APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 6
HCA/2019/000568/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

DAVID DUDGEON

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Auchincloss (sol adv); PDSO
Respondent: M Hughes; Crown Agent

7 January 2020

[1] The appellant is a 43 year old first offender. On 25 June 2019, he pled guilty by section 76 indictment to a charge of possessing, at his home address, a quantity of texts, manuals, booklets, leaflets, video files and other guides containing information of a kind likely to be useful to a person committing or preparing an act of terrorism, contrary to the Terrorism Act 2000, section 58(1)(b).

[2] After a lengthy procedure involving extensive psychiatric examination the appellant was sentenced to a period of 2 years' imprisonment, reduced from the period of 3 years which would have been selected but for the early plea. A supervised release order for a period of 12 months was also imposed. The appellant has been granted leave to appeal but restricted to the argument that the starting point sentence of 3 years was excessive.

[3] The appellant appears to have a history of mental health issues dating back to 1995, including paranoia and low mood for which he received outpatient treatment. In March 2019 one of the appellant's treating psychiatrists contacted the police due to concerns about his disclosures and behaviour during consultation. A search of his home address took place. A number of documents of concern were found on electronic devices. These included:

- books which contained instructions on the production and use of crude chemical and biological weapons,
- documents and video files containing techniques for fighting and attacking with knives and other weapons in order to inflict fatal and non-fatal injuries, and
- a book describing itself as the Art and Science of Purposeful Concealment, which showed, amongst other things, how to smuggle weapons onto aeroplanes.

[4] The sheriff also reports that the appellant had disclosed a sustained interest in extreme right-wing material and had an extensive internet browsing history in which he accessed websites of an extreme far right nature and on topics including anti-Semitism, holocaust denial, racism, conspiracy theories and serial killers.

[5] In his report to this court the sentencing sheriff explains that in the period of deferral for sentence concerns about the appellant's mental state materialised. Various different reports were obtained but by the date of the sentencing diet, on 26 September, the available

medical opinion was to the effect that the appellant did not require assessment or treatment in hospital.

[6] The sentencing sheriff's view was that the charge which he was dealing with was a serious one and that there were aspects of the case which were both concerning and unusual. He noted that the websites accessed by the appellant and the materials gleaned from them were sinister, violent and disturbing and whilst the appellant had not acted upon the material which he had ingathered, his actions were worrying and spanned a period of years. The sentencing sheriff concluded that the appellant's conduct ought to be seen in the context of freely and frequently expressed violent and extremist racist views. In these circumstances he considered that only a significant custodial sentence was appropriate.

[7] On the appellant's behalf, it was contended that the sentence imposed was excessive. It was submitted that it was relevant to take account of the period of time which had passed without incident since the appellant downloaded the material specified in the charge. These documents were downloaded onto the appellant's computer in March 2013 and then on two days in July 2015. It was submitted that most of that material was last accessed on the same date as it was created by download and that the most recent date on which any of the material was accessed was 2 July 2015. Accordingly, it could be seen that the appellant had not accessed any of the relevant material for a period of years prior to his arrest. This was not only of relevance in the context of the appellant not having acted on any of the material but it was also relevant to take account of the passage of time which had elapsed between acquiring this material and making the various observations to the psychiatrists which the sheriff had been concerned about.

[8] It was also submitted that the observations which the appellant had made to the psychiatrist and which had caused concern were made at a time when he was being treated

for a presumed psychotic illness. In light of these circumstances it was contended that the sheriff had attached too much weight to the comments made by the appellant and that the headline sentence selected was therefore excessive.

[9] The offence to which the appellant pled guilty is one of a group of offences created by part 6 of the Terrorism Act 2000. The offence is committed by possessing items of a kind likely to be useful to a person committing or preparing an act of terrorism. The materials found in the appellant's possession plainly satisfied that requirement. The maximum sentence for an offence of this kind is 15 years imprisonment. The offence of possessing items of the appropriate sort is committed whether or not any further action is taken. Different and more serious offences occur if acts of a violent or terrorist nature are thereafter engaged in.

[10] Parliament has considered how best to respond to the threat of terrorist behaviour and has concluded that significant sentences should be available to be imposed on anyone who has engaged in the support or facilitation of such conduct.

[11] The sentencing sheriff in the present case gave careful consideration to the appellant's circumstances and balanced these against the nature of the material obtained by him. He took account of Parliament's purpose and intention in creating the offence with which he was dealing and he assessed the seriousness of the particular conduct concerned in light of the sentencing regime provided for. It is not clear whether the particular submissions founded upon in the present appeal were advanced before the sheriff at the sentencing diet. There is no reference in his report to a submission being made to the effect that the extent of the appellant's culpability should be mitigated by reference to the period of time which had elapsed since the material was downloaded. However, as was observed in presenting the appeal, it is clear from the sheriff's report that he was well aware of when

the relevant material was downloaded and when it had been accessed. The sheriff noted that the appellant had not acted on any of the material downloaded.

[12] However, this was not the only relevant consideration. As the sheriff noted in his report, the appellant had shown a sustained interest in concerning material and had an extensive internet browsing history disclosing access to websites of an extreme far right nature. Although not necessarily criminal conduct in and of itself, this ongoing interest legitimately cast a light on the context in which the appellant had downloaded the material specified in the charge and the appellant had frequently expressed violent and extremist racist views to those who had interviewed him. In our opinion the sheriff was correct to take account of this aspect of the case as reflecting on the appellant's possession of the prohibited material.

[13] In the whole circumstances we do not consider that the conclusion which the sheriff reached in selecting a headline sentence of 3 years' imprisonment can be described as excessive. The appeal must therefore be refused.