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THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday 2nd May 2019

B e f o r e:

LADY JUSTICE NICOLA DAVIES DBE

MR JUSTICE SPENCER

MR JUSTICE MORRIS

R E G I N A
v
CANICE JOSEPH HAYIBOR

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Ms Natalie Csengeri appeared on behalf of the **Appellant**

J U D G M E N T
(Approved)

1. **MR JUSTICE SPENCER**: On 11th January 2019 in the Crown Court at Sheffield the appellant, now 24 years of age, was sentenced by His Honour Judge Thomas QC to a term of 18 months' imprisonment for an offence of possessing an article with a blade in a public place, contrary to section 139(1) and (6) of the Criminal Justice Act 1988. He had pleaded guilty to the offence in the magistrates' court and was committed to the Crown Court for sentence. He was afforded full credit of one-third for his guilty plea. The appeal is brought by leave of the Single Judge.

2. The principal ground of appeal is that the judge must have concluded that the appropriate sentence after trial would have been 27 months' imprisonment, which was well above the starting point for such an offence in the relevant Sentencing Council guideline and accordingly the sentence was manifestly excessive. Ms Csengeri also submits on behalf of the appellant that the judge should have considered suspending the sentence of imprisonment.

3. The bare facts can be shortly stated. At around 11.30 pm on Friday 23rd November 2018 a blue Jaguar car arrived outside 43 Regent Street, Balby in Doncaster. This was captured on CCTV. At least three males got out of the vehicle. The driver remained in the vehicle. The three males were holding what appeared to be long-barrelled shotguns. They took aim at 43 Regent Street, which is a terraced house, and opened fire. There were multiple shots. The males then got back into the car and drove off at speed. The appellant emerged then from 43 Regent Street brandishing a machete. He was seen running up and down the street with others also in possession of weapons.

4. The appellant said in his police interview that he took a weapon from the house to protect himself, with the aim of warding off those attacking him; he was also trying to bring back into the house a pregnant female who was outside in the street in order to protect her. He described the weapon in his police interview as a "small kitchen knife", but when the machete was pointed out to him on the CCTV he admitted that this was in fact the weapon that he had with him.

5. One of those outside in the street responding to the gunfire from the men in the Jaguar was a friend or acquaintance by the name of Callum Hutton-Spigner. He subsequently pleaded guilty to possession of a shotgun with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1968.

6. Those are the bare facts of the offence, but the context and the background to the incident are also important. The appellant had moved to Doncaster from London to leave behind a lifestyle centred around an organised crime culture of drug use and violence; that is what he told the probation officer when the pre-sentence report was being prepared. Although only 23 years of age, his criminal record included a conviction in 2013 for supplying Class A drugs (heroin and cocaine) for which he was sentenced to detention for two years on a guilty plea. In 2015 he was sentenced to four months' imprisonment for burglary of a dwelling with intent to steal; in February 2017 he was sentenced to two years' imprisonment for attempted burglary of a dwelling with intent to steal; in March 2017 he was sentenced to two months' imprisonment concurrent for common assault.

7. In August 2018 he was himself the victim of a shooting. There were still some pellets in his abdomen. The co-accused, Hutton-Spigner, was also from London.

8. There was a pre-sentence report. The appellant had moved to Doncaster with his girlfriend; she was pregnant and due to give birth in February 2019. We are told that she has now given birth. The appellant told the probation officer that he had gone to this house in Regent Street to visit a friend and to smoke cannabis. On hearing the gunshots, he and others in the house initially hid inside to avoid injury, but he later went out with the weapon to try to frighten the people who were shooting at the property. He acknowledged to the probation officer that, in view of his previous lifestyle in London, he should have known better than to take the weapon and go outside. He claimed that he felt he had no choice but to act in the way he did to protect himself and others. However, as it was put in the pre-sentence report:

> "The current matter appears to be a reflection of the lifestyle he wished to leave behind when he moved from London to Doncaster and seems to be continuing despite his assertions to the contrary."

9. There was some debate in the court below at the time of sentencing as to whether it was appropriate to sentence the appellant alone, when there was still uncertainty as to the position of the co-accused. At that stage there was still an issue as to whether the co-accused had been in possession of a real firearm or an imitation. He subsequently pleaded guilty, as we have indicated, to possession of a shotgun with intent to cause fear of violence. He was sentenced on 24th April 2019 to a term of three years ten months' imprisonment.

10. In passing sentence on the appellant, the judge noted that the appellant had again been caught up in the discharge of firearms, as he had been in London. The reaction of those in the house (the appellant and his co-accused) was to come outside, by which time the car had driven off. It appeared that a weapon carried by the co-accused had been discharged. Although the judge was not then to know it, that was borne out by his subsequent plea. The appellant's contribution, as the judge put it, was to come out of the house with the machete. It was not merely a small kitchen knife, as he had originally claimed, but could clearly be seen on the CCTV to be a machete and a substantial bladed weapon. The judge acknowledged that there were a lot of unanswered questions in the case, but applying the relevant Sentencing Council guideline, he was satisfied there was higher culpability and greater harm. There was higher culpability because this was a bladed article and, moreover, it could be described as a “highly dangerous weapon”, within the meaning of the guideline. We note that those were two separate relevant factors under the guideline which go to culpability. The judge said that the appellant was there in the middle of what seemed to be some sort of gang warfare, armed with a machete.

11. There was greater harm because the appellant was in possession of the weapon in circumstances where there was a risk of serious disorder and there was a risk of serious alarm and distress. Those, again we note, are two separate factors going to the issue of harm in the guideline.

12. The judge said that in his judgment it was a serious case of its kind in every sense. He noted that under the relevant guidelines the starting point for a category 1A offence was 18 months' custody, with a range up to 30 months. His assessment was that this offence fell much more towards the top end of the range than the bottom. He took a starting point of 27 months, which he discounted by one-third for plea, resulting in the sentence of 18 months' imprisonment.

13. On behalf of the appellant Miss Csengeri, who did not appear in the court below, submits that although there was higher culpability because this was a bladed article, the sentence should have reflected the exceptional circumstances in which the appellant left the property in response to gunshot fire. She submitted in writing, and has developed the submissions orally before us, that possession of the weapon fell only just short of reasonable excuse, which would mean category D culpability; or at least there were features of category D culpability which the judge should have borne in mind.

14. Miss Csengeri takes issue with the judge's finding that serious disorder could have resulted from the appellant's possession of the machete. He went out into the street only after the gunshots had been fired at the property. She points out that the witness statements from civilians living nearby merely provide evidence of distress generally from the overall seriousness of the incident, and in particular the gunfire, without mention in their statements of the appellant brandishing a machete.

15. In relation to the guideline, she submits that the judge gave no explanation for taking a figure which was in fact nine months above the starting point of 18 months. It is said that the judge failed to have regard to the appellant's personal mitigation, including the lack of any previous convictions for the use or possession of weapons. She points to his caring responsibilities for an aunt with whom he and his partner were living in Doncaster by the time of sentence. The has poor mobility and mental health issues. The appellant was her registered carer. His partner was shortly due to give birth, and, as we have said, has happily now given birth.

16. In her oral submissions Miss Csengeri also went as far as to submit that the level of sentence which the judge imposed meant that he was obliged to consider whether the sentence should have been suspended and that he failed to give proper consideration to that possibility.

17. We have considered all these submissions carefully. The context of this offence was important, we think. The judge was entitled, to an extent at least, to read between the lines here as a matter of common sense and to sentence on the basis that the carrying of the machete out into the street was more than merely a defensive response to the armed attack on the house by three men in a car. As the author of the pre-sentence report put it, the offence appeared to be centred around a culture of drug use and the use of violence and weapons within local communities. His co-accused came out into the street and discharged a weapon of some kind, the judge found, now acknowledged by his plea to be a shotgun.

18. In the appellant's case this was plainly a category 1A offence under the guideline. As the judge rightly identified, there was not simply the single basic level A culpability

factor of possessing a bladed article, but also the fact that it was a highly dangerous weapon, that is to say (to quote from the rubric of the guideline) a weapon "whose dangerous nature must be substantially above and beyond" the basic definition of an offensive weapon as "any article made or adapted for use in causing injury, or is intended by the person having it with him for such use".

19. As to harm, the judge was entitled to conclude that the harm which was caused "or was risked" fell within category 1. The offence was committed in circumstances where there was a risk of serious disorder, and although the eyewitnesses did not speak of alarm or distress at the sight of the machete as opposed to the use of firearms, the appellant went out into the street with his co-accused when both of them were armed in their different ways. At the very least that was conduct to which the appellant contributed which *risked* serious alarm or distress.

20. The starting point under the guideline for category 1A was 18 months' custody. The guideline acknowledges that in a case of particular gravity, reflected by multiple features of culpability or harm, it may be that an increase from the starting point is merited before further adjustment for aggravating or mitigating features. We think the judge was entitled to treat the circumstances of the offence and the multiple features of culpability and harm which he identified, and to which we have referred, as making it is a case of particular gravity. Furthermore, it was an aggravating factor that the appellant had a bad criminal record for one so young, including a recent conviction for common assault. The offence here was committed not long after the end of the licence period of his previous sentence. There were no real factors under the guideline reducing seriousness, simply the general personal mitigation of his domestic circumstances. Taking all these factors into account, we think the judge was fully entitled to move up from the starting point of 18 months, before reducing the sentence for the guilty plea.

21. The question is whether an uplift of nine months was justified. We think that the judge went somewhat too far in making the uplift as great as nine months. We think that 21 months would have been appropriate as the starting point after trial rather than 27 months. Applying the reduction of one-third credit for plea, that would result in a sentence of 14 months rather than 18 months' imprisonment. We therefore allow the appeal. We quash the sentence of 18 months and we substitute a sentence of 14 months' imprisonment.

22. We should say for completeness that the judge was right to conclude that the offence was much too serious for anything but an immediate custodial sentence. Only such a sentence could achieve appropriate punishment.

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