[2019] EWCA Crim 1296 No:

201901878/A4

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

9 July 2019

Before:

Lord Justice Davis
Mr Justice Warby
HIS HONOUR JUDGE Potter
(Sitting as a Judge of the CACD)

**Regina**
**and**
**Jack O'Shea**

Mr G Wedge appeared on behalf of the **Appellant**

Mr Justice Warby

This is an appeal against sentence in a case of possessing a disguised firearm, contrary to section 5(1A)(a) of the Firearms Act 1968.

The appellant, Jack O'Shea, aged 23, pleaded guilty to that offence before His Honour Judge Simon James, on 11 March 2019 in the Crown Court at Canterbury. On 23 April 2019 he appeared before the same Judge who sentenced him to 2 years' imprisonment.

**Facts**

The facts of the case are quite straightforward.

On 8 October 2016 the police attended the appellant's home address in relation to an unrelated matter. They conducted a search, in the course of which they found a bag in the living room, containing what they initially believed was a black torch. On closer inspection this turned out to be a rechargeable handheld electric stun gun and torch combination device. It had a master on/off slider at the base and a further switch and button on the side which operated the torch and the stun functions.

Although not capable of emitting a lethal electronic charge, the device emitted an electronic shock which, when placed into contact with a person, was capable of causing temporary incapacitation. When police found it, it was charged.

The appellant was arrested and questioned. He admitted that the device was a Taser, that it belonged to him, and that he had it in his possession. He accepted that it was an offence to be in possession of the item. He said that he had it for protective purposes because of ongoing disputes with people in the area where he lived, which was on the Isle of Sheppey. He said it was something that he felt he needed to keep close to him as protection.

He was charged in December 2016. The delay between that date and the plea of guilty earlier this year is accounted for by the loss of the Crown Prosecution Service case file.

**Antecedents**

The appellant was not of good character. He had a reprimand and a caution for assault committed at the age of 11, and five convictions for six offences committed between October 2011, when he was 15 years old, and 17 March 2018, just after he turned 22. This offending included assault of a police officer, burglary, theft in a dwelling, possessing cannabis, and two offences of criminal damage. He had been sentenced to a referral order, a youth rehabilitation order and, most recently, a community order.

That sentence was imposed on 14 June 2016, for burglary, and was a one-year order. Hence, the offence with which we are concerned was committed during the currency of the community order.

**Pre-Sentence Report**

A pre-sentence report depicted a supportive family setting, but a troubled family history. The appellant and other family members had been attacked by locals when they moved to the Isle of Sheppey and the appellant's brother had been injured in an assault. He himself had dropped out of school at the age of 15. The most recent criminal damage was attributed to depression following a breakdown. The report assessed the appellant's risk of re-offending as “medium”, reporting that he had responded in a satisfactory way to probation supervision during the community order.

**Sentencing**

This is an offence that attracts the minimum sentence provisions of the firearms legislation. By section 51A of the Firearms Act 1968 the Court was required to impose a sentence of at least 5 years' imprisonment unless it was of the opinion that there were exceptional circumstances relating to the offence or to the offender which justified not doing so.

HHJ James was persuaded that were such exceptional circumstances in this case. He accepted that the weapon had been kept at the appellant's home and observed there was no direct evidence to dispute his account of why he had it, namely that it was obtained purely for defensive purposes after the appellant and his family members had been subjected to threats of violence. There was no evidence, said the Judge, that the weapon had ever been used to inflict or even threaten violence.

The Judge noted the appellant's previous convictions but also his relative youth and the fact that he had never before served a custodial sentence. The Judge was prepared to accept that his relative immaturity had been contributed to the commission of this offence.

The Judge did not consider that any of those features of mitigation was individually capable of amounting to exceptional circumstances; it was, however, the cumulative effect that satisfied him that it would be unjust to impose the mandatory minimum sentence.

Nonetheless, he concluded it was necessary to impose a deterrent sentence. He referred to the reason for the prescribed minimum sentence provisions, namely to provide a clear and persuasive deterrent against holding weapons of this sort. He said that the fact that the weapon's real function was disguised made it a particularly attractive tool for those intent on involvement in criminal activity. In the circumstances, he concluded it was still necessary to impose a sentence of imprisonment. Taking account of the appellant's personal circumstances and obligations, which included looking after his mother, as well as his early plea, the sentence was one of 2 years' immediate imprisonment.

**Grounds**

The grounds of appeal are that the sentence imposed was manifestly excessive. Further and alternatively, that the Judge could and should have suspended any sentence of imprisonment.

In support of those grounds Mr Wedge has relied on two decisions of this Court, R v Zhekov [2013] EWCA Crim 1656 and R v George Watson [2018] EWCA Crim 1634. Both were cases of possession of a disguised firearm in the form of a stun gun.

In Zhekov, the sentencing Judge imposed a term of 2 years' immediate imprisonment. This Court allowed an appeal and substituted a sentence of 52 weeks suspended for 12 months. In Watson the sentencer imposed the statutory minimum sentence. This Court allowed an appeal and substituted a term of 26 weeks suspended for 12 months.

Mr Wedge submits that the present case has factual similarities to both cases and, in particular, to Watson. He submits that the Judge, having rightly found exceptional circumstances, was wrong to impose an immediate custodial sentence at all, or alternatively wrong to impose one as long as 2 years.

**Discussion**

Zhekov was a lorry driver from Bulgaria. The features which figured most powerfully in this Court's reasoning in that case were that he was a foreign national of unblemished character who had lived all his life in Bulgaria, and was in possession of a defensive weapon that was entirely legal in his home country, having no idea that he was doing anything wrong by possessing it in this jurisdiction.

On a proper analysis, the facts of this case are very different from those of Zhekov. The offence with which we are concerned was committed several years after Zhekov, by a British citizen with previous convictions, who was well aware that the stun gun he held was an illegal weapon. Mr Wedge has relied on Zhekov in submissions today as authority for the principle that the Court should be cautious about approaching the matter of deterrence in a case of this kind.

In Watson, the background to the appellant's possession of a stun gun was different. The appellant was 19 and of good character. Some 4 months before the offence was detected, he had been violently assaulted in the street by a group of young men using a baseball bat and had been punched and kicked to the ground. Threats to kill had been made. The weapon had been given to him by a friend after those events.

Those are circumstances rather closer to those of the present case, but they are clearly distinguishable, not least when it comes to the timing and nature of the assaults to which the offenders were subjected and their respective characters. This offending was committed when the appellant was subject to a community order imposed following the latest of a series of offences. It would in any event be quite wrong to regard Watson as authority for the proposition that a suspended sentence is the only proper disposal where a disguised firearm is held for defensive purposes without use or an immediate intention to use the weapon. These cases must always turn on their particular facts.

It is not unusual for an offender to seek to justify, or at least explain, possession of a prohibited weapon by reference to threats of violence or fear. Here we note that the attacks on the family that are described in the probation report had started 12 years beforehand. Although the appellant had described an ongoing feud, and an attack on him and his brother, that attack had been 3 years previously. He accepted, in speaking to the probation officer, that the feud had died down recently. There was no evidence of any serious or imminent threat to the appellant's safety or that of his family. He had deliberately taken possession of the stun gun. He rightly agreed with the probation officer that, instead of obtaining a Taser, he could and should have gone to police for protection if that was required.

The appellant's personal circumstances were not especially unusual either. In contrast to Zhekov and Watson, he was a defendant of previous bad character, albeit not for offences of this description.

Evidently the Judge's notional sentence after a trial, after allowance for mitigating circumstances, was one of 3 years' imprisonment. He gave full credit for the appellant's prompt admissions and early guilty plea. We see nothing wrong in that approach to an offence of this gravity.

In our view, the sentencing Judge also gave proper consideration to the question of whether the sentence at which he arrived could and should be suspended. It was, formally speaking, capable of suspension. He clearly had in mind the appellant's personal circumstances, including the fact that he was sole carer for his mother, as well as other relevant mitigation but considered that nothing but an immediate custodial term would properly reflect the seriousness of the offending.

We cannot say he was wrong in that conclusion either. On the facts of this case, we are unable to identify any

features which in isolation or in combination make it manifestly excessive or wrong in principle to impose the sentence passed by the Judge in this case.

**Disposal**

Accordingly, this appeal is dismissed.