APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 41
HCA/2019/000194/XC

Lord Brodie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

SEAN BARCLAY

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Fyffe (sol adv); Paterson Bell
Respondent: Hughes (ad hoc); Crown Agent

28 May 2019

[1] The appellant, Sean Barclay is 28 years old. On 26 March 2019 at a continued preliminary hearing in the High Court at Glasgow, he pled guilty to two charges on the indictment which he faced. The first was a charge of theft by breaking into property occupied by the British Army at the Army Cadet Building in Newport on Tay and stealing various items. The second charge was a contravention of section 5(1)(a) of the Firearms

Act 1968 as amended. The sentencing judge imposed a sentence of 3 years' imprisonment in respect of the first charge, discounted from the period of 4 years which he would have otherwise imposed in light of the plea of guilty and a consecutive period of 5 years' imprisonment in respect of the second charge.

[2] The appellant appeals against sentence on three grounds. First, that the headline sentence selected in relation to the first charge was excessive, second, in relation to the second charge that the sentencing judge erred in deciding that there were no exceptional circumstances such as would permit him to depart from the minimum sentencing provision and third, that the cumulative effect of the sentences imposed resulted in an excessive overall sentence.

[3] The circumstances which lay behind the charges are these. When the appellant was aged about 13 or 14 years old, he had attended cadet training for a number of moths at the building which was broken into. He had also been in the Territorial Army for nearly a year when aged 16-17. As part of his training in both roles he had been taught gun handling.

[4] On an unknown date in early May 2018, he was able to break into the Army Cadet Building at Victoria Street, Newport on Tay. Despite the fact that this is a building surrounded by a six foot high metal boundary fence with a security gate, he obtained entry to the Cadet Force Building by smashing a back door window and then forcing open double doors within. He obtained entry to a lock fast cabinet within which were stored five drill purpose rifles. He stole three of these, five spring loaded magazines, five gun slings, 12 drill purpose rounds, a carrier bag, a ruck sack and some money. With the exception of the money the items stolen were then hidden in a wooded area in a country location near to Newport on Tay where they were subsequently discovered on 14 July 2018.

[5] The drill purpose rifles were used by military cadets for practicing rifle drill and weapons handling tests. One was manufactured by Royal Small Arms, Nottingham the other two by Royal Small Arms, Enfield. The rifles were derived from original SA80 assault rifles but had been modified in a number of ways to prevent them from firing bulleted cartridges. Certain components of the drill purpose rifles namely the gas ports, the bolt carriers and the upper and lower receivers were all components which could be used in original SA80 automatic assault rifles.

[6] The second charge to which the appellant pled guilty was a charge brought under section 5 of the Firearms Act. That section applies to weapons subject to general prohibition. The charge narrated a contravention of subsection (1)(a) of that section, which was the possession of relevant component parts in relation to a prohibited weapon, namely parts which were capable of being used for a firearm which was so designed or adapted that two or more missiles could be successively discharged without repeated pressure on the trigger, in other words an automatic weapon. The relevant component parts were those to which I referred a moment ago.

[7] Section 51A of the Firearms Act provides in subsection(1)(a)(i) that where an individual is convicted of *inter alia* section 5(1)(a) of the Act then the court must impose a minimum sentence of 5 years' imprisonment if the offender is aged 21 or over. Subsection (2) of section 51A provides that the court is required to impose such a sentence unless it is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify not doing so.

[8] Before the sentencing judge reliance was placed upon the proposition that the drill purpose rifles were not capable of firing live rounds. In order for the relevant component parts to be of value, the rifles would require to be dismantled and the parts then removed

and used in a genuine assault rifle. This meant that the appellant's possession in terms of section 5(1)(a) could be seen as something in the nature of a technical offence. Attention was also drawn to what the appellant had told the police at interview. He had described the guns as training props which, it was said, was correct. It was said that he did not appreciate that they would be regarded as firearms.

[9] Relying on what had been said in the cases of *HMA* v *McGovern* 2007 SCCR 173 and *The Queen* v *Rehman and Wood* 2005 EWCA Criminal 2056 it was submitted to the trial judge that he ought to conclude that exceptional circumstances such as would permit him to depart from the minimum sentencing provision were present in the appellant's case.

[10] In these submissions presented on the appellant's behalf before us, it was argued that the sentencing judge had erred in his approach to the question of whether exceptional circumstances were present. Looking to the sentencing statement which the judge issued at the time as set out at pages 12 and 13 of his report, it was submitted that he had approached this question by seeking to balance the aggravating and mitigating circumstances present in the case. He ought, it was submitted, to have considered the whole circumstances recognising that there may be cases where there is a single striking feature which is of itself exceptional. It was submitted that the fact that these were drill purpose of so called dummy rifles incapable of firing ammunition as was known to the appellant was a significant feature and failed to be described as a single striking feature which could be exceptional. The appellant it was said possessed something which he believed was not a firearm. The true nature of the items it was said only came to light when they were examined by firearms experts. In these circumstances it was submitted that the deterrent purpose which lay behind the minimum sentencing provision would have no effect if an offender did not know

that he possessed something which turned out to be a firearm. In all these circumstances the imposition of the minimum sentence was arbitrary and disproportionate.

[11] In relation to the first charge it was submitted that the sentence selected was excessive in light of the appellant's record of previous offending which although lengthy, was dominated by non-analogous offending. The offence was committed at a time when the appellant was a drug addict, looking for an opportunity to fund his habit. He planned to sell on the items stolen. Separately it was submitted that the overall sentence could be seen to be excessive when it was appreciated that the commission of the second charge began during the events set out in the first. Both charges could be seen to be part of the same course of conduct and a lesser overall sentence would have been appropriate.

[12] Our decision in respect of these submissions can be dealt with individually. Ground one, the charge of theft by housebreaking which the appellant pled guilty to was plainly a serious one of its type. He broke into secure premises utilising the knowledge which he had obtained from his previous cadet and Territorial Army experience. The circumstances lead to the inference that he did so in the knowledge that he would be able to access drill purpose rifles which would have the appearance of genuine assault rifles and which he would then be able to sell. The obvious market for imitation firearms of this sort is in the criminal fraternity. The enterprise was well planned and considerable efforts were gone to in the aftermath to conceal the stolen items. The appellant has a lengthy record of criminal conduct involving many offences of dishonesty. In these circumstances we do not consider that the sentence selected by the sentencing judge in relation to this charge can be criticised when looked at individually. We shall return to this matter in due course.

[13] In respect of ground two, the fact surrounding charge 1 as I have just identified them are also part of the whole circumstances which require to be taken account of in determining

whether exceptional circumstances are present for the purposes of the Firearms Act provisions. The essential contention relied upon by the appellant is that, as constituted, the drill purpose rifles cannot discharge ammunition and that the appellant did not realise that what he possessed would be classed as a firearm or a prohibited weapon. It was submitted that there was no evidence to suggest that he knew the relevant component parts could be removed and used as parts in an otherwise viable genuine rifle.

[14] The submission that the items removed were so called dummy rifles and not as such firearms in layman's terms may be correct in so far as it goes. However, Parliament has determined that the definition of firearm as used in the Firearms Act means a number of different things. One of these is a relevant component part in relation to a prohibited weapon. Parts of the drill purpose rifles were capable of being removed and then being used as parts of genuine automatic assault rifles. This makes the statutory offence committed by the appellant both serious and unusual in the sense that the courts do not regularly encounter offences relating to automatic weapons. The submission that the appellant did not realise that he would be in possession of items falling within the definition of firearms sits uneasily alongside the fact that he broke into military premises and stole modified automatic assault rifles with the intention of selling them onto others.

[15] One of the reasons behind the policy decision reflected in the minimum sentence provision is that the mere possession of firearms can create dangers to the public. The possession of a firearm may result in that item going into circulation and coming into the possession of another in whose hands it would constitute a real danger. The appellant's very purpose in dealing with the drill purpose rifles was that they and their component parts should be sent into further uncontrolled circulation. His intention is one of the factors

which requires to be taken into account in assessing the question of exceptional circumstances.

[16] It is also relevant to take account of the appellant's record of previous convictions for this purpose. He has a lengthy record of offending involving offences of dishonesty, offences of violence, breaching orders of the court and failing to comply with the terms of non-custodial sentences. He has received a significant number of custodial sentences.

[17] In our opinion it is helpful to remind ourselves of what was said by Lord Nimmo Smith in delivering the opinion of the court in *Her Majesty's Advocate* v *McGovern* at paragraph [11] where he said this:

> "While there may be cases in which exceptional circumstances are found to exist, the emphasis is on the word 'exceptional', and such cases will be rare. In deciding whether or not exceptional circumstances exist, it is necessary to consider as a whole all relevant circumstances relating both to the offence and to the offender."

As his Lordship went on to say: "it is only those circumstances that are claimed to be exceptional which fall to be taken into account."

[18] Even if it is to be accepted that the appellant did not appreciate that component parts of the drill purpose rifles could be used as parts of a genuine assault rifle, this it seems to us, is very far indeed from the sort of lack of knowledge which would defeat the effect of a deterrent sentence as was discussed in the case of *The Queen* v *Rehman*. What the court said in this regard can be found at paragraph 14 of the decision of the court given by the Lord Chief Justice where he said:

> "It is to be noted as already pointed out that part of the context is that section 5 of the Firearms Act creates an absolute offence. Secondly the purpose of the provision is the ensure that absent exceptional circumstances the courts will always impose deterrent sentences. However it is to be noted that if an offender has no idea that he is doing anything wrong a deterrent sentence will have no deterrent effect upon him."

It can hardly be suggested that the present appellant falls into that category. It is also relevant to note what the Lord Chief Justice went on to say in the following sentences of that same paragraph. The section makes clear that it is the opinion of the court that is critical as to what exceptional circumstances are. Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist or clearly wrong in not identifying exceptional circumstances when they do exist, this court will not readily interfere. That it seems to us, is the same approach which should be followed by this court.

[19] Looking then to the whole circumstances of the case, we do not consider that the sentencing judge can be faulted in the conclusion which he arrived at in determining that exceptional circumstances had not been established.

[20] Accordingly, the appeal must be refused in relation to ground two. In relation to ground three the appellant relies on the totality principle and submits that the overall sentence imposed was one which the trial judge ought to have recognised as excessive. We are satisfied that there is some force in the submissions which were presented in support of this ground of appeal and we shall give effect to it. We shall give effect to it by quashing the sentence which was imposed in respect of charge 1 and in its place imposing a headline sentence of 32 months imprisonment which we shall restrict by a quarter to result in a sentence of 24 months' imprisonment and the sentence in respect of charge 2 will run consecutively to that sentence.