years. This properly and adequately reflected the unusual circumstances of this case and in particular, his express acceptance that there was no planning, no time for significant reflection, that the firearm was available as a direct consequence of Freeman's attack on the appellant and that initially, at least, the appellant acted in self-defence albeit that this changed subsequently.

15. In our judgment, the judge's approach reflected a proper and fully justified application of the Sentencing Council's Guideline. The overall sentence he imposed was condign punishment and not manifestly excessive in all the circumstances. Accordingly and notwithstanding the cogent submissions made by Mr Johnson on the appellant's behalf, this appeal is dismissed.