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201705332/A4

**Neutral Citation Number: [2018] EWCA Crim 1296**  
**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 16 May 2018

**B e f o r e:**

**PRESIDENT OF THE QUEEN'S BENCH DIVISION**  
**(SIR BRIAN LEVESON)**

**MR JUSTICE JAY**

**MRS JUSTICE McGOWAN DBE**

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**R E G I N A**

**v**

**RICHARD ANTHONY McMAHON**

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(Official Shorthand Writers to the Court)

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**Mr N Robinson** appeared on behalf of the **Appellant**

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1. MR JUSTICE JAY: On 24 November 2017 this appellant was sentenced by Mr Recorder Anthony Clover, sitting at Kingston Crown Court, on what had become a two count indictment, following guilty pleas, to a total term of 5 years' imprisonment. On count 2, possessing a disguised firearm, contrary to section 5(1A)(a) of the Firearms Act 1968 the sentence was 5 years' imprisonment; on count 3, possession of a controlled drug (cannabis), contrary to section 5(1) of the Misuse of Drugs Act 1971, a concurrent sentence of 3 months' imprisonment was imposed. Various consequential destruction and forfeiture orders were made.
2. The appellant appeals against sentence by leave of the single judge.
3. The facts were that on 16 November 2016 police searched the appellant's bedroom in connection with other matters. They found a disguised firearm, namely a stun gun disguised as a torch in the top drawer of a cupboard in the front bedroom that he was occupying at the time. It looked like a torch except for a pointed electrode at the front which was powered by an internal battery. It was tested in the condition it was received and it was found to be in working order. Electrical pulses were observed as blue sparks between the electrodes on the head of the device. The torch and laser function were both in working order. It was marketed as a non-lethal self-defence item which could be discharged when activated when held next to someone: it was a short ranging incapacitating weapon. There was no evidence that the weapon had ever been used and it was not capable of achieving a lethal outcome.
4. The police also found two cannabis growing plants and 243 grams of harvested herbal cannabis in a small room and small tent containing a light.
5. The appellant was arrested and admitted to growing cannabis which he smoked due to anxiety and depression and that he had no intention of supplying it to anyone else. His plea to simple possession was accepted.
6. The appellant's basis of plea, which the Crown accepted, was that:
  - (i) The stun gun or torch was given to him as a present by his friend, Marcus, who had been on holiday in Turkey. Marcus had since died and the appellant kept the item for sentimental reasons but also in the event that he should need a torch;

(ii) The appellant had never used the stun gun feature of the item; and

(iii) The appellant did not know it was illegal to be in possession of such an item.

7. Although the prosecution commented on the plausibility of certain aspects of the basis of plea, they did accept it and there was no Newton hearing.
8. The appellant was born on 1 April 1985. He had seven previous court appearances for 17 offences between 2001 and 2009. The only matter of very marginal relevance was the appellant's conviction for possession of an offensive weapon in a public place in 2003. That was not a firearm.
9. According to the pre-sentence report the appellant was a low risk of re-offending and of serious harm. He had complied with all bail conditions and had demonstrated a willingness to engage fully and should a custodial sentence be avoided a suspended sentence of 18 months suspended for 2 years was proposed.
10. The appellant relied on character evidence which was also before the Recorder.
11. In his sentencing remarks the Recorder listed the exceptional circumstances which were being advanced on behalf of the appellant included, as his basis of plea makes clear, his absence of belief that the possession of the gun was unlawful.
12. The Recorder concluded at page 3D of the transcript that it was very difficult to believe that the appellant was unaware that it was illegal to possess this item. He was a man with some considerable experience of life and the court was satisfied that there were no exceptional circumstances and that he would not be unjust to pass the minimum sentence.
13. The grounds of appeal, ably developed orally by Mr Robinson, are that the Recorder should have found that there were exceptional circumstances in line with the approach set out in this court in R v Rehman [2006] 1 Cr App R(S) 77. In short, the guidance in Rehman is that first, circumstances are to be regarded as exceptional where the minimum sentence would result in an arbitrary and disproportionate sentence; secondly, it was not appropriate to look at each circumstance separately - a holistic approach was required. Thirdly, the deterrent purpose of the provision has no effect in relation to a person who was not aware that he was committing an offence under the section.
14. As for the exceptional circumstances said to exist here, paragraph 20 of the grounds is relevant and, in our view, six points really fall to be considered. First, the appellant had not bought the item himself but rather was given it by someone else; secondly, albeit a firearm, the stun gun was a non-lethal weapon and the lower end of the scale of illegal firearms; thirdly, the applicant had never used the stun gun feature of the item; fourthly, the appellant had no intention of ever using the stun gun feature of the item; fifthly, the appellant had retained the item for sentimental reasons; and sixthly, the appellant did not know it was illegal to possess the item. Further, the point is made by Mr Robinson

that the Recorder should not have rejected the basis of plea without a Newton hearing.

15. We consider that there is merit in these grounds. Save for observing that it was very difficult to believe that the appellant was unaware that possessing this weapon was unlawful the Recorder really gave no other reasons for rejecting the appellant's case. Although the appellant's apparent ignorance may not have been particularly plausible, it was the basis of his plea and it was unfair to him to reject it without giving him the chance of a Newton hearing. It follows that in that particular regard the Recorder erred in principle. It also follows that we can approach the sentencing exercise for ourselves, taking into account the exceptional circumstances which have been advanced.
16. We think that this was a somewhat unusual case, which merits close examination. The considerations advanced on behalf of the appellant should be considered cumulatively against the policy backdrop of a provision which requires the imposition of a minimum sentence for deterrent reasons unless exceptional circumstances are made out.
17. Taking all the circumstances of this particular case into account on that cumulative basis and following the guidance in Rehman, we conclude that exceptional circumstances are made out. We have particular regard to the characteristics of this weapon, its non-lethal features, the manner of the appellant's acquisition of it and his ignorance of the inherent illegality of bare possession. In the circumstances we have concluded that the Recorder erred and imposed a disproportionate sentence which was manifestly excessive.
18. In deciding the sentence which we should properly substitute for the sentence that was imposed, we take into account the appellant's mitigation. However, the seriousness of this offence and the important element of deterrence which continues to underpin the Parliamentary purpose, drives us to conclude that the appellant should receive a custodial sentence which cannot be suspended. The appeal is allowed to the extent that the sentence of 5 years' imprisonment on count 2 is quashed and for it is substituted a sentence of 30 months' imprisonment.

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