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Neutral Citation No. [2020] EWCA Crim 1442

IN THE COURT OF APPEAL
CRIMINAL DIVISION



No. 202002170 A4

Royal Courts of Justice

Wednesday, 14 October 2020

Before:

LADY JUSTICE SIMLER DBE
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE MENARY QC

REGINA
V
STEPHEN BROWNLEE

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MR R. VARDON appeared on behalf of the Appellant.

J U D G M E N T

MR JUSTICE JEREMY BAKER:

1 On 6 August 2020 Stephen Brownlee appeared at Chester Crown Court and, having previously entered guilty pleas in relation to three indictments, was sentenced to a total of three years' imprisonment comprised of the following concurrent terms:

The first indictment

Count 1, being knowingly concerned in the fraudulent evasion of a prohibition on the importation of goods, contrary to s.170(2)(b) of the Customs and Excise Management Act 1979 - three years.

Count 2, possessing a prohibited weapon, contrary to s.5(1)(b) of the Firearms Act 1968 - three years.

Count 3, attempting to convert an article which was so constructed as to be incapable of discharging any missile through its barrel into a firearm, contrary to s.1(1) of the Criminal Attempts Act 1981- three years.

The second indictment

Possessing a controlled drug of class B, namely cannabis, contrary to s.5(2) of the Misuse of Drugs Act 1971 - seven days.

Third indictment

Count 1, possessing extreme pornographic images, contrary to s.63(1) and (7) of the Criminal Justice and Immigration Act 2008 - seven days.

Count 2, possessing extreme pornographic images, contrary to s.63(1) and (7) of the Criminal Justice and Immigration Act 2008 - seven days.

2 Steven Brownlee now appeals against sentence with the permission of the single judge.

The circumstances of the offences

3 The offences came to light following a multinational law enforcement operation known as “Operation Bayonet”, which targeted internet sites operating on the dark web, in particular one known as AlphaBay, which used sophisticated encryption software called “Tor” which enabled anonymous communications between users who could then trade in illegal items, including drugs, weapons and fraudulently obtained credit cards, that could be paid using crypto currencies.

4 The appellant was an AlphaBay user with the profile name "Groovebox" and had made a number of purchases, including manuals with the titles "How to build your own 9mm sub-machine gun", a do-it-yourself manual on how to make your own explosives, "How to build your own guns", "How to make a sonic gun", "How to do your own gunpowder: a professional manual," "Where to buy a 9mm Glock replica black gun in Europe with no customs," and "The big book of secret hiding places, sneak it through, smuggling made easier."

5 On 26 May 2020 the North West Regional Organised Crime Unit executed a search warrant at the appellant's home in Warrington in Cheshire. The appellant admitted to officers that there was a blank-firing gun in the premises that he had purchased online from Spain along with some ammunition and shotgun cartridges. The police recovered a 9mm Zoraki model 917 gas and signal firing self-loading pistol, which was a prohibited weapon under s.5(1)(b) of the Firearms Act 1968 as it was capable of firing flares and noxious substances. The stock and trigger mechanism from a shotgun were also found, although no charges arose from those items. Officers also found two jars containing cannabis and a copy of "The Anarchist Cookbook," which provided guidance on how to manufacture explosives and convert firearms.

6 Upon his arrest for the importation of the prohibited weapon, the appellant replied, "It's just inquisitiveness, isn't it?" Subsequently, during his police interview, the appellant said that he had purchased the pistol to deter potential burglars and that he had acquired that model after receiving advice via an undisclosed internet forum. He denied having any intention to convert it into a firearm. He said that he could not remember downloading the manual which related to smuggling and converting firearms. When asked about the stock and trigger mechanism from a shotgun, the appellant said he had been given them 15 years earlier and intended to make a crossbow from them. He also admitted purchasing the cannabis via AlphaBay.

7 Forensic examination of the pistol revealed damaged to the threads and marks on the barrel obstruction, which appeared to have been caused by a drill. A partial drilling out of the obstruction in the barrel constituted the offence in count 3. Checks with other law enforcement agencies in the country confirmed that the appellant had no known links to any terrorist or similar organisation. Forensic examination of the appellant's computer revealed 98 videos containing extreme pornographic images, some portrayed sexual acts involving animals and others sexual acts that involved non-consensual penetration of a person's mouth, anus or vagina.

The appellant

8 The appellant is 49 years of age and has no previous convictions. Prior to his arrest, he was in full-time employment working for an IT company and he lived with his 80-year-old father, who suffered from some ill health.

9 In discussion with the author of the pre-sentence report, the appellant stated that the firearms offences were committed as a result of his naivety, due to his own inquisitiveness and a need to protect his family who had previously been subjected to a burglary in their own home in the late 1990s. He stated that he had no intention to convert or use the firearm. He also

stated that he had a limited understanding of the dark web and only used it to purchase cannabis because he did not wish to engage with local drug dealers. He stated he had been using the drug for a period of about 10 years. There was no discussion about the extreme pornographic images found on his electronic equipment, as these had not been discovered at the time.

- 10 The author of the pre-sentence report observed that she had reservations about some of the claims made by the appellant. She noted the possession of a publication concerning the conversion of weapons and the attempt to do so in this case. She stated that whilst the Ministry of Justice risk assessment tool, which is based on the nature and number of previous convictions, would suggest the appellant was at low risk of re-offending, she disagreed and was concerned that as his first offences were serious ones using sophisticated anti-detection measures, this raised the possibility of a willingness to act in further offences. Moreover, whilst the offences themselves had not caused any actual harm, the risk of harm arising from them was of significant concern.
- 11 There were letters before the court from those who knew the appellant, including one from his brother who gave evidence to the effect that the appellant was a socially-isolated immature man with time on his hands, who had let curiosity get the better of him in a naive and unworldly way and who posed no risk of danger to society.
- 12 In submissions this morning we understand that there was further evidence from the prosecution by way of the police officer who had attended at the appellant's home, who noted that the appellant lived in one area of his father's home which was of a chaotic and filthy nature, characteristic of a recluse.

The sentencing remarks

- 13 In his sentencing remarks the judge, after determining that the appellant was entitled to a 25 per cent reduction to reflect his timely pleas of guilty, observed that it was:

"...suggested that your actions were simply naive and your motivation was no more than to have in your possession an imitation firearm which you could if necessary use to deter burglars in your house. You have been given the opportunity to give and to call evidence in respect of that matter in a *Newton* Hearing and you have chosen not to do that, although the submission has been made orally before me based on the papers. I'm afraid I reject your explanation. I reject it in the light of your plea to count 3. I reject it in the light of the other material that you have obtained on the dark web and also the level of knowledge and sophistication that inevitably was required in order to source such items as these. As the author of the pre-sentence report points out and indeed echoed by your own counsel, you are an intelligent person. The author of the pre-sentence report takes the view that you are an insightful person. You clearly have disclosed an interest in firearms. You are an informed person. Quite simply, the assertions you made do not fit with the admitted evidence before this court."

- 14 The judge went on to consider the questions posed in *Avis* [1998] 1 Crim App R 420 and concluded that:

"The gun was a blank-firing handgun, although an attempt had been made to adapt it so it was capable of discharging. There is no evidence it had been used. You are a person of previous good character. I am satisfied that you had intended to seek to make it capable of use and, as such, inevitably, any use of that weapon would have been illegal."

- 15 The judge dealt with the risk posed by the appellant and stated that:

"I accept the assessment statistically that the risk of you further offending is low, but, like the author of the pre-sentence report, I have concluded that such an assessment would be inappropriate and that the real risk that you present is higher than a low risk and the risk if it were to come about is one of very serious harm potentially on members of the public."

- 16 Finally, the judge determined that, after taking into account the mitigation available to the appellant, the offences were too serious to be dealt with in any other way than by the imposition of an immediate custodial sentence.

The grounds of appeal

17 In his grounds of appeal, Mr Vardon, who appears before us today as he did in the lower court, submits that the judge failed to have regard to the reality of the firearms offences and the nature of the appellant. He submits that the weapon was not converted and could only be converted with skill and tools not available to the appellant. He submits that the attempt to convert the weapon while made out in law was half-hearted and not repeated during the 13-month period he was in possession of the weapon and that the appellant represented no danger to the public and, on the contrary, required help to end his social isolation.

Discussion

18 On any view, it was the firearms offences that formed the most serious aspect of this case, which, as appreciated by the sentencing judge, were required to be considered in the light of the answers to the questions posed in *Avis* as endorsed and updated in *Wilkinson* [2009] EWCA Crim 1925. True it is that the weapon which was prohibited under s.5(1)(b) of the Firearms Act 1968 was a gas and signal blank-firing self-loading pistol, as it was capable of firing flares and noxious substances: see *Rose* [2015] EWCA Crim 155. Moreover, there was no evidence as to its use by the appellant. However, in light of the prosecution evidence and in the absence of any contrary evidence from the appellant at an offered *Newton* Hearing, the judge was entitled to find that the appellant had intended to make it capable for use as a firearm. Indeed, the appellant's plea of guilty to count 3 on the first indictment acknowledged that he had already attempted to do so.

19 We readily accept that these factors have to be set within the context of the appellant's lack of previous offending, his good employment record, his care responsibilities and his social isolation. Moreover, we accept that the attempts to convert the weapon into a firearm had by then only reached a relatively early stage. Nevertheless, it is clear from the expert evidence that there was damage to the threads of the muzzle and marks on the barrel

obstruction, which appear to have been caused by a drill. We acknowledge that the appellant had been in possession of the weapon for just over a year and that that is as far as the attempts had got by that stage, but we respectfully disagree that there was any particular sophistication or specialised equipment required to have converted this weapon into a firearm and we do not accept that the judge was not entitled to reach the view that he did concerning it. Furthermore, just as the author of the pre-sentence report and the sentencing judge expressed scepticism concerning the appellant's claimed naivety and inquisitiveness as an explanation for these offences, we too have similar concerns arising not only from the use of the dark web, but in particular the type of publications which the appellant had purchased.

20 In these circumstances, we consider that not only was a custodial sentence justified for these offences, but that having regard to the Sentencing Council's guidance on the imposition of community and custodial sentences, the judge was entitled to determine that having regard to risks to the public, the appropriate punishment could only be achieved by the imposition of an immediate custodial sentence.

21 In so far as the period of imprisonment is concerned, given the reduction of 25 per cent to reflect the timing of the appellant's pleas of guilty, this represents a post-trial period of four years' imprisonment. Moreover, it has to be borne in mind that the overall sentence not only takes into account the firearms offences, but the criminality involved in the other indictments and, in particular, the third indictment.

Conclusion

22 In these circumstances, given the very concerning aspects of this case which we have set out in the course of this judgment, we are not persuaded that the sentence imposed in this case after taking into account the mitigation that was available to the appellant, was either wrong in principle or indeed manifestly excessive and the appeal, accordingly, is dismissed.

CERTIFICATE

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