IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 477

No.s 202101340/B2 &
202101333/B2

Royal Courts of Justice

Wednesday 30 March 2022

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(LORD JUSTICE FULFORD)
LADY JUSTICE WHIPPLE DBE
SIR NIGEL DAVIS

REGINA
V
CARL PHILLIPS

_____

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MR D HUGHES appeared on behalf of the Appellant
MR P JARVIS appeared on behalf of the Crown

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J U D G M E N T

LADY JUSTICE WHIPPLE:

Background

1. On 1 March 2021 in the Crown Court at Sheffield the appellant, who was then aged 28, changed his pleas to guilty to counts 3 and 4 on the original indictment. On 8 April 2021 in the same court in front of His Honour Judge Dixon the appellant was sentenced to 12 years and nine months on count 3, which was a charge of causing grievous bodily harm with intent, contrary to section 18 of the Offences Against the Person Act 1861, and the same term of 12 years and nine months to be served concurrently on count 4, which was a charge of possession of a firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968. Two other counts were ordered to lie on the file.

2. The appellant's co-accused Ben Jones pleaded guilty to a single count of affray on 1 March 2021 and was also sentenced on 8 April 2021 to nine months' imprisonment which was suspended for 18 months.

3. The appellant now appeals against sentence with the leave of the single judge and applies for leave to appeal against conviction in respect of count 4, that application having been referred to the full court by the single judge. We are satisfied that the delay was not the fault of the appellant and we grant the appellant an extension of time of 47 days in order to seek leave to appeal against conviction. Further, we are satisfied that the point raised by way of appeal against conviction is arguable and we grant leave to appeal against conviction.

Facts

4. The facts in brief are these. On 31 July 2020 at about 10.00 in the morning, one of the complainants, Jason Riley received a telephone call from somebody called 'Joe' demanding payment of £2,500, said to be outstanding fees or wages for construction work supplied to Mr Riley who was in the building industry. Mr Riley did not think payment was due for another week. Mr Riley employed the co-accused Ben Jones and his father, the appellant was sub-contracted to Ben Jones and his father.

5. At about 3.00 pm that afternoon Ben Jones together with the appellant and three other males arrived at a construction site in Nottingham where they made demands for the money from Mr Riley. Mr Riley said the men were armed with hammers. The men used threatening behaviour but there were no physical blows. This was the affray which formed the count to which Ben Jones pleaded guilty. The appellant was also charged with involvement in this affray but that was one of the counts that was left on the file.

6. Mr Riley went to see a friend, Sulius Sunglia who described Mr Riley as being stressed and panicking. Mr Sunglia advised Mr Riley that the best thing to do was to simply pay the money. Mr Riley therefore raised the £2,500 to pay the men and initially asked for them to come and collect it. They told Mr Riley that he would have to come to them in the Sheffield area. A meeting was eventually arranged for later that day, 31 July 2020.

7. Mr Sunglia drove the car to the arranged meeting place which was in a remote lane in the Ulley reservoir area. Mr Riley was the front seat passenger and three of Mr Riley's employees travelled in the back. At the meeting point Mr Sunglia stopped his car about

three metres behind a Volkswagen Golf which contained the appellant and a number of other males. Mr Sunglia and Mr Riley both got out of their car at about the same time as the appellant got out of the Golf. The appellant was holding a sawn-off shotgun and without any request for money or discussion he raised the gun and shot Mr Sunglia in the shin area of his left leg. The appellant then fired a second shot which hit the front of Mr Sunglia's car. Mr Riley was not struck by either shot. The men then got back into the Golf, including the appellant, and they drove away.

8. Mr Sunglia felt immediate pain and described blood spurting everywhere. He tried to use his phone to photograph the Golf's number plate without success and then got Mr Riley to use his belt as a tourniquet before describing that everything went black. Mr Sunglia was taken to hospital. He was noted to be in acute pain when he was admitted, initially to the Rotherham General Hospital and subsequently on transfer to the Northern General Hospital. He underwent a surgical procedure to wash out and debride the wound on 1 August 2020. The operation note indicates that there were multiple deep and superficial led fragments found, there were both entry and exit wounds, he had a fractured mid-shaft of his left fibula. Mr Sunglia was discharged from hospital on 3 August 2020 with a follow-up regime. It was thought at that stage that he would be fully weight-bearing as soon as he was comfortable. No formal plastic surgery followed up was required but he had been reviewed by the plastic surgeons.

History of Proceedings

9. So far as the case history is concerned, the appellant was arrested on 7 September 2020 when he denied any involvement in the offending. He was charged on 19 September

2020 in relation to the events of 31 July 2020. He pleaded not guilty at the PTPH on 7 October 2020 and trial was fixed for 3 March 2021. It appears that at this stage that Ben Jones had not been charged; he was charged subsequently and became a co-defendant later that year.

10. At the PTPH on 7 October 2020 the appellant's representative requested sight of certain telephone evidence on which the prosecution intended to rely. That evidence was not provided by the prosecution. The defence made a disclosure application which was heard on 8 December 2020 when the prosecution were ordered to provide it by 17 December 2020. The evidence was not disclosed by that date, so the defence made another application to the court, leading to another order for the prosecution to disclose this material by 16 February 2021. That deadline also passed without the evidence being disclosed by the prosecution. The defence then applied to vacate the trial, citing the failure of disclosure as a reason, but that application did not succeed.

11. In the event the evidence was served by the prosecution on 26 February 2021. The defence commissioned an expert report to consider it. Having received that expert report, on 1 March 2021 the appellant entered his guilty pleas to counts 1 and 2. This was two days before the trial was due to start.

Appeal against conviction

12. The appellant argues that his guilty plea to count 4 was entered in error. Count 4 charged the appellant with possessing a firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968 which provides as follows:

> "If a person, at the time of his committing or being arrested for an offence specified in Schedule 1 to this Act, has in his possession a firearm or imitation firearm, he shall be guilty of an offence under this subsection unless he shows that he had it in his possession for a lawful object."

13. The particulars of count 4 on the indictment alleged that on 31 July 2020 at the time of committing an offence specified in Schedule 1, "namely an offence of wounding or causing grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861", the appellant had in his possession a firearm, namely a shotgun. It was not until the appellant's counsel Mr Hughes came to draft the notice of appeal against sentence that he spotted a defect in the particulars of count 4. The problem is this: paragraph 2 of Schedule 1 to the Firearms Act 1968 lists those offences under the Offences Against the Person Act 1861 to which section 17(2) applies; the offence of wounding or causing grievous bodily harm with intent contrary to section 18 of the 1861 Act is not included in that list. The appellant thus pleaded guilty to an offence under section 17(2) which does not exist.

14. The Crown accepts that the plea of guilty to count 4 as set out on the indictment as flawed and that in its current terms the conviction is unsafe. However, the Crown invites this Court to correct the defect using powers under section 3A of the Criminal Appeal Act 1968, which provides as follows:

> "(1) This section applies on an appeal against conviction where—
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> (a) an appellant has been convicted of an offence to which he pleaded guilty
>
> (b) if he had not so pleaded, he could on the indictment have pleaded, or been found, guilty of some other offence, and

(c) it appears to the Court of Appeal that the plea of guilty indicates an admission by the appellant of facts which prove him guilty of the other offence."

(2) The Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the appellant's plea of guilty a plea of guilty of the other offence and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity."

15. The Crown submit that by his plea to the section 18 offence, count 3, the appellant has admitted facts which prove him guilty of an offence under section 20 of the 1861 Act. Section 20 is a lesser offence which is necessarily incorporated in a plea to section 18: see R v Mandair [1995] 1 AC 208. Section 20 is included within schedule 1 of the Firearms Act 1968. Indeed, the Crown argue that the appellant could have pleaded guilty to count 4 on the basis that the offence he committed at the time he had the shotgun in his possession was an offence contrary to section 20, and if he had done that there would be no difficulty now.

16. The appellant by Mr Hughes accepts that this is a pragmatic way to resolve the difficulty he has identified. It was obviously regrettable that no one present at the sentencing hearing identified the flaw in the way count 4 was drafted, but in this case it makes little difference in practice, given that the maximum sentence for the section 18 offence is life imprisonment and the inclusion of count 4 did not therefore serve to increase the court's sentencing powers. Further, the judge imposed the same sentence for counts 3 and 4 and ordered them to be served concurrently, and he did not increase the term on count 3 to reflect the offending on count 4 because the facts giving rise to counts 3 and 4 are in effect identical, so the inclusion of count 4 on the indictment did not serve to increase the

sentence in fact imposed. In this case, the error is purely technical.

17. Having considered the options and noting that Mr Hughes does not resist the course proposed by the Crown, we accede to the Crown's proposal. It is preferable that the indictment should contain a count to reflect the appellant's use of a firearm. It is appropriate for the appellant's record to show a conviction for using firearms in the course of committing the section 18 offence. Mr Jarvis told us that this approach is consistent with CPS guidelines which indicate that where a firearm is used the indictment should in general contain a firearms offence. He also told us that if the point had been appreciated at an earlier stage, it may well be that count 4 would not have contained an offence under section 17(2) of the Firearms Act 1968, but rather would have contained some other offence under that statute. We are where we are and in our judgment the Crown's proposed solution is a pragmatic and reasonable one.

18. We therefore exercise our powers under section 3A of the Criminal Appeal Act 1968 to correct the error on the indictment. We substitute for the offence currently charged another and different offence of possessing a firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968, namely an offence under section 20 of the Offences Against the Person Act 1861. To that limited extent this appeal is allowed.

Appeal against sentence

19. In his sentencing remarks, the judge noted that the appellant was 28 and of effective good character. He fell to be sentenced for a very serious offence of section 18 and with

possessing a firearm whilst committing an indictable offence. The judge had regard to the assault guideline. We interpose to emphasise that that guideline was replaced by a new guideline on 1 July 2021 but we, like the judge, will have regard to the old guideline.

20. The sentencing judge described this offence as causing harm which was serious in the context of this offence. It was serious because of how it was occasioned, the fracture of the limb that was caused, and the other pellets in the leg that were sustained as a result of the gun being used. That put it into the greater harm category. In terms of culpability, the judge said there was a significant degree of premeditation. The complainant was lured down the road. A shotgun was obtained, taken to the scene, produced from the car and used. The use of a weapon was obviously an aggravating factor. The only reason to discharge the weapon twice was to cause more serious harm than actually resulted. This was targeting somebody in a vulnerable position by virtue of being lured to where they were and by virtue of the fact that the appellant had the gun. The appellant played a leading role in this group. These were factors indicating higher culpability.

21. On the lower culpability side, it was said that the appellant was remorseful. It was said that he was subordinate in the group and that culpability therefore should be lower, but the judge rejected that latter submission.

22. The judge held that this was higher culpability and greater harm which put this offending in Category 1. That category has a bracket of nine to 16 years with a starting point of 12 years. The appellant's counsel had argued on his behalf that it was Category 2 because the harm was not of the most serious type for this offence. The judge did not

accept that submission but said that in any event, even if the defence was right on that, the number of aggravating factors in terms of culpability would be such that this case would be raised to Category 1 in any event.

23. The judge then turned to the guideline for section 17(2) of the Firearms Act 1968. He said that this was a case where a firearm was discharged. It was conduct intended to maximise fear or distress and the serious nature of the intended or actual associated offence put this clearly within higher culpability, but the number of factors was of note. The harm was certainly serious. Whether it got to severe was a moot point, but the combination of factors that were in the culpability bracket, alongside this being serious physical harm, if not more, put this into Category 1A. That category gave a range of 10 to 16 years with a starting point of 12 years.

24. In terms of the aggravating factors, the appellant had no previous convictions of note, no bail, no motivation, but if this was a sawn-off shotgun as described it would be prohibited by statute. It was a firearm modified to make it more dangerous. The firearm had not been recovered. The offence was committed as part of a group. All of those factors aggravated the starting point.

25. In terms of mitigation, the appellant had no previous convictions. He was said to be remorseful. It was said in effect that he had been led along, which the judge did not accept. To the contrary, the judge said this was wicked, disgraceful violence, the sort of violence that the courts would not tolerate.

26. Reflecting on the appellant and all the judge knew about him, taking into account the powerful materials in his favour and letters that had been submitted on his behalf, the appropriate starting point after trial would have been one of 15 years.

27. The way the Crown had conducted the prosecution was criticised by the judge. The reality was that they did not make available to the defence materials that should have been made available much earlier. But the other side of the coin is that the appellant knew he had discharged the firearm. He did not make an indication of plea in the Magistrates' Court. He entered a not guilty plea at the PTPH and it was only after material that effectively compelled him to plead that he did so. As a result in the judge's view the appropriate discount for credit was 15 per cent.

28. The effect of that meant the sentence concurrent on both counts was one of 12 years and nine months' imprisonment. The judge understood it would be difficult for the appellant in terms of bringing up his child, relationships and the like but the reality here was that the court would not tolerate the use of firearms causing violence in this way, particularly when it was organised and to do with money with a motive behind it.

29. Ben Jones was dealt with for the affray and on the basis that Jones had pleaded guilty at the PTPH the judge gave him 25 per cent credit for his guilty plea.

30. The appellant appeals against sentence on grounds that the sentence of 12 years and nine months was manifestly excessive. In the Notice of Appeal three grounds are pursued. First, it is argued that the judge erred by placing the offences in the highest category

within the Sentencing Council Guidelines. It is submitted that the principal offence was that of causing grievous bodily harm with intent and that the appropriate category was 2A, which would have produced a starting point of six years' imprisonment rather than the 15-year starting point identified by the judge. Secondly, it is argued that the judge failed to afford the appellant the appropriate level of credit for his guilty pleas. The pleas were entered only days after he was advised about the contents of an expert report, which was only commissioned once the prosecution had belatedly complied with an order for disclosure of telephone evidence. Further, it is argued that the appellant should have been given the same level of credit as his co-accused Ben Jones. Third, it is argued that the judge failed to have any or any adequate regard to the appellant's personal mitigation, including good character and the fact that his partner had given birth to their first child in early 2021.

31. We are grateful to Mr Hughes for his oral submissions today. In those submissions he has focused with economy on the first ground of appeal.

32. We turn to the first ground. The appellant concedes that the shooting on 31 July 2020 was high culpability, but it is important to note that the judge found there were a number of factors which put this into the high culpability range, whether under the assault guideline or the firearms guideline. Those factors, together with the appellant's use of a sawn-off shotgun modified to make it more dangerous and the fact that he acted as part of a group served to increase the seriousness of the offending. Mr Hughes argues that this was not greater harm in the context of section 18 offences. We are not so persuaded. The judge was entitled to conclude that a shotgun wound to the leg involving a fractured

bone, entry and exit wounds and the consequential need for surgery and on-going treatment did count as greater harm, even in the context of section 18 offences which are of their nature very serious. By his conduct the appellant was guilty of creating an enormous risk to life and limb and the outcome could have been a great deal worse.

33. Given that this offending involved such a high level of culpability and greater harm, the judge was right to put this offending in the top category in the guidelines and then was justified in going above the indicative start point by some margin to arrive at the notional sentence after trial. Fifteen years was within the range open to the judge. Thus the first ground of appeal against sentence fails.

34. The judge credited the appellant with a discount of 15 per cent for his guilty plea. The appellant had pleaded not guilty at the PTPH and he then entered guilty pleas very close to the date of trial. As the judge noted, the appellant knew whether he had committed these offences and it was not necessary for him to wait for disclosure or for his expert's report. A discount of 15 per cent was well within the ambit of the judge's discretion for a plea entered at this stage and in these circumstances. The discount given to Mr Jones was irrelevant. We see no error in the discount accorded to the appellant to reflect his guilty plea and the second ground of appeal on sentence fails.

35. Finally, we note that the judge referred in terms to the appellant's personal mitigation, including his good character and the fact that his partner had recently given birth; these matters were taken into account. Such personal mitigation could not carry much weight in the context of offending of this gravity. The third ground of appeal against sentence

fails.

36. In conclusion, we are not persuaded that this sentence of 12 years and nine months on a plea was manifestly excessive and we dismiss the appeal against sentence.

Conclusion

37. We allow the appeal against conviction and substitute for the offence currently charged the offence of possessing a firearm at the time of committing an offence, contrary to section 17(2) of the Firearms Act 1968, namely an offence under section 20 of the Offences Against the Person Act 1861. We dismiss the appeal against sentence.

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