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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday, 23 May 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

SIR DAVID FOSKETT

R E G I N A

v

SEAN ANTHONY EDWARDS

PAUL JAMES FRITH

LEE EDWARD CULLEN

LAURENCE CHRISTOPHER McCARTHY

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Mr D Whitehead appeared on behalf of the **Appellant Edwards**

Mr R Peggs (Solicitor Advocate) appeared on behalf of the **Appellant Frith**

Mr P Mendelle QC appeared on behalf of the **Appellant Cullen**

Mr S Mahmood appeared on behalf of the **Appellant McCarthy**

J U D G M E N T

(Approved)

1. MR JUSTICE PICKEN: The appellants each appeal against sentence, the single judge having given limited leave to appeal on the basis that, as he put it “the sentencing levels may have been somewhat too high”. The single judge refused leave on other grounds and, formally at least, there is a renewal on the part of one of the appellants in respect of that refusal.

2. The appellants were all sentenced on 29 June 2018 at Birmingham Crown Court before His Honour Judge Henderson in respect of two counts, namely conspiracy to supply prohibited firearms (count 1) and conspiracy to sell ammunition without being registered under the Firearms Act 1968 (count 2). This followed guilty pleas being entered on the eleventh or twelfth day of the trial by the appellants Sean Edwards, Paul Frith and Lee Cullen, who changed their pleas to guilty. The other appellant, Laurence McCarthy, was found guilty some days later on 23 March 2018. Edwards was sentenced to 14 years and 3 months’ imprisonment on each of the two counts concurrent, Frith was sentenced to 19 years’ imprisonment, Cullen was sentenced to 21 years and 8 months’ imprisonment and McCarthy was sentenced to 20 years’ imprisonment.

3. The background facts can be summarised as follows. On 12 March 2017 McCarthy ordered eight blank firing pistols from a supplier in Calais, France. At that stage the weapons had been perfectly legal pieces of equipment. The pistols were delivered in two batches, each of which were signed for by McCarthy on 16 March 2017 and 24 April 2017, respectively on their delivery to his home address in Birmingham. At some stage between the guns being delivered and 23 June 2017, the guns were modified from blank firing pistols into working lethal weapons. It is unclear who had carried out the modifications to make the guns illegal. However, on 23 June 2017 the police stopped a vehicle in Birmingham which was being driven by Frith. Cullen and Edwards were passengers in the vehicle. McCarthy was in a separate vehicle nearby. Inside the boot of the vehicle being driven by Frith the police found two guns along with ammunition consisting of 25 bullets. The bag that contained the guns and ammunition had Frith’s fingerprints on it. The appellants were arrested.

4. The two guns that had been found were from the second batch that had been delivered to McCarthy. The guns, as we have previously observed, had originally been legal but were by this stage in their modified and, therefore, illegal state. The subsequent investigation which the police undertook uncovered a receipt for the guns, partly in French and partly in English, which had been found in a caravan belonging to Frith. It should be noted that that the receipt made no mention of ammunition. It must be the case, therefore, that the ammunition which the police came to find was sourced from elsewhere and so that the applicant’s activities were not confined to sourcing the guns from Calais. Although the serial numbers had been ground out, it was possible for a forensic expert to ascertain what those numbers had been and they matched serial numbers found on the voice in Frith’s caravan. A police expert subsequently successfully test fired the guns that had been found.

5. In interview, the appellants essentially denied the offences, as did McCarthy when he was arrested at his home on 6 September 2017. Subsequent mobile phone evidence, including call, text and cell site evidence, established links between the various appellants.

6. In general terms, the Crown’s case at trial was that Cullen was organising the sale of the two guns together with McCarthy who had purchased them from France. Frith was to assist in at least the transportation of the guns and ammunition and had been a former custodian as there had been evidence of firearms and paperwork being at his premises. Edwards was seen as something of a middleman who was closer to the purchasers than the other appellants; somebody had given him instructions or advice as to what to do.

7. At the time of sentence, Edwards was aged 36; he had 16 convictions for 40 offences spanning from February 1999 to August 2012. Frith was aged 44; he had 13 convictions for 23 offences spanning from January 1991 until

October 2013. His relevant convictions including four firearm shotgun offensive offences. Cullen was aged 46; he had three convictions for 18 offences spanning from October 2013 until August 2017. As for McCarthy, he was aged 44; he had three convictions for four offences spanning from December 1990 until November 1996. His relevant convictions included one firearm shotgun offensive weapon offence.

8. In his sentencing remarks, the judge echoed previous comments made by the then Lord Chief Justice in 2009 when he observed that the gravity of gun crime cannot be exaggerated. The judge went on to observe that the three core participants whom he was sentencing were closely connected over a substantial period of over 3 months or so. There was no question, the judge observed, that any of those three had joined the offending at the last minute, although the judge accepted that some of their contact would be legitimate because they had legitimate business connections with one another as well as illegitimate. He was sure that Cullen was the leader who had been directing others, with McCarthy and Frith acting as his lieutenants and Edwards as a vital link man with customers, albeit that he was satisfied in Edwards' case he was only involved in relation to the two guns which had been seized from the car. The judge was satisfied, as regards the other applicants, that he was dealing with a conspiracy which had involved eight adapted firearms including those two guns and therefore a further six.

9. The judge noted the 25-year starting point in the case of the lead appellant in *R v Stephenson [2016] EWCA Crim 54* and stated that in the cases of Cullen, Frith and Edwards there would be 5% credit for their belated guilty pleas.

10. We leave to one side for the present count 2, the offence involving the conspiracy to sell ammunition. We will return to that count but focus for the present on count 1. It is convenient also to leave aside for the present the case advanced on Edwards' behalf in relation to that count, given that the sentence which he received overall was lower than the sentences received by the other appellants, so reflecting the judge's approach as explained in his sentencing remarks that Edwards was involved with two guns as opposed to eight.

11. The other appellants each contended before the single judge that the judge ought not to have approached the matter of sentence on the basis that they had been concerned in the supply not two but eight adapted firearms; in other words, both batches of weapons delivered to McCarthy. They said that there was insufficient evidence to justify passing sentence on such a basis.

12. Frith renews his application for leave on that ground, although the other applicants do not themselves seek to do that. To be more precise, Mr Peggs, who appears on behalf of Frith today, explains that, whilst the renewal in relation to that ground is formally maintained, nonetheless he is not in a position to advance submissions in relation to it and the reason why it is maintained as a matter of form is that he has been unable, prior to today, to seek instructions from Frith in relation to the renewal.

13. It is appropriate, in the circumstances, that we deal with Frith's renewed application on that ground. We can do so shortly since we are clear there is no merit in the point raised. On the contrary, we agree with the single judge when he observed as follows in refusing leave to appeal on this ground:

"I consider that the judge was entitled to sentence on the basis that both consignments of guns were part of the conspiracy. The fact that he directed the jury in McCarthy's case that there was no evidence as to what happened to the other guns in answer to question from them is nothing to the point. There was no direct evidence and the issue was whether the sentencing judge could properly draw the inference he did. It was not necessary for the jury in determining guilt or innocence to make a finding about the six guns, but it was necessary to do so on

sentence. McCarthy was convicted by the jury and the other three pleaded guilty after having been advancing their dishonest defences for some time before the jury. There was nothing to set against that inference which was available on the evidence before the Court."

14. It should be borne in mind in this regard that, by the stage that Edwards, Frith and Cullen changed their pleas to guilty, the judge had served prosecution evidence. Cullen had also given evidence denying the offences, albeit it was during his evidence, after Edwards had changed his plea, that Cullen himself decided to change his plea. Furthermore, Frith gave evidence at a Newtonhearing and, prior to that, McCarthy had given evidence in the days leading up to his conviction and, therefore, prior to the sentencing hearing.

15. It follows that the judge was in a good position to form his own view on the matter. We see no basis, in the circumstances, for disturbing that view and we refuse Frith's renewed application based on this ground.

16. We will come back to consider other points which have been raised by the various appellants. However, focusing on the single ground in relation to which the single judge gave leave, we are unpersuaded that the judge adopted too high a starting point in the cases of Cullen, Frith or McCarthy by reference to the Stephensoncase. We acknowledge that Stephensoninvolved an automatic sub-machine pistol (unlike the present case and as the judge himself noted) and that Stephensonalso involved a conspiracy which spanned a longer duration (10 months) as opposed to the 3 months or so in the present case. Stephensonalso entailed a somewhat more substantial amount of ammunition since in that case there were as many as 492 rounds as opposed to the 25 rounds recovered by the police in the present case - a point not mentioned expressly at least by the judge in his sentencing remarks. It may be also that the operation in the present case was less sophisticated than in Stephenson. However, it seems to us that the judge implicitly recognised this by taking the lower starting points or, more accurately, sentences prior to credit for guilty plea which he did, namely 23 years in the case of Cullen and 20 years in the cases of Frith and McCarthy.

17. The sentences received by Cullen, Frith and McCarthy were severe and they may well have been at the top of the range. But we do not consider them to be excessive still less manifestly excessive.

18. As for Edwards, whose sentence reflected his lesser involvement, again we see no basis for the submission that the sentence which he received was too long. Nor can we agree with the submission made on his behalf that he should have been afforded 10% credit rather than the 5% credit which the judge gave him in respect of his guilty plea. In circumstances where the change of plea did not take place until the eleventh day of trial, we cannot accept that Edwards should have received greater credit. In any event, as the single judge put it when refusing leave on this ground, the level of credit given by the judge was "within the range available" to him.

19. This leaves the suggestion, albeit not a point pursued orally today, that the judge failed to take into account matters of mitigation in relation to McCarthy within the sentence that was passed on him. This is a reference to the fact that McCarthy has worked since a young age and has provided financially for his family. It is the case that no reference was made to these matters by the judge in his sentencing remarks. We are clear nonetheless that there can be no question in this case that the sentence in respect of McCarthy was excessive as a result. In context, we consider that the mitigation advanced did not represent substantial mitigation at all.

20. We observe also, for completeness, that the judge chose to sentence without pre-sentence reports. This was understandable since, on any view, substantial terms of imprisonment were inevitable in a case such as this.

21. For those reasons but for a point which has been raised by the Registrar concerning count 2, it follows that we would have dismissed these appeals. However, it has been pointed out that the maximum sentence for selling ammunition without being registered under the 1968 Act is 5 years' imprisonment. Plainly, in the circumstances, the concurrent sentences which the judge passed in respect of count 2 cannot stand. We substitute for those sentences terms of 3 years' imprisonment in the case of each of the appellants. This obviously has no effect on the overall sentence in each case since the sentences in respect of count 2 will remain concurrent. However, to that extent and only to that extent the appeals are allowed.

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