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IN THE COURT OF APPEAL
CRIMINAL DIVISION



No. 202302277 A3

[2024] EWCA Crim 151

Royal Courts of Justice

Tuesday, 13 February 2024

Before:

LADY JUSTICE WHIPPLE
MRS JUSTICE STACEY
HIS HONOUR JUDGE PICTON

REX

v

LUKE MATTHEWS

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Mr J. Scobie KC appeared on behalf of the Applicant.
The Crown were not represented.

J U D G M E N T

MRS JUSTICE STACEY:

- 1 This is a renewed application for leave to appeal against a sentence following refusal by the single judge, together with an extension of time of approximately six days in which to renew his application for leave to appeal.
- 2 On 12 June 2023, before the Common Sergeant of London sitting at the Central Criminal Court, the applicant, then aged 31, was sentenced to an extended determinate sentence of nine years and two months, comprised of a custodial term of seven years and two months and an extended licence period of two years, for the offence of possessing a firearm with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1968.
- 3 The single ground of appeal is that the judge erred in finding the applicant to be dangerous within the meaning of section 279 of the Sentencing Act 2020 and, therefore, erred in imposing an extended term of sentence with the consequence that the sentence was manifestly excessive.

The Facts

- 4 The applicant wanted to assist his mother to get a tenant, Tom Kennedy, out of a property that she owned. Initially, he thought a brick through the window would be sufficient but a drug-dealing associate Kyle Kelson recommended that discharging a sawn-off shotgun would be more effective. Mr Kelson obtained one for him and the applicant collected the weapon from Mr Kelson.
- 5 At around midnight on 18 June 2020, the applicant, his cousin Lee Matthews and another drug-dealing associate, Aaron McGrath, went to the applicant's mother's property where Mr Kennedy lived in Sutton. They travelled with the shotgun in Mr McGrath's car and a taxi ordered in the name of another. The applicant pointed out to the others the property where Mr Kennedy lived and his bedroom window which was at the front of the house. The light was on and they presumed Mr Kennedy to be still up and in his room at the time. The

applicant then hid, waiting in the car in a nearby street, while Mr McGrath and Lee Matthews discharged the firearm through the bedroom window at the applicant's instigation and direction. The applicant had played a leading role in a group activity intended to cause maximum fear and distress, and an actual firearm had been discharged. Mr Kennedy was still up, and at home in his bedroom and in the event, by pure chance, he was uninjured. But what was done was extremely dangerous and could have had devastating consequences.

6 All three men left the area in a combination of three vehicles and went back to Mr Kelson's house, both to return the gun and to collect a consignment of cocaine that they had previously ordered and paid for. It transpired that the drugs were not there and following an altercation between the applicant and Mr Kelson in the street, the gun went off in Mr Kelson's face and he died at the scene. The three men disposed of the shotgun immediately afterwards and it has never been found. The applicant has been a professional Class A drug dealer for a number of years, earning several thousands of pounds a week.

7 The applicant, Lee Matthews, Mr McGrath and a fourth defendant named Gary Hayde were tried for the murder of Mr Kelson, possession of a firearm with intent to endanger life and for this offence. On the first day of trial, the applicant, Lee Matthews and Mr McGrath pleaded guilty to this offence. Lee Matthews, Mr McGrath and Mr Hayde were all acquitted of murder but the jury was unable to reach a verdict on the applicant. Following a retrial, the applicant was acquitted of murder and the offence of possessing a firearm with intent to endanger life was left to lie on the file. The Common Sergeant presided over both trials.

Sentence

8 The applicant had 10 convictions for 21 offences, spanning from 7 September 2010 to 9 November 2018. His relevant convictions included possession of an offensive weapon in a public place (2011), common assault on three occasions (2013), assaulting a constable (2015) and a section 20 wounding (2018). He was on licence at the time of this offence.

- 9 The victim personal statement made harrowing reading. Mr Kennedy was completely upended and he lives in constant fear, and now sleeps in his car so he can keep on the move. He has suicidal thoughts. However, the judge accepted that this was Category 2 harm and not severe psychological damage as he felt he had to ignore the impact of Mr Kelson's death on Mr Kennedy since the applicant and the other defendants were found not guilty of Mr Kelson's murder. It was common ground that it was a high culpability offence with a starting point of six years and a range of four to eight years in accordance with the guidelines.
- 10 The judge found that there were four aggravating features of the crime. First, a prohibited weapon - a sawn-off shotgun - had been used; secondly, the offence was committed as part of a group; thirdly, the firearm was disposed of following the incident and has never been recovered; and, fourthly, at the time of the offence the applicant was on licence for other offences.
- 11 In the context of the factual background, the judge regarded it as a very serious offence of its type. The judge reminded himself of the sentences he had given to Lee Matthews and Mr McGrath at the end of the first trial. He had made an upward adjustment to the starting point for Lee Matthews to eight years, the top of the range. But by an unfortunate mathematical error in applying a 10 per cent discount for the late guilty plea, he arrived at a final determinate sentence of six years and nine months, instead of the seven years and two months he had intended. Once pronounced, it could not be increased and Lee Matthews retains the benefit of the judge's mistake. Mr McGrath was sentenced to seven years.
- 12 The judge considered the applicant to be significantly more culpable than either Lee Matthews or Mr McGrath for three reasons. First, unlike them, he was on licence at the time of the offence following his release from a three-year sentence for dealing in Class A drugs and a specified section 20 offence of violence (of wounding his girlfriend). He had around nine months of his licence period still to run. Secondly, he was the protagonist,

organiser and principal mover. Thirdly, he used the others to do his dirty work and he exposed them to greater risk of being caught. The judge was particularly unimpressed with the way the applicant had hidden in Mr McGrath's car while the others fired the shotgun and how he had made sure the cars used were not his and taxis were booked in others' names. He also considered there had been much planning by the applicant. The judge found the applicant to be very selfish and a manipulative individual.

- 13 The judge concluded that a sentence outside the range was necessary and justified as the applicant was significantly more culpable than the other two. He agreed to allow a 10 per cent discount for the guilty plea since it had been indicated to the prosecution a few weeks before the first trial even though the plea was not entered until the first day of the trial.
- 14 A pre-sentence report assessed the applicant as posing a high risk of serious harm to the public. The nature of the risk was physical assault and associated emotional and psychological harm caused by controlling behaviour. The pre-sentence report author also noted a long history of domestic violence. The applicant expressed remorse and empathy in the pre-sentence report interview, but the report author was uncertain if the emotions and views expressed were genuine.
- 15 The judge was meticulous in disregarding the matters for which the applicant and his co-defendants were acquitted.
- 16 The judge concluded that there was a significant risk to members of the public of serious harm occasioned by the commission - - by the applicant of committing further specified offences in the future [for] four reasons. He concluded that the applicant was a manipulative, self-centred and determined career criminal. Secondly, because unlike his co-defendants, he had been the principal player and it was he who had decided to initiate and commit the offence whilst on licence. Thirdly, because of the background of his involvement in a substantial Class A drug dealing over a number of years; and, fourthly, because of the views of the pre-sentence report author.

- 17 The judge concluded that an upward adjustment to the starting point be made to nine years from which he then deducted 20 per cent, arriving at a custodial term of seven years and two months, and imposed an extended licence period of just two years.
- 18 The single ground of appeal would be that the judge arrived at a sentence which was manifestly excessive as the judge incorrectly concluded the applicant was dangerous.
- 19 The limited differences between the applicant and his co-defendants did not justify an extended sentence for the applicant when the two co-defendants had received determinate sentences and no pre-sentence reports had been ordered for them. It was submitted that the applicant's antecedent history was not particularly violent and was of a different type, unplanned domestic violence. No mention had been made of the extraordinary circumstances of the case which was that the offence had been committed as part of the applicant's tearful reunion with his mother and his desire to please her. The pre-sentence report author had noted that lack of maturity may have had an influence on his actions.

Analysis and Conclusions

- 20 The trial judge was best placed to make an assessment of the facts and the risk the applicant poses in the future, having heard all the evidence in both trials which included the applicant giving evidence twice over the course of 10 days. The learned judge made a careful and detailed assessment of the relevant factors in his sentencing remarks. As already noted, he was meticulous in putting from his mind and directing himself to take no account of those matters for which the applicant had been acquitted. He explained why he regarded the applicant as being in a different position from the two co-defendants. His conclusion was based on four distinct actions, all of which were based on the evidence, including the conclusion reached in the pre-sentence report. The conclusions in the pre-sentence report were consistent and supportive of the judge's conclusions. The author was also quite correct in noting that it was the judge's decision ultimately.

- 21 The fact that the applicant's previous violent offending was not of the same level could not preclude a finding of dangerousness given the particularly serious nature of this offence. The reasoning of the judge in his sentencing remarks is properly reflected in the material before the court (see *R v Bourke* [2017] EWCA Crim 2150). There are no arguable grounds to interfere with the judge's assessment of dangerousness. Mr Scobie KC correctly notes the imposition of an extended sentence is not automatic on a finding of dangerousness (see *Bourke*) but on the facts of this case, such a sentence was amply justified. It is not reasonably arguable that the decision to impose an extended sentence was manifestly excessive.
- 22 Leave and leave for representation is refused and the extension of time is also refused. It would not be in the interests of justice to extend time given the lack of merit in the appeal.
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CERTIFICATE

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