

IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2019] EWCA Crim 1727

Royal Courts of Justice

The Strand

London

WC2A 2LL

Tuesday 15th October 2019

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE JAY

and

MR JUSTICE JULIAN KNOWLES

R E G I N A

- v -

KEVIN PALOKO

EMIR TZOURTZI

KLEVI HASA

Computer Aided Transcript of Epiq Europe Ltd,

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Mr E Moss appeared on behalf of the Appellant Kevin Paloko

Mr P Crampin appeared on behalf of the Appellant Emir Tzourtzi

Mr S Grattage appeared on behalf of the Appellant Klevi Hasa

J U D G M E N T

(Approved)

Tuesday 15th October 2019

LORD JUSTICE FLAUX:

1. On 15th November 2018, in the Crown Court at Sheffield before His Honour Judge Richardson, the three appellants pleaded guilty to various offences.
2. On 25th January 2019, in the same Crown Court before His Honour Judge Dixon, they were sentenced as follows. Kevin Paloko, on count 1, affray, contrary to section 3 of the Public Order Act 1986, was sentenced to two years' imprisonment; on count 2, possessing an imitation firearm with intent to cause fear of violence, contrary to section 16A of the Firearms Act 1968, to an extended sentence of nine years, under section 226A of the Criminal Justice Act 2003, comprising a custodial sentence of five years and an extended licence period of four years; and on count 5, having an offensive weapon, contrary to section 1(1) of the Prevention of Crime Act 1953, to nine months' imprisonment. All of those sentences were ordered to run concurrently with each other. However, on count 6, possessing a prohibited firearm, contrary to section 5(1)(aba) of the Firearms Act 1968, he was sentenced to a determinate sentence of six years' imprisonment, which was ordered to run consecutively to the other sentences.
3. Emir Tzourtzi, was sentenced on count 1 (affray), to two years' imprisonment; on count 2 (possession of an imitation firearm), to an extended sentence of seven years, comprising a custodial term of five years and an extended licence period of two years; and on count 4 (having an offensive weapon), to nine months' imprisonment. All of those sentences were ordered to run concurrently with each other. Klevi Hasa, who had pleaded guilty to counts 1 and 2, received the same sentence on those counts as Tzourtzi.
4. Paloko entered a basis of plea: that only he was in possession of the handgun (count 6) and that the other two appellants were not aware of it. No evidence was offered against them on that count and not guilty verdicts were entered, pursuant to section 17 of the Criminal Justice Act 1967.
5. The appellants all now appeal against sentence with the leave of the single judge.
6. The facts are as follows. All three appellants travelled from London to Yorkshire for the purpose of stealing drugs. They stayed in a hotel in Huddersfield from 3rd June 2018. Over consecutive nights of 8th and 9th June 2018, they travelled to an address in Elicia Avenue, Doncaster, with the intention of committing an offence. Dennis Russo lived at that address with his wife, stepson and mother-in-law. At approximately 3.15am on 8th June, Russo was woken by a noise. He went to explore. He saw a male crouched on the flat roof of the single storey extension to the rear of the property. The male, who had his face covered, approached the window. Russo retreated, closed the door and held the handle to prevent the man from entering. It appeared that the man had accessed the rear bedroom, because he tried the door handle and told Russo to open it. When unable to enter the property further, the man left. Russo went outside where he saw three men, including the man on the roof, drive away slowly in a red Volvo car. There was no charge on the indictment in relation to the events of 8th June, but they form part of the explanatory background.
7. Concerned about what had happened, Russo arranged for his family to stay elsewhere and for his brother,

Marik Russo, to stay with him at the house. At 1am on 9th June, Russo saw someone looking at his house from a nearby alleyway. He and his brother, both armed with baseball bats, went to investigate. Russo recognised the man from the previous night. As they approached, the man pulled a camouflage scarf around his face. When Russo asked why he had come to the house, reference was made to Albanian and to "weed". Soon after that, the red Volvo pulled up. The driver, armed with a large black knife, got out of the vehicle. Another man, wearing a full face mask and holding what appeared to be a black handgun, left the vehicle from the rear passenger seat. Both Russo brothers were disarmed, and Marik Russo was head-butted by the man holding the knife.

8. The three men got back into the car while the Russo brothers went back to the property and locked themselves inside. Two of the three men tried, unsuccessfully, to enter through the front door. All three of them then left in the Volvo. Dennis Russo called the police at 1.46am. Within minutes the Volvo's movements were being tracked by the Automatic Number Plate Recognition system. At 2.35am, armed officers from West Yorkshire Police arrested the three appellants after they pulled into a petrol station on Wakefield Road. Tzourtzi was the driver; Paloko was in the front passenger seat; and Hasa was seated in the rear.

9. During an initial search of the Volvo, police officers found a black gas-powered handgun that was a replica of a Beretta semi-automatic handgun, a large hunting knife, three balaclavas and two baseball bats which had been taken from the Russo brothers. Paloko was found to be in possession of a knuckleduster and a camouflage snood. Tzourtzi had a small, fixed-bladed knife in a bag he had been carrying. The knuckleduster and small blade had not been produced during the confrontation with the Russo brothers.

10. Paloko declined to comment during his police interview. As there were no interpreters available for Tzourtzi and Hasa, they were not interviewed.

11. On 18th June 2018, the police conducted a more thorough search of the Volvo. A working handgun, loaded with five rounds in the magazine, was found pushed down between the rear seat and the backrest. A round tip matching those from the magazine was also recovered from the car's back seat. Other items recovered from the car included a black holdall, black heavy-duty gloves, heavy-duty duct tape, six screwdrivers, an expandable baton, and another knuckle-duster.

12. Paloko was aged 24 at the time of sentence. He had six convictions for ten offences between 2011 and 2017. Relevantly, in May 2011, he was sentenced to four years' detention in a young offender institution for offences of robbery and possession of a firearm when committing an offence; in November 2012, to eight months' detention in a young offender institution, which was ordered to run consecutively to that earlier sentence for an offence of assault occasioning actual bodily harm; and in September 2013, to two years' detention in a young offender institution for possession of a Class A drug (crack cocaine) with intent to supply. Tzourtzi was aged 24 at the time of sentence. He had two convictions in 2017 for two offences of possession of Class A drugs (cocaine), for which he was fined. Hasa was aged 21 at the time of sentence. He had no previous convictions in the United Kingdom.

13. The judge had the benefit of a pre-sentence report for Paloko. He had told the author of the report that the three of them had travelled to steal a large quantity of cannabis that they believed was being cultivated in the property adjacent to the victim's home. The author's opinion was that Paloko's offending was part of an entrenched criminal lifestyle linked to gang involvement and drug dealing. He was assessed as posing a high risk of harm to members of the public and criminal associates. He had exhibited reckless behaviour in the past and demonstrated a willingness to use instrumental violence. His specific gang affiliations were unknown, but several had been recorded on previous probation assessments. During the course of the assessment, concerns about his ability to cope in custody and his vulnerability due to threats from other gang members were identified.

14. Tzourtzi and Hasa were sentenced without pre-sentence reports. However, in granting leave the single judge ordered pre-appeal reports for them both which we now have and to which we will refer later in this judgment.

15. In sentencing the appellants, the judge said that this had been a pre-planned and determined effort to carry out criminal activity. The appellants believed that they had information about a cannabis factory and had gone armed with the intention of taking what they could. On 8th June they had carried out a scouting trip. It was unclear whether they intended to commit the offence that night and were frightened off. It was not until a number of days after their arrest that the prohibited firearm was discovered. Paloko would be sentenced in accordance with his basis of plea.

16. The judge said that in effect this had been an attempted aggravated burglary. It was a planned attempt to raid a property while armed with weapons, one of which had the appearance of being a lethal weapon. They had travelled from London to South Yorkshire for that purpose. The judge had considered the sentencing guidelines for aggravated burglary for guidance as to the general criminality. Under those guidelines it would have been an offence of greater harm as the occupier was at home, violence was used, they had gone equipped, weapons were present, and it was a group offence. That would have placed it into category 1 in the guideline, which had a sentencing range of nine to thirteen years' custody. The aggravating features would have moved it towards the top of that range.

17. The relevant issues with regard to the imitation firearm and affray offences were that the appellants were in a public street late at night, the occupiers had been confronted with weapons, and it had been premeditated group offending. The judge determined that, with the exception of count 6, he would pass a sentence on count 2 that reflected the overall criminality and would impose concurrent sentences on the other counts.

18. For complex reasons, which we do not need to detail, the judge gave all three appellants a full one-third credit for their guilty pleas.

19. The judge referred to the fact that Paloko had travelled from London to Yorkshire to carry out a criminal enterprise, crossing county lines and doing so having obtained a live firearm and live ammunition which he had brought to carry out the crime. The offence in count 6 carried a minimum sentence of five years' imprisonment, but it deserved far more than the minimum term. The judge said that he had considered *R v Avis* [1997] EWCA Crim 3423. He noted that, apart from the fact that the firearm contained live ammunition, a discharged bullet head was found in the car, which suggested that it had been used some time recently. Bearing in mind those factors, and Paloko's criminal history, there would have been a sentence significantly in excess of five years for possession of that item on its own. But in his case totality would have to be considered, albeit totality was difficult to balance when there was a minimum term.

20. On count 1 (affray), all three appellants were sentenced to two years' imprisonment. On count 2 (possession of the imitation firearm), the starting point would have been seven and a half years, reduced to five years' imprisonment after credit. Tzourtzi was sentenced to nine months' imprisonment on count 4 (having an article with a blade or point), and Paloko to nine months' imprisonment on count 5 (having an offensive weapon). On count 6 (possessing a prohibited firearm), for Paloko alone, the sentence was a consecutive term of six years' imprisonment.

21. The judge considered dangerousness. He concluded that all three met the relevant criteria. They had travelled from London armed and with the intention of committing an offence. The knife and imitation firearm were produced without any hesitation. The judge had no doubt that it would have been used but for the occupants being disarmed. All three of them were dangerous men. They belonged to a criminal fraternity who would carry out violence when required. They had arm themselves to that effect. The judge passed an extended sentence upon each of them on count 2.

22. In succinct submissions on behalf of Paloko, Mr Edward Moss submits that in passing a consecutive sentence on count 6, the judge arrived at an overall sentence that was manifestly excessive, equating, as it does, to a term in excess of fifteen years' custody after trial. This was one occasion of criminality. In his written Advice, Mr Moss had submitted that there was an unjustified disparity between the sentences passed on Paloko and those passed on the other two appellants. However, he sensibly abandoned that ground of appeal during the course of his oral argument before us this morning.

23. Given his basis of plea that he alone was in possession of the prohibited firearm and live ammunition, it was inevitable that the sentence Paloko received would be more severe than that imposed on the other two appellants. We consider that the judge was entirely correct to pass a consecutive sentence in relation to that offence. Not to have done so would have been to fail to recognise the seriousness of the offence of possession of a prohibited firearm. The judge was also correct to say that, looking at that offence on its own, a sentence in excess of the five year minimum term was amply justified, given that the firearm was live, was loaded with live ammunition, and there was the presence of a discharged bullet head, together with Paloko's bad criminal record, including for possession of a firearm (albeit nearly nine years ago).

24. Despite Mr Moss' submission to us this morning that, effectively in the alternative, the judge may have erred in

passing the sentence he did on count 2, and had insufficient regard to totality, we consider that in relation to the appellant Paloko, as in relation to the other two appellants, the sentence imposed on count 2, so far as its custodial aspect is concerned, was entirely justified.

25. The only aspect of the sentence on Paloko which has given us any pause for thought is whether the length of the consecutive sentence on count 6 pays sufficient regard to totality. As the judge recognised, the fact that there was a minimum sentence of five years' custody for the offence did pose difficulties in dealing with totality. However, the sentence imposed of six years equated to nine years after trial – almost at the maximum for this offence (ten years' imprisonment). Whilst this was extremely serious offending, given the aggravating features which the judge correctly identified, it was not the most serious for this type of offence. We think that a starting point of nine years after trial does pay insufficient regard to totality. In the circumstances, in order to pay proper regard to totality, we consider that the sentence on count 6 should be reduced from six years to the minimum term of five years' imprisonment. It will continue to run consecutively to the other sentences. To that extent the appeal by Paloko is allowed.

26. In relation to both the other appellants, the ground of appeal is that the judge erred in finding that each of them was dangerous and in passing an extended sentence without first obtaining a pre-sentence report. As is accepted by Mr Crampin on behalf of Tzourtzi, under section 156(4) of the Criminal Justice Act 2003, the court does not have to obtain a pre-sentence report before sentencing an offender. However, given the relative youth of these two appellants and the lightness of Tzourtzi's previous convictions and the lack of Hasa's previous convictions, it would have been better practice for the judge to have obtained pre-sentence reports before sentencing them. It is also unfortunate that the judge made the finding of dangerousness without alerting their counsel to the fact that he considered making such a finding, so that submissions could be made on the issue on their behalf.

27. That said, the position now is that this court has a pre-appeal report for each of these two appellants. The author of the report on Tzourtzi assesses that he poses a high risk of serious harm to the public, specifically those he may target for financial gain or for illicit substances. He demonstrated a capacity for violence in that he head-butted Mr Russo's brother, and there was a potential for physical harm through the use of a weapon, particularly as he accepted carrying an imitation firearm for his own protection. Although he had no previous convictions for weapons offences, the number of weapons involved in this offending was alarming, as was the level of pre-planning that would have been required.

28. The author of Hasa's pre-appeal report assessed him as posing a high risk of future harm to any victim and to the general public, specifically those he might target to obtain money or drugs. The nature of the risk would be physical harm in the course of an altercation, particularly if he felt that he was being challenged or threatened. Given that he had a weapon on him during this offending, there was also a high risk of physical harm through the use of a weapon. Although he had no previous convictions in the United Kingdom, his willingness to threaten death and carry a knife and a gun indicates the potential for fatal harm.

29. In realistic, but nonetheless eloquent, submissions on behalf of their respective clients, Mr Crampin and Mr Grattage recognise that both appellants face difficulties in this court in challenging the finding of dangerousness made by the judge, given what is said in each of the pre-appeal reports. Despite those submissions, in our judgment the conclusions reached by the authors of the two pre-appeal reports amply justify, albeit retrospectively, the judge's finding of dangerousness in respect of both Tzourtzi and Hasa. Furthermore, we consider that the nature of the offending involving as it did the multiple use or presence of weapons and the assessment of the risk that these men pose to the community also justified the conclusion that only an extended sentence was appropriate.

30. The sentences passed were neither manifestly excessive, nor wrong in principle. In all the circumstances, their respective appeals against sentence are dismissed.

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