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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2021/01838/A3

[2021] EWCA Crim 1461

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 27th August 2021

THE VICE PRESIDENT OF THE COURT OF APPEAL CRIMINAL DIVISION
(Lord Justice Fulford)

MR JUSTICE MURRAY

MR JUSTICE WALL

R E G I N A

- v -

OLIVER BEL

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Mr R Wormald QC and Miss A Bright appeared on behalf of the Applicant

Mr J Allman appeared on behalf of the Crown

J U D G M E N T

Friday 27th August 2021

LORD JUSTICE FULFORD:

1. On 22nd April 2021, in the Crown Court at Manchester, before His Honour Judge Conrad QC and a jury, the applicant, who is now aged 25, was convicted of the offence of collecting information, contrary to section 58 of the Terrorism Act 2000, namely having in his possession a record of information, "The Anarchist's Cookbook", which was likely to be useful to a person committing or preparing an act of terrorism.
2. On 21st May 2021, he was sentenced to a special custodial sentence for an offender of particular concern, pursuant to section 278 of the Sentencing Act 2020, comprising a custodial term of two years and a further one year licence period.
3. The applicant's plea to a related summary offence (sent for trial pursuant to section 51(3)(b) of the Crime and Disorder Act 1998) of sending grossly offensive matter by an electronic communications network, contrary to section 127(1)(a) of the Communications Act 2003 was held to be equivocal and the charge was sent back to the magistrates' court for trial.
4. We note that, having been convicted of an offence to which sections 41, 44, 45 and 53 of the Counter-Terrorism Act 2008 apply, the applicant was required to comply with the notification requirements set out therein for a period of ten years.
5. The applicant's application for leave to appeal against sentence has been referred to the full court by the Registrar.
6. As to the circumstances of the offending, in January 2019 the applicant came to the attention of counter-terrorism police. A report was made by a member of the public about some posts by the applicant in a Facebook group called the "Young Free Speech Society". At the time the applicant was a maths undergraduate student at Pembroke College, Cambridge. We note that he was a student who had achieved considerable academic success at school. In his posts the applicant defended Adolf Hitler and made derogatory comments about Jews.
7. The police made contact with the applicant. In May 2019 there was a short series of meetings between the applicant and a counter-terrorism officer, PC Penegar, from the Prevent programme in Cambridge (viz. the programme within counter-terrorism policing which seeks to dissuade people from being drawn into extremism).
8. Notwithstanding this intervention, the applicant continued to communicate angry, racist and extreme views online with other individuals with a similar world view. In July 2019 he commented on Facebook that he felt like "going on a spree". That post was reported by the applicant's tutor to the Prevent programme.
9. On 12th November 2019 the anti-fascist group "Hope Not Hate" published an article in which they revealed the applicant as a member of the far right. The article was entitled "Meet the Cambridge graduate who loves Hitler and hates the Jews". The applicant had been identified as a member of the Iron March forum in a leak of its membership list by the online research group Bellingcat.
10. Three days later police officers from the North West Counter Terrorism Unit went to the applicant's home. They conducted a search and seized his mobile telephone and a number of books, including books concerning the life of Adolf Hitler and the Nazi movement. One of the books recovered was the Anarchist's Cookbook which contained instructions on how to create improvised explosive devices, including instruction on making high explosives such as blasting

gelatine and nitro-glycerine, and the use of firearms and other weapons. The applicant had indicated to the officers where this volume was to be found in his bedroom.

11. Police enquiries discovered that the applicant had ordered the book from Amazon in December 2018. It was clear from what the police found that the applicant harboured extreme right-wing views and had a general interest in extreme violence, both political and otherwise. It was further demonstrated that the applicant was in contact with individuals closely connected to the proscribed "National Action" group and with individuals who identified as "incels" or "involuntary celibates" – a movement perhaps most characterised by a hatred of women.

12. There had been two occasions in July 2019 (already referred to above) when the applicant had expressed in online posts a desire to go on "a spree" (referring to a killing spree).

13. The applicant sought to conceal his mobile telephone, which nonetheless was seized. Its contents revealed multiple examples of the applicant discussing his hatred of Jews, black and gay people, and his identification as a national socialist and as an incel were set out. Similarly, there were multiple examples of the applicant discussing violence, including his desire to kill his uncle, to prevent him from selling the house in which the applicant was living. The applicant was actively networking with two of the founder members of the proscribed far-right group National Action: Alex Davies (in September 2017) and Benjamin Raymond (in October 2020). He also admitted in his prepared statement and police interview to having been in contact with Ethan Stables.

14. The Schedule of Agreed Facts at trial set out that Mr Stables had been convicted in February 2018 of preparing an act of terrorism, making threats to kill, and possessing explosives, all of which concerned a plan on his part to carry out an attack at a Gay Pride event.

15. There was a pre-sentence report before the court. Its author observed that the applicant harboured extreme right-wing views and described himself as a "Racial Socialist", believing that his race (people of European descent) should have its own "homeland so our racial identity is not lost". He described a multi-racial culture as "not positive" and expressed the view that people of different races should live separately. He has Asperger's Syndrome, an Autistic Spectrum Disorder ("ASD"). One feature of ASD is intense, narrow and often obsessional interests. Where the pursuit of these interests has developed into illegal activity, or where an interest is inherently illegal, it was indicated by the author of the report that this may be an important factor in gaining an understanding of the offending. The author observed that the applicant struggled to see why anyone would be concerned about his possession of a book, reporting it as "nothing nefarious" and "for academic interest only". He seemed oblivious to the seriousness of his situation and failed to understand why the possession of a book he purchased from Amazon would be illegal. He stated that, in his view, it was "strange that I should be punished for possession of a freely available book". He also expressed the view to the author of the report that his racist comments had been posted on a private forum and were meant for a specific audience. He did not see why people might be upset by his posting such views as they were never intended for a wider audience. He said to the author of the report that his political views had been "mischaracterised by the prosecution, I am more moderate than has been presented". He said that he had always held his views. However, as his mother was unaware of these views when he was growing up, in the opinion of the author of the report the applicant had come into contact with individuals holding similar views and due to his ASD he went beyond normal curiosity to satisfy an "academic interest". Based on the information available, the applicant was at risk of influence by others and this could lead to his moving deeper into right-wing extremism.

16. Of particular concern, therefore, was – in the view of the author of the report – the

applicant's complete lack of understanding of the seriousness of his actions or of the risks posed by his ongoing association with those of an extreme right-wing viewpoint. Similarly, his lack of internal controls when it came to expressing his views was a likely result of his ASD. This condition would render him vulnerable to the influence of others. If he persisted in his association with such individuals, the risk of harm could increase exponentially. Although at the time that the report was prepared he had no intention of causing harm to others, a full understanding of the risk he posed could not be possible until Extremism Risk Guidance had been completed post-sentence. He was assessed as posing a high risk of harm to the public until such time as he developed internal controls to understand and manage his risk to others. There continued to be identifiable indicators of risk of serious harm, the potential event could happen at any time and the impact would be serious. He was assessed as posing a medium risk of harm to children through radicalisation into right-wing extremism. He was also assessed as a medium risk of harm to himself.

17. Against that background and bearing in mind that the applicant was entrenched in his views, his continued association with right-wing extremists and his lack of any real awareness of the risks involved in that association, the view was expressed that the risk he poses is not presently manageable in the community. In all the circumstances, the author of the report did not propose an alternative to a custodial sentence.

18. It is to be emphasised in this context that, as set out above, the applicant had been the subject of an intervention by Prevent in 2019, but had persisted in possessing the Anarchist's Cookbook, despite the understanding that it was extremist in nature, as evidenced by a comment he made on 15th November 2019 when his home was searched, and despite PC Penegar having explained to him the significance of section 58 of the Terrorism Act 2000.

19. It is also to be emphasised that on 31st January 2020, following the seizure at his home of the Anarchist's Cookbook, a Totenkopf SS badge and a skull mask associated with the far-right, the applicant bought a pack of two identical masks from Amazon to replace the one which had been seized.

20. Following his arrest and release on bail on 19th February 2020, on 25th February 2020 the applicant contacted the officer in the case and requested the return of the Anarchist's Cookbook and the Totenkopf badge.

21. Finally in this regard, on 2nd October 2020 the applicant contacted Benjamin Raymond (see above) via Twitter and asked him for his contact details.

22. These matters are all relevant to the present suggestion advanced on behalf of the applicant that the judge should have imposed either a suspended sentence or a community penalty.

23. When passing sentence, the judge observed that the Anarchist's Cookbook was of use to a person preparing or committing an act of terrorism. The applicant had indicated that he knew the nature of the book, and he had been warned about such material by at least one police officer. His defence that he had a reasonable excuse for possessing it, namely academic research or legitimate intellectual interest, was rejected by the jury. He had not given evidence to support his defence before the jury nor had he testified during the *Newton* hearing to support his contention, as expressed to the author of the pre-sentence report, that his political views had been mischaracterised by the prosecution and that he was more moderate than had been presented.

24. The judge noted that a great deal of the evidence showed the applicant's extreme right-wing mindset in terms of his communications and alliances with others of a similar mind. His

pronouncements were abhorrent to all right-thinking people, as were the vile images he kept on his mobile telephone – a device that he did not want the police to have and had attempted to conceal.

25. The judge observed that it was profoundly dispiriting to see a young man like the applicant, blessed with high intelligence, whose heart was filled with so much hatred for all manner of people who had done him no harm and who posed no threat to him. Many of his postings were truly hateful and worrying. The relevance of the evidence of his views and the expression of those views was that they were pertinent to his possession of the Anarchist's Cookbook.

26. The judge expressly addressed the fact that in 2016 the applicant had been diagnosed with Asperger's Syndrome and considered the extent to which allowance needed to be made for that fact. However, the judge concluded that the applicant used the diagnosis when it suited him. From what the judge had seen of him at the trial and during the pre-trial hearings and bearing in mind the other evidence in the case, he concluded that the applicant was a highly manipulative person. Although the judge bore in mind his mental disorder, as required by the definitive guideline, he did not find that it had any material effect on sentencing. The way in which the applicant exploited his diagnosis of Asperger's Syndrome had been demonstrated at the beginning of the trial when the applicant had refused to wear a mask, as required. He told the security staff that it was his human right not to wear a mask. He then changed his reason and claimed through his counsel that wearing a mask adversely affected his health in terms of his Asperger's condition. He refused to wear a mask to come into court.

27. The evidence demonstrated, however, that the applicant exploited his medical condition in that he had stated that he needed to act "legit autistic" when attending a relevant assessment and, even more significantly, photographs recovered from the applicant's telephone showed him wearing a Nazi type mask, seemingly quite happily. When the judge told him that he was considering revoking the applicant's bail if he did not comply with the court's requirements, the applicant then wore a mask and continued to wear it throughout the trial, without any ill effect. In the judge's assessment, this showed that he was an arrogant young man who was trying to assert his authority over the court and who believed that he was superior to others. The applicant's perception of himself as being superior was apparent from his demeanour throughout the video-recorded interviews under caution which were played in full to the court. The applicant's behaviour did not, in the judge's view, currently bode well for his rehabilitation.

28. Amongst matters of particular concern to the judge were that the applicant had not been frank with PC Penegar who dealt with him with courtesy and tact when he tried to talk him away from extremism. Particularly, he did not tell the officer of his involvement with the Iron March forum. Also of concern was his fascination with weapons, including his attempt to import pepper spray, his express desire to go "ER" (a reference to the killer Elliot Rodgers), and "going on a spree", together with his contact with people of concern, such as Ethan Stables, Alec Davies, Garron Helm and others. The real worry, as expressed by the judge, was that the applicant's conduct may have the effect of encouraging others of an extreme mindset to take an extreme course. The judge noted the contents of the pre-sentence report and the concerns expressed by the author.

29. The judge bore in mind the definitive guideline for this offence and the joint sentencing note. This was a Category C case in terms of culpability. In terms of harm the judge accepted the prosecution's submission that it straddled Categories 1 and 2. The book provided instruction for specific terrorist activity endangering life and some of the techniques described in the book, taken in isolation, would be very likely to cause harm which would indicate Category 1. However, the applicant's intention, if any, to use the techniques in the book and therefore the likelihood of harm actually being caused was less certain. There was not a great

deal of difference in the starting points in the two categories. Category 1 indicated a starting point of two years' custody after trial, Category 2, a starting point of 18 months' custody after trial. The judge bore in mind that the guideline was published when the maximum sentence for this offence was ten years' imprisonment. It had since been increased to 15 years' imprisonment. In the judge's view there had, accordingly, to be some uplift within the category in the sentence that was to be imposed.

30. With regard to mitigation, the judge took into account defence counsel's submissions, in particular the applicant's lack of previous convictions and his age at the time of these matters.

31. We interpolate to note that, contrary to the submissions in the written grounds of appeal, the judge clearly had the applicant's relative youth well in mind.

32. The judge identified as aggravating factors the applicant's failure to heed the warnings of PC Penegar and the period of time over which the offence was committed.

33. In the view of the judge, this offence was so serious that only immediate custody was appropriate and the sentence would be immediate imprisonment. The judge observed that the pre-sentence report did not suggest that a community order was appropriate.

34. This application has been argued in two notably different ways. Until half an hour before we sat, we anticipated that the application would be addressed, at least in the main, on the basis of the written grounds of appeal settled by Miss Bright. Mr Richard Wormald QC, recently instructed, has presented a somewhat differently formulated application which raises, *inter alia*, a potentially important additional ground of appeal, not raised before the judge or in the written grounds. We propose to deal with both the written and the new grounds of appeal.

35. As regards the significant new matter raised, Mr Wormald suggested that this court's decision in *R v LF* [2016] EWCA Crim 561; [2016] 1 WLR 4432, was wrongly decided in the sense that it was indicated in that case that a suspended sentence of imprisonment cannot be considered practical or desirable in this context. The court is asked to consider whether the judgment in *R v LF* precludes the judge from passing a suspended sentence in the right case. Mr Wormald essentially argued, by way of submissions that somewhat departed from those originally formulated by Miss Bright, that the correct result in this case would have been a suspended sentence.

36. The prosecution heard of this new argument only late yesterday. Mr Wormald accepts that they have not had time properly to prepare to meet it. Therefore, we invited Mr Wormald to address us on the basis that a suspended sentence was an option that reflected the justice of the case, and we indicated that if at the conclusion of the submissions we considered that his proposition in this regard potentially had merit, we would adjourn the application in order for full argument on the point to take place.

37. In the written grounds of appeal it was argued, as we have already indicated, that the judge was wrong to pass a custodial sentence on somewhat different bases from those advanced by Mr Wormald. Common to both submissions was the suggestion that a custodial sentence will be unduly difficult for this mentally ill applicant to bear. However, Miss Bright also argued that the applicant's good character should have anchored the sentence to a community-based disposal.

38. On that issue we observe immediately that, although previous good character is frequently – indeed usually – a significant matter to take into account, that feature alone is not determinative of the kind or of the length of the sentence a court should impose. Certainly, it

does not create a presumption that a non-custodial course will be followed. Those observations are perhaps particularly relevant in a case such as the present, when the author of the pre-sentence report was unable to recommend a non-custodial option.

39. It was suggested in the written grounds of appeal and orally by Mr Wormald, that the judge adopted an incorrect approach to the applicant's mental health issues. Mr Wormald made the general submission that it was wrong in principle for someone who has Asperger's Syndrome and who began obsess with right-wing ideology (some of it vile and offensive), and who was in possession of the Anarchist's Cookbook, to be sent immediately into custody. This is particularly said to be the case given the applicant's previous good character and his lack of insight into his offending.

40. In this regard, Mr Wormald took the court to significant parts of the guideline entitled "Sentencing offenders with mental disorders, developmental disorders or neurological impairments". Our attention was drawn, for instance, to parts of paragraph 4:

" some mental disorders can fluctuate and an offender's state during proceedings may not be representative of their condition at the time the offence was committed,

care should be taken to avoid making assumptions. Many mental disorders, neurological impairments or developmental disorders are not easily recognisable,

no adverse inference should necessarily be drawn if an offender had not previously either been formally diagnosed or willing to disclose an impairment or disorder,

offenders may be unaware or unwilling to accept they have an impairment or disorder and may fear stigmatisation if they disclose it ...

...

a formal diagnosis is not always required ..."

41. At paragraph 15 we note:

"Courts may find the following questions a useful starting point. They are not exhaustive and they are not a checklist, as the range of offenders, impairments and disorders is wide.

At the time of the offence did the offender's impairment or disorder impair their ability:

to exercise appropriate judgment.

to make rational choices,

to understand the nature and consequences of their actions?

At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?

..."

42. It is undoubtedly the case that real care needs to be taken as regards the defendant's mental health when this is a matter of concern and is a live issue in the case. In those circumstances an assessment needs to be made as to its impact on the sentence that is to be imposed. However, in this case, as already described, the judge found that the applicant's culpability was not significantly reduced by the diagnosis of Asperger's Syndrome. That, to a real extent, is determinative of a number of the points on which Mr Wormald relied in oral arguments, as founded on what are otherwise important principles set out in the guideline.

43. In this regard, we agree with Mr Allman, for the respondent, that the critical passages in this sense are to be found in the guideline as follows:

"11. Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour.

12. In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required.

13. The sentencer, who will be in possession of all relevant information, is in the best position to make the assessment of culpability. Where relevant expert evidence is put forward, it must always be considered and will often be very valuable. However, it is the duty of the sentencer to make their own decision, and the court is not bound to follow expert opinion if there are compelling reasons to set it aside."

44. Furthermore, Dr Kahtan, the psychiatrist who prepared the report dated 6th August 2020, which was before the court, addressed how the applicant presents and expresses himself, rather than his reasons for collecting the information set out in the Anarchist's Cookbook. Mr Wormald relied on the passage from the pre-sentence report, to which we have already referred, where some of the features of Asperger's Syndrome are rehearsed. It is suggested that Asperger's may be a central part of the offence when the individual pursues an interest which is illegal. It was suggested by the author that that was the position in this case. But, as we have already stressed, the judge found otherwise and, in our view, the judge's detailed reasoning and conclusions on this issue were wholly sustainable: principally, that the applicant's autism did not have any significant bearing on his culpability and that he is a manipulative individual who used his diagnosis for his own advantage. This was a matter for the judge to assess and these were conclusions which were properly available to him on the evidence.

46. Furthermore, it was suggested in the written grounds of appeal that the judge wrongly

conflated the issue of the applicant's health with (i) his lack of remorse and (ii) his truculent behaviour during the trial. With great respect to Miss Bright, in our view the judge did not confuse or conflate the mental health issues with other features or factors in the case. Instead, the judge assessed the relevance of the applicant's Asperger's Syndrome on the basis of all the evidence as regards culpability and, as we have just described, decided that it did not have any significant impact. Amongst other things, the judge concluded that the applicant had manipulated his diagnosis for his own advantage in these proceedings.

47. Overall, it is argued by leading and junior counsel that the judge failed to afford sufficient weight to the applicant's mitigation, and particularly his age, immaturity, vulnerability, good character and mental health issues. It is against that background that it is suggested by Mr Wormald that the possibility of a suspended sentence should have been actively considered by the judge, given that it constitutes the sentence which properly meets the public's concern over offending of this kind, whilst accommodating the particular circumstances of the applicant.

48. We are very much alive to the difficulties posed for the applicant by his diagnosis of Asperger's Syndrome, but his unrelenting activities which provide the relevant context for his possession of this guide (a guide which we emphasise is for creating serious explosive devices) leads to the conclusion that an immediate custodial term was inevitable.

49. The judge's approach, in our view, was faultless. We underline the time and care he took to express his approach to the sentencing exercise. We note that there is no clear evidence that imprisonment will present particular and striking hardship, albeit prison will undoubtedly not be easy for this applicant, given his background and circumstances.

50. Offences of this kind are of great concern to society, as reflected in the sentencing guideline which addressed the position when the maximum was significantly lower. We are grateful to Mr Wormald and Miss Bright for their notably helpful submissions but for the reasons set out above, although we grant leave, we dismiss the appeal.

51. Given that we do not consider that a suspended sentence was a viable option, we have not needed to adjourn for full argument as to whether the correct approach to this issue was taken in *R v LF*. That argument will have to await the right case.

52. Finally, we express our thanks to Mr Allman for the significant assistance he provided to the court in argument.

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