

Neutral Citation Number: [2014] EWCA Crim 1971

Case No: 201306168

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LUTON
HIS HONOUR JUDGE FARRELL QC
T20137251

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 15th October 2014

Before :

LORD JUSTICE DAVIS
MRS JUSTICE THIRLWALL DBE
and
MRS JUSTICE ANDREWS DBE

Between :

JORDAN ANTOINE
- and -
THE QUEEN

Appellant

Respondent

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr R Storey (instructed by **Lawtons Solicitors**) for the **Appellant**
Mr A J H Hilton QC (instructed by **the Crown Prosecution Service**) for the **Crown**

Hearing date : 15 August 2014

Judgment
As Approved by the Court

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Mrs Justice Thirlwall :

1. The issue in this appeal is whether a prosecution should have been stayed as an abuse of the process of the court where the defendant had already been convicted and sentenced for lesser offences arising out of the same facts.
2. On 30th July 2013 before Luton Magistrates the appellant, Jordan Antoine, then 19 (DOB 25.6.94), pleaded guilty to:-
 - i) Possession of a firearm without a certificate contrary to section 1(1)(a) of the Firearms Act 1968 as amended and
 - ii) Possession of ammunition without a certificate contrary to section 1(1)(b) of the same Act. He was sentenced to 4 months' imprisonment on each charge to run concurrently.
3. On 14th August 2013 he was charged with further offences and the case was sent to the Crown Court at Luton. There was a preliminary hearing on 27th August and a date set for legal argument which took place on 16th October 2013. In a ruling given on 18th October, HHJ Farrell QC refused to stay the prosecution. On 5th November the appellant pleaded guilty on Indictment to Count 1, Possession of a prohibited firearm contrary to S5(1) (ABA) of the Firearms Act (as amended) and to Count 2, Possession of a firearm following a detention and training order contrary to s21 (2) of the Firearms Act. He was sentenced the same day. On count 1 the sentence was 56 months' detention in a young offenders institution and on Count 2 to 24 months' detention in a young offenders institution, the sentences to run concurrently. This is his appeal against conviction and sentence which he brings by leave of the single judge.

The Background

4. The appellant was wanted for failing to attend at court in respect of a breach of a Detention and Training Order imposed on 8th June 2012 (just before his 18th birthday) for a series of offences, including the supply of Class A drugs. On 21st July 2013 he was seen via CCTV in Pastures Way, Luton. He was carrying a black bag. He was followed by armed police in vehicles and on foot and by a police helicopter. He ran into a house in Runham Close, Luton. The police entered the property and arrested him. The black bag was behind a sofa in the living room. Inside it was a silver revolver and some sandals. In the revolver was a round of ammunition. The trained firearms officer who found the gun described it in his statement as a viable handgun capable of firing a potentially lethal projectile. That statement was made on 22nd July, the day after the arrest.
5. The appellant was taken before the Luton Magistrates on 22nd July for breach of the DTO and sentenced to 30 days' detention. He began serving his sentence. On 25th July the police asked that he be produced for interview. He was brought to the police station but said he was hearing voices. The forensic medical adviser was called and declared he was not fit for interview and no interview took place.
6. According to the police report (on form MG3) "at 14 25 [on 25th July] an unsolicited comment was made by Antoine to Detention Officer Harris while he was conducting a cell watch of Antoine in Bedford Police Custody area as follows. He stated he had been brought to the Police Station from Bedford Prison and was serving 30 days for a

breach and “was fucked.” He stated he was looking at a long time, 10 years, “I got caught with a loaded handgun.”” This information was before HHJ Farrell QC in a statement dated 25th July. There was no dispute about the conversation. From the start the appellant was in no doubt about the seriousness of his position and was anticipating a lengthy prison sentence.

7. A Detective Constable sent the MG3 to the CPS for advice as to charge. It is not dated but it must have been sent very soon after the 22nd July. The proposed charge on the first page is “Possession of firearm and ammunition without a certificate.” The report sets out the facts and ends as follows “We are requesting the charging decision based on the evidence presented and in the absence of an account from the defendant based on a doctor’s decision that he was not fit to be interviewed. However the evidence is absolute and leaves no room for a justifiable defence to be represented.”

8. The CPS charging advice and decision appears on the form MG3. It was not produced in the Crown Court, not was it available to Mr Hilton QC who appeared for the CPS before us. It was provided during the appeal hearing by the solicitor for the appellant to whom we are grateful. It is not dated but the charge sheet is dated 25 July 2013. The relevant sections are as follows:-

“Evidential Criteria

Clear evidence that the suspect is in possession of the firearm with a round of ammunition in it ready to fire.

Firearms officer has confirmed it is a revolver handgun and capable of being fired.

S1 Firearms Act offences are appropriate in the circumstances

Public Interest

Nature and seriousness of the offences. Numerous shooting in the area recently.

Huge community impact. Lengthy sentence likely. In PI to prosecute.

Mode of Trial

Give the fact that the gun was loaded ready to fire in circumstances of the arrest these were clearly dangerous circumstances and a sentence well in excess of the powers of the Magistrates is inevitable.

Instructions to Court Prosecutor

Substantial grounds to believe he will CFO [commit further offences] and FTA [fail to attend]. He is facing lengthy sentence and has FTA in the past. He is involved in gang violence and will continue to offend. Appeal bail if granted as he is a danger to the community.

Anticipated guilty pleas

Forfeiture and destruction order.”

9. In the course of his ruling HHJ Farrell QC reproduced in his remarks what we were told was the relevant part of the statement from the Senior Crown Prosecutor who advised. It reads, “On 25th July I gave advice in the case of Jordan Antoine. In making this statement I have read the MG3 advice that I gave on that day. I make the following comments in relation to the said advice. It is my normal practice to record the information that I was given on the MG3 and I believe I would therefore have seen the material recorded and the material provided to the CPS on the said MG3. Without seeing these documents again I cannot say exactly what the material contained. From the top of the MG3 it is clear that I was asked to consider a Section 1 offence which I did in accordance with the evidence and the Code for Crown Prosecutors’ evidential and public interest test. From the comments I have made on

the form it is clear that I considered that the case should attract a lengthy sentence, well in excess of the powers of the Magistrates Court. There is no reference on the MG3 as to whether I considered any other offences. It is my normal practice that if I do consider other possible charges and dismiss them, then I would record this on the form. I have not recorded any such considerations ...and therefore I can only infer that I did not consider any other charges.”

10. We cannot understand the charging decision. The purpose of Section 1 is to regulate and license the use of firearms. It is generally considered to be the default category where a weapon is not dealt with elsewhere. S1 offences are triable either way. If tried summarily the maximum sentence on each is 6 months’ imprisonment. If tried on indictment (save where the offence is aggravated where the maximum is 7 years) the maximum sentence on each is 5 years’ imprisonment.
11. A revolver is a prohibited weapon (see section 5). A firearms certificate is not available for a revolver. The obvious charge was under section 5(1)(ABA) of the Firearms Act 1968. This carries a mandatory minimum sentence of 5 years’ imprisonment in the absence of exceptional circumstances. It is triable on indictment only (see section 51A). No explanation was given for the failure to consider section 5 or for the misconceived focus on section 1.
12. The police charged the appellant with the offences under section 1 on 30th July and he appeared before the magistrates the same day. He pleaded guilty and was sentenced to 4 months’ imprisonment, as we have said. We understand from the defence (no information being available from the CPS) that there was no application for the case to be sent to the Crown Court to be dealt with on indictment. Apparently the case was dealt with before the magistrates by a CPS paralegal who has not been identified. There is no statement from him/her as to what happened at court that day. The only instructions to the paralegal are those contained in the advice we have set out above. There is no attendance note of the hearing. No one from the CPS attended the hearing before us. Mr Hilton QC appeared alone, without even having the original file available to him. This was highly regrettable, given the nature of the appeal and the circumstances of the charges.
13. The following day, 31st July 2013, the CPS wrote to the Magistrates and sought to reopen the sentence pursuant to s142 Magistrates Court Act 1980. That provision permits the Magistrates to correct errors in certain circumstances. We have not seen the letter to the Magistrates. We do not know what error was being attributed to them. HHJ Farrell’s ruling reveals that the CPS considered that the Magistrates had been unduly lenient, in the light of the authorities. Given that these were treated as summary offences and the appellant had pleaded guilty at the earliest possible stage, the sentences of 4 months represented the maximum the Magistrates could impose. There could be no complaint about the fact that the sentences were concurrent. The mistakes were made by the CPS. As a result the appellant was charged with the wrong offences and was dealt with in the wrong court.
14. Whatever the basis of the application to reopen the sentence, it was considered on the papers and refused by the Magistrates in a decision communicated by the CPS to the defence on 9th August 2013. In the same letter the CPS said they would be charging the appellant with further firearms offences. On 14th August he was charged with

three offences under the Firearms Act, including those to which he later pleaded guilty. Thus, just over 3 weeks after his arrest, the appellant was charged with the section 5 offence which reflected his criminality and to which he later pleaded guilty. An offence in respect of the ammunition was left on the file. An offence under section 21 was also pursued. It did not, in our judgment, add anything practical to the section 5 charge.

15. By the time the appellant was charged with the further offences the police had received a document described as an “interim statement” from a forensic scientist, dated 7th August. He described the gun as a conventional working revolver of .44 S&W Russian calibre and a prohibited weapon. The ammunition was not, he thought, viable. Mr Hilton submitted that this was new information, a submission the judge accepted. The statement of the forensic scientist reveals that he received the gun from the police on 26th July 2013. No explanation was given to us as to why the gun was sent to him at that stage, nor as to why the result of the examination was not obtained before the appellant was charged and dealt with in the Magistrates. The evidence was only “new” because a decision was taken to charge before it was received. Justice was not served by this ill informed headlong rush to court.

PROCEEDINGS IN THE CROWN COURT

16. Before HHJ Farrell QC Mr Storey for the appellant had put his case in two ways: first that the appellant was entitled to rely on a plea of autrefois convict and second that the prosecution should be stopped as an abuse of the process of the court. He did not appeal against the judge’s refusal to allow the plea of autrefois convict. The law is clear; the second set of offences were different from those to which the appellant had originally pleaded guilty. A plea of autrefois convict was bound to fail (see Rose LJ VP in **R v Beedie [1997] 2 Cr App R 167**, at page 170, repeated most recently by Pitchford LJ in **R v Dwyer [2012] EWCA Crim 10**, paragraphs 15 and 16.

Abuse of Process

17. Before turning to the detail of the arguments we pay tribute to the written and oral argument of Mr Storey. He has presented the case with commendable skill and focus. We are also grateful to his solicitors for their attendance and the assistance they gave during the course of the hearing.
18. Mr Storey relied on the decision in **R v Beckford [1996] 1 Cr App Rep 94** where this court identified the two categories of case where a prosecution should be stayed:-
 - a) cases where the court concludes that the defendant cannot receive a fair trial and
 - b) cases where the court concludes that it would be unfair for the defendant to be tried.He accepted that the defendant could have a fair trial but submitted that it would be unfair for the defendant to be tried here; the case comes, he submits, into the second category.
19. In the years since the decision in **Beckford** (and indeed in a decision of the House of Lords the same year – see **R v Latif [1996] 2 Cr App R 92** at 100) the second category has been developed and refined. It is well established that a stay for an

abuse of the process of the court may be imposed in either of the following circumstances:-

i) that a fair trial is impossible

ii) that the continued prosecution offends the court's sense of justice and propriety or public confidence in the criminal justice system would be undermined by the trial - see the judgment of Lord Dyson sitting in the Privy Council in **Curtis Warren v HM Attorney General of the Bailiwick of Jersey** [2011] 2 Cr App R 29 at paragraph 25.

20. The courts have not endeavoured to identify every situation which would come within this second category. Lord Dyson referred to "the infinite variety of cases that can arise". The facts of each case must be examined carefully.
21. Mr Storey relies on the statement of Lord Cockburn CJ in **R v Elrington** [1861] 1 B & S 688, "whether a party accused of a minor offence is acquitted or convicted he should not be charged again on the same facts in a more aggravated form." and on the principles to be distilled from the line of cases dealing with the doctrine of autrefois convict and related abuse of process, beginning with the decision of the House of Lords in **Connelly v DPP** [1964] AC 1254, HL. Where a person has once been tried on particular facts what is required, Mr Storey submits, is a "special application of the abuse of process rules." The starting point is that it is prima facie oppressive to put that person on trial a second time. Before being permitted to do so the Crown must first demonstrate that there are special circumstances justifying a second trial. If there are no special circumstances then the case should be stayed as an abuse. If there are such circumstances the judge should then consider whether, in the exercise of his discretion, he should stay the prosecution. Mr Storey further relies on the decisions of this court in **R v Beedie** [1998] QB 356 and in **R v Dwyer** [2013] EWCA Crim 10. In each of those cases different constitutions of this court found that it was for the Crown first to demonstrate special circumstances and then to demonstrate that to proceed would not be an abuse of process. This is different from the conventional approach to applications to stay a case as an abuse of process. There the burden is on the defendant - see the **Consolidated Criminal Practice Direction** [2002] 3 All ER 904 Pt IV, at para 36 and the **Criminal Procedure Rules**. Wherever the burden lies we do not think that cases where a defendant is being prosecuted on the same facts as those which have led to an earlier conviction constitute a different category of abuse of process (and Mr Storey did not suggest that they did). Such cases come within the second category. It would be surprising, we think, were the requirement to prove special circumstances to lead to a different conclusion from the one reached where the question is whether to permit the case to continue would offend the court's sense of justice and propriety.
22. The phrase "special circumstances" originates in the speech of Lord Devlin in **Connelly** at pages 1359-60:
"As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried...but a second trial on the same or similar facts is not always necessarily oppressive," We pause there. The principle underlying the general rule is that a trial for different offences arising out of the same facts that led to an earlier trial is **prima facie** oppressive. Lord Devlin continued: "and there may in a particular case be special circumstances which make it just and convenient in that case. The

judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule.”

23. In this case HHJ Farrell QC formulated the question to be asked thus: “Have the prosecution satisfied me that in this particular case there are special circumstances which make it neither oppressive nor unjust to try this defendant on the charges set out in this indictment?” Mr Storey did not submit that the judge asked the wrong question. He submits that he came to the wrong conclusion in the light of the decisions of this court in **Connelly, Beedie and Dwyer**.
24. In **R v Beedie** the appellant was the landlord of a number of flats. He failed properly to maintain a gas fire in one of the flats. As a result, on 29 November 1993 a young woman died of carbon monoxide poisoning. He was prosecuted for breach of his duty under section 3 (2) of the Health and Safety at Work Act 1974. He was fined £1500 on 14th June 1994. He was then prosecuted under the Housing Act 1985 and ancillary regulation for further breaches of his obligations in respect of gas fires in other flats. He was conditionally discharged on 25 March 1994.
25. An inquest took place in August 1994. The appellant was required by the coroner to give evidence. He was not informed that he was not obliged to incriminate himself. On the contrary the coroner told him that there was no question of a further prosecution and so he could not incriminate himself. He gave evidence. The jury found that the young woman had been unlawfully killed. The CPS (who had not been informed of the case until this stage) then instituted proceedings for manslaughter. The appellant pleaded autrefois convict and applied for the prosecution to be stayed. The trial judge refused the plea of autrefois convict and refused to stay the prosecution. The appellant pleaded guilty. He was sentenced to 18 months’ imprisonment suspended for two years.
26. The Court of Appeal overturned the conviction on the grounds that the prosecution was an abuse of the process. At 366E Rose LJ VC said “A stay should have been ordered because the manslaughter allegation was based on substantially the same facts as the earlier summary prosecutions, and gave rise to a prosecution for an offence of greater gravity, no new facts having occurred, in breach of the principle in **Reg v Elrington 1 B&S 688**”. There were no special circumstances. Rose LJ observed that in **Connelly** Lord Devlin did not attempt a definition of special circumstances but had given as an example the situation where a judge would have ordered separate trials had the offences in the second indictment been included in the first but the prosecution preferred two indictments without demur from the defence. Rose LJ found that “nothing remotely akin to those situations arose in the present case, and we can see no special circumstances of any kind.” The court did not attempt to define special circumstances but said that the two matters there relied on by the Crown, namely the public interest in the prosecution of cases where death occurs and the wishes of the victim’s family, whilst good reasons to permit the prosecution to continue did not give rise to special circumstances. Accordingly the judge was in error in carrying out the balancing exercise. In the absence of special circumstances the prosecution should have been stayed. The conviction was quashed.
27. We note the delay between the death of the young woman and the inquest, the circumstances in which the appellant had given evidence and the further delay before charge.

28. In **R v Dwyer** the central issue was whether there was indeed a second prosecution brought “on the same or substantially the same” facts – see Pitchford LJ at paragraph 19. The appellant had pleaded guilty in the Crown Court to possession of 3.41 grams of heroin in 25 wraps with intent to supply. At that time the prosecution had evidence which gave rise to the strong suspicion that the appellant had done this before but it did not have evidence upon which to charge him with a conspiracy the breadth of which later appeared in the second indictment. That evidence became available later in the form of telephone and ANPR evidence. However when sentencing the appellant the recorder had before her his admission that he had been supplying heroin on a frequent basis for a period of six months. He was a drug addict. In the light of the mitigation the recorder sentenced the appellant to 12 months’ imprisonment suspended for 2 years. The prosecution then charged the appellant along with 4 co-accused with conspiracy to supply Class A drugs. The period of the conspiracy was the same six months in respect of which the appellant had made admissions. He appeared before the Crown Court in April 2011 and pleaded autrefois convict and also submitted that the case should be stayed as an abuse of the process. The judge ruled against him and he then pleaded guilty to the conspiracy. In due course he was sentenced to 4 years’ imprisonment. He appealed.
29. In giving the judgment of the court Pitchford LJ concluded that the prosecution had misled both the Crown Court judge before whom the plea to the new count had been entered and Butterfield J who sentenced the appellant. The prosecution case had shifted significantly so that by the time it was presented to the Court of Appeal it was clear (and the court so concluded) that the appellant had been sentenced by the recorder “on almost precisely the same basis as that now conceded to be the basis on which the second set of proceedings was founded.” The court was satisfied that had this been made clear to Butterfield J he would not and indeed could not have concluded “that the evidential picture now available here is wholly different from the picture that existed at the time [the appellant] was [first] sentenced.” At paragraph 31 Pitchford LJ said “The fact that the sentence was exceptional is not a basis for giving the prosecution a second bite at the same cherry, let alone for finding special circumstances requiring a further prosecution in the interests of justice.”
30. Mr Storey says that the second set of charges in the appellant’s case was brought before the Crown Court because the prosecution were dissatisfied with the sentence (as HHJ Farrell observed in his ruling). It follows, Mr Storey submits, that there are no special circumstances here either.
31. We cannot agree. True it is that the sentence was the catalyst for the prosecution reviewing this case, but here, unlike in **Beedie** and **Dwyer**, no one with the responsibility for prosecuting this case correctly applied their minds to the appropriate charges and how they should be prosecuted. This was not an escalation from minor charges to more serious charges, contrary to the general rule described in **Elrington**, but a move from misconceived charges to correct charges.
32. There is this further consideration. This appellant was carrying a loaded revolver through the streets of Luton. He was subject to a detention and training order. He knew the risk he was taking of being sentenced to a long custodial term. He was expecting to go to the Crown Court. He was expecting a term measured in many years. The sentence of 4 months’ detention was an unexpected, astonishing and undeserved windfall. Leaving aside the misguided attempt to have the sentence

revisited by the Magistrates, the appellant was aware that appropriate charges were to be brought 9 days after the sentence was imposed and only 19 days after arrest. The facts are quite different from those in **R v Beedie** and **R v Dwyer**.

33. We have no hesitation in concluding that the judge was justified in finding that there were special circumstances here which required that the prosecution continue. The court's sense of justice and propriety was not offended nor was public confidence in the criminal justice system undermined. On the contrary, a stay would have brought the criminal justice system into disrepute.
34. We have made it plain that we accept that serious mistakes were made but there was no bad faith and the mistakes were rectified within a very short time. The fact that the fault lay with the Crown Prosecution Service did not require the grant of a stay, given the circumstances of this case.
35. The appeal against conviction is dismissed.

Appeal against Sentence

36. We have set out the facts earlier in this judgment. At the time of the offence the appellant was on licence. He was already in breach of the terms of the detention and training order. This was a further very serious breach and a serious offence in its own right. By the time he was sentenced the appellant was awaiting sentence for further offences of supplying Class A drugs which predated the offences with which we are concerned. As a juvenile he had been before the courts for robberies and possession of knives in a public place.
37. In sentencing the appellant the judge had regard to the matters set out in the guideline case of **R v Avis [1998] 2 Cr App R (S) 178**. He noted that the gun was in the appellant's possession in a public place. It was loaded but the forensic evidence was that the ammunition was not viable. He accepted that the gun had not been brandished and the appellant had not sought to use it.
38. The appellant was still only 19 and had pleaded guilty at the first opportunity in both courts to both sets of offences. He had also spent a week believing that he had got away with a 4 month sentence.
39. The judge considered the mandatory minimum sentence. The relevant provision is section 51A:

"(2) The court shall impose an appropriate custodial sentence ... for a term of at least the required minimum term ... unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify its not doing so...

(4) In this section the 'required minimum term' means-

(a)(i) ...five years."

40. The judge found that the fact that the appellant had already served 4 months in the circumstances we have described constituted exceptional circumstances (relating to

the offender) within the meaning of the section and said that he would reduce the sentence to reflect that period in custody. He then went on to consider the pleas of guilty. He observed “were it not for the mandatory provisions I would ...have to give you full credit for your plea of guilt, which would require a discount of the full one-third.” Nonetheless he concluded that he was precluded from making that reduction.

41. Mr Storey accepts that the judge was correct to say that the mandatory sentence may not be reduced to take account of a guilty plea (see **R v Jordan, Alleyne, Redfern [2005] 2 Cr App R (S) 44** at paragraph 26) but, he submits, once the judge had found exceptional circumstances sentence was at large. We agree. In **Redfern**, Douglas Brown J, giving the judgment of the Court of Appeal (dismissing the appeal), said, “once a judge has properly identified exceptional circumstances the sentence is at large. The minimum sentence provided in the section is a factor which the judge can take into account, as he will also take into account the guideline case of **Avis** and all available mitigation. This will not only involve the exceptional circumstances themselves, but also good character and a timely plea of guilty.”
42. We have therefore reviewed the sentence on count 1 in light of the judge’s finding of exceptional circumstances. There is no need to repeat any of the circumstances. Suffice it to say that we consider that a provisional sentence (before reduction for a guilty plea) of 5 years would have been the right sentence for this offence committed by a man of 19, with this record. We reduce that by 4 months to reflect the judge’s finding and then reduce the resulting 4 years and 8 months by one third to reflect the early guilty plea. Accordingly the sentence is one of 37 months on count 1. The sentence on count 2 remains unchanged.
43. Accordingly the appeal against sentence is allowed. We quash the sentence of 56 months and substitute for it a sentence of 37 months in a young offenders’ institution.