

Neutral Citation Number: [2019] EWCA Crim 170

No: 201705466/A2

**IN THE COURT OF APPEAL**

**CRIMINAL DIVISION**

Royal Courts of Justice

Strand

London, WC2A 2LL

Friday, 25 January 2019

**B e f o r e:**

**LORD JUSTICE BEAN**

**MR JUSTICE NICOL**

**MR JUSTICE POPPLEWELL**

**R E G I N A**

**v**

**KARL REECE GARDENER**

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**Mr M Wolkind QC** appeared on behalf of the **Applicant**

**J U D G M E N T**

(Approved)

1. LORD JUSTICE BEAN: On 28 September 2017 in the Crown Court at Basildon, the applicant Karl Reece Gardener pleaded guilty to possession of an imitation firearm with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1968. On 6 December he was sentenced by Her Honour Judge Leigh to an extended sentence of seven years and four months' imprisonment, comprising a custodial term of five years and four months and an extended licence period of two years. There were two counts under section 16A and the sentence was the same concurrent on each count. He also pleaded guilty to a minor drug offence, namely simple possession of cannabis, and received a concurrent sentence of two weeks' imprisonment: we need say no more about that. He renews his application for leave to appeal against the sentence on the two firearms counts after refusal by the single judge.
2. The applicant had been in a relationship for about eight years with Miss Lauren Carr. They had two children together. On 17 August 2017 Miss Carr ended the relationship by leaving the address that she shared with the applicant and moving with the two children to live with her mother and her step father, whose name was Clifford Connors.
3. Over the following few days the applicant sent abusive and threatening text messages to Miss Carr with remarks such as: "You're lucky I didn't get someone to throw acid in your face" and "I'm going to fucking punch you". On one occasion he also attended the address of her mother and step father but was refused entry.
4. In the early hours of 27 August, following a night out drinking with friends, he attended the address again and threatened to smash the windows and burn the house down. Miss Carr's mother and step father were at home; Miss Carr herself was out with friends.
5. Subsequently, Miss Carr received three short videos from the applicant which had been sent to her mobile phone. In the videos the applicant can be seen in the company of another man inside a BMW vehicle. The applicant is seen at various points in the videos holding a shotgun with clingfilm over his hands. There is also a pistol lying around in the car. He makes remarks principally directed at Mr Connors rather than Miss Carr, such as: "I'm going to ruin your fucking life. Your fucking stepdaughter thinks she can hide but she can't. I'll fucking blow them away. Clifford, I'll come and knock your fucking door off. I've got a semi-automatic. I swear to you I'm ready for any of you": and so on and so forth on the same lines.
6. Miss Carr showed the videos to her parents and the police were called. The applicant sent text messages to Miss Carr asking her to retract the complaint. He was subsequently arrested on 29 August.
7. When the applicant pleaded guilty in the Crown Court a pre-sentence report was commissioned and was available to the sentencing judge. In section 3 of the report, the writer notes the lack of insight shown by the applicant:

"Mr Gardener acts in an instrumental manner most likely as a means of

asserting his control over the victim and her family. He shows no insight into this abusive behaviour and the harm he has previously caused. This lack of insight is likely to have contributed to these current offences."

And then this at section 4:

"I acknowledge the court have requested dangerousness to be assessed. In making my assessment and recommendation I have referred to the Legal Aid, Sentencing Punishment of Offenders Act 2012. Mr Gardener's offending behaviour has quickly escalated in seriousness following the breakdown of his relationship with the victim. As stated, he has a previous Domestic Violence Prevention Order as a result of his behaviour towards Miss Carr and in her statement she has indicated that Mr Gardener has been abusive and controlling in nature. She has taken control by leaving him which has caused him to resort to threatening behaviour that has had a significant impact on Miss Carr and her family. His emotional state and alcohol use are factors in the behaviour though it is likely that his attitudes ultimately motivated his actions. Mr Gardener is unable to acknowledge that previous behaviours towards the victim have been harmful and without this insight, he is unlikely to accept there is a need to change. This increases the risk of him committing further offences against Miss Carr and her family. His previous offence of wounding indicates that Mr Gardener is capable of inflicting significant harm against another, and whilst subject to bail, he made further threats against the victim. He is still of the view that he was not guilty of the previous conviction against him. Again, a pattern of denial around his behaviour is emerging. When considering dangerousness, I am unable to determine whether Mr Gardener was intent on carrying through with any of the threats he made towards Mr Connors. While his conviction is for an imitation firearm, I am unable to determine whether this was the case, or whether the guns were real. If he does have access to weapons, this would significantly escalate the risk he poses towards the victims. I have concerns that unless Mr Gardener can accept the breakdown of the relationship, and can accept that he has been an abusive partner, the risk he poses to the victims is unlikely to reduce. Presently he is assessed as posing a high risk of serious harm towards Miss Carr and her parents."

8. In her sentencing remarks the judge referred to the history and said at page 1C:

"It is clear that before the offences were committed you sent numerous text messages to Miss Carr of a threatening nature, and also when you saw her out in a vehicle, you drove at her in a clear attempt to frighten her. You also sent a message threatening so throw acid at her.

It is important that people understand that the background of it, when I am being asked to take into account the mitigation I [have heard] about your remorse and that this is you acting out of character. Well, I'm afraid your previous behaviour to that makes hard for me to accept those

submissions..."

Then she mentions the contents of the videos. She addresses a co-defendant and then after reference to the applicant's police interview, she continued:

"Mr Gardener, there was a dangerousness assessment ordered on you, because of your previous convictions, and because of the sentence that can follow from this offence. I am satisfied that the criteria is laid out for your offence of an extended sentence. Your inability to accept the previous offending, and from what I can see of your behaviour on the video clips sent to Miss Carr, the risk that you, in my view, so clearly still pose to her."

9. In his submissions before this court, Mr Michael Wolkind QC, who did not appear at trial, submits that the judge failed (and indeed the probation officer, in a passage in the pre-sentence report, which we have not read out), failed to remember that following the decision of this court in Burinskas [2014] 2 Cr.App.R (S) 45, as recently restated in Bourke [2017] EWCA Crim. 2150, the imposition of an extended sentence does not follow automatically from a finding of dangerousness; and it is not every case in which a defendant is found to pose a high risk of serious harm to members of the public whom it is necessary for the protection of the public to impose an extended sentence rather than a determinate sentence. That is correct as a matter of law, and it is a little unfortunate that the passage we have read from the judge's sentencing remarks, ending with the words "the risk that you in my view so clearly still pose to her", does not go on to add something on these lines: "The risk is such that in my view it cannot adequately be met by the imposition of a determinate sentence."
10. In our view those missing words are clearly implicit. We consider that in the light of the contents of the videos and the menacing behaviour of the applicant in the days following Miss Carr's departure from the home they had shared, the conclusion that the applicant posed a high risk of serious harm to members of the public (whether to Miss Carr, her step father or anyone else) was amply justified. The contents of the pre-sentence report are very clear and the conclusion drawn as to risk by the writer is one which she was entitled to draw and which the judge was entitled to follow. The judge was entitled to form the view that a determinate sentence would be inadequate protection.
11. We consider that the finding of dangerousness is unimpeachable and the judge's decision to impose an extended sentence rather than a determinate sentence is likewise unimpeachable.
12. We turn to the second ground of Mr Wolkind's appeal which can be more shortly stated. Section 16A of the Firearms Act 1968 creates an offence of possession of a firearm or an imitation firearm with intent to cause fear of violence. Whether the firearm is real or imitation, the statutory maximum sentence is one of 10 years. In the present case the sentence imposed by the judge was as follows. She said that if there had been a trial the starting point for the sentence on the applicant would have been in the region of eight years; he was entitled to full credit for his prompt plea of guilty; and

that reduced the custodial element of an extended sentence to one of five years and four months, to which she added the extended licence period.

13. Mr Wolkind submits that in the case of possession of an imitation firearm, a starting point of eight years is too close to the maximum of 10 years. Although the weapons shown in the videos have not been recovered so that it is possible that they were real firearms, we must approach the case and the learned judge clearly did approach the case, on the assumption in the applicant's favour that they were imitation firearms since that is the particulars of the offence given in the indictment. It would also clearly have been inappropriate to do other than impose concurrent sentences on the two counts.
14. In the grounds of appeal settled by trial counsel, there is reference in particular to the case of Oddy [2009] 2 Cr.App.R (S) where an appellant had pleaded to possession of a firearm, that is a real one, with intent to cause fear of violence. In that case the gun had been pointed at the victim and then fired above her head causing a bullet hole in the wall behind her. That appellant, who had previous convictions for firearm offences and who had pleaded guilty, had a sentence of seven years reduced to six years on appeal. The point is made that if a starting point of the statutory maximum was inappropriate in the case of a real firearm fired in the presence of the victim, then the sentence for possession of an imitation firearm should adopt a considerably lower starting point. In another case, Attorney-General's Reference No 20 and 21 of 2010 (Smith and Gethin), where a shortened shotgun was discharged through the letter box of the front door of an occupied flat, the increased sentence imposed by this court on the reference was five years.
15. Of course every case is different. But, as we have said, it must be assumed in the applicant's favour that these were imitation firearms. Another point in mitigation, although only a relatively minor one, is that the threats were not made face to face.
16. We have no sympathy with this applicant whose behaviour towards Miss Carr and her family has been shocking and terrifying. Nevertheless, we think that the starting point of eight years was somewhat too high having regard to the factors to which we have referred. We consider that the correct starting point would have been seven years. Applying the one-third discount which the judge gave for the prompt plea, the custodial term is reduced to 56 months, plus the licence period of two years, making 80 months in all.
17. We therefore quash the concurrent sentences imposed by the judge on the firearms charges and substitute concurrent extended sentences of 80 months, comprising a custodial term of 56 months and an extended licence period of two years. To that extent, this appeal is allowed.

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