IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 1677

CASE NO 202102275/A1

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 27 October 2021

LORD JUSTICE COULSON
MR JUSTICE JEREMY BAKER

REGINA
V
MIA PEERS

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MR J DYER appeared on behalf of the Appellant

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1 This is another case of possession of an illegal firearm, contrary to section 5(1)A of the Firearms Act 1968. Parliament has prescribed a minimum term of five years' imprisonment in such cases by operation of section 51A of the same Act. The courts are therefore obliged to impose a term of at least five years unless there are exceptional circumstances.

2 The appellant is now 20. On 24 May 2021 she pleaded guilty to possession of a firearm and ammunition. On 16 July 2021 at the Manchester Crown Court before His Honour Judge Smith ("the judge") she was sentenced to five years' detention. She appeals against that sentence with leave of the single judge.

The Background Facts

3 The appellant had previously had a relationship with a man called Joshua Barnes. The circumstances in which she came to be in possession of the prohibited weapon and ammunition was set out in her written basis of plea which was not challenged by the Crown. It is appropriate therefore to set out the basis of plea in full:

> "1. Approximately 1 to 1½ weeks before her arrest Joshua Barnes attended her address and told her he wanted to store something in her understairs cupboard. He placed this item in the back of the cupboard. She did not know what the item was. He told her not to ask any questions and not to let anyone go near it. The defendant was suspicious, but it did not cross her mind that the bag would contain a firearm or ammunition.
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> 2. The defendant began to worry about what was in the bag but was too scared to look. The bag remained in the cupboard until 28/11/20.
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> 3. On 28/11/20 a number of armed, masked men forced their way into 14 Long Street [a neighbouring property which the appellant was visiting] and threatened the occupants. The defendant had a knife held to her throat. It became clear that they were looking for a firearm and had the wrong address. One of the men mentioned the name 'Josh'. The police were called and the men fled the scene.
>
> 4. The defendant realised that the item she had been asked to store was likely to be the weapon the men were looking for. She did say to her friend ... that she thought the attack had something to do with the item she had been asked to store. However, she was too scared to mention this to the police at the time she made her statement.
>
> 5. Having returned to her house, the defendant decided to open

> the bag to see what was inside. In doing so she touched the gun and magazine. Her mother attended her address, having been alerted to the fact that something serious had taken place. She then told her mother about the firearm. The police were still at the scene, outside on the street. She knew that her mother would tell the police about the firearm and she herself showed the police exactly where it was.
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> 6. In interview on 29/11/20 the defendant told the police how she came to be storing the weapon and named Joshua Barnes, but she was too scared to tell the police that she herself had touched the weapon. She had no previous experience of police custody and had been through a terrifying ordeal the previous evening."

The Correct Procedure

4 In *R v Beaman*, reported as part of *R v Rogers and others* [2016] EWCA Crim 801, the Lord Chief Justice set out at paragraph 121 the procedure to be followed in cases where a defendant wishes to allege exceptional circumstances. He said:

> "In our judgement the procedure should follow that of a Newton hearing. When a defendant wishes to rely on exceptional circumstances, these should be set out on his behalf in writing and signed by his advocate. The prosecution should then state whether they are agreed or not. If they are not agreed, then the defendant can then decide whether to seek a hearing, with the consequence that if he is disbelieved he will lose some of the credit to which he would otherwise be entitled. If the circumstances are agreed by the prosecution, but the judge does not approve that agreement, then the defendant must decide whether he wants a hearing."

5 That procedure was not followed in this case. Exceptional circumstances were not mentioned in the basis of plea. Although they were referred to in the submissions prepared by Mr Dyer in a document called "outline submissions on sentence", the particular point which now arises, namely as to the appellant's precise state of knowledge, was not spelt out; neither was there any reference to the case of *R v Boateng* which, as we shall see, is of particular significance in this respect.

6 This failure has had two results. First, it has meant that one element of the basis of plea – the last sentence of paragraph 1 - has assumed a significance, certainly in this court, which was not apparent at the time of the sentencing exercise. Secondly, it has meant that, as far as we can tell, proper thought was not given at the time to whether a *Newton* hearing was required or not.

The Sentencing Remarks

7 At the sentencing hearing the judge observed that the weapon was a self-loading pistol which had had its serial number erased. It had been adapted by means of

changing and exchanging the barrel to enable bullets to be fired with both automatic and non-automatic settings. The automatic settings allowed rapid fire and rapid discharge of the cartridge that was in the pistol. There were five bullets in the gun when it was found.

8 In his sentencing remarks the judge explained why this offence carried a minimum term of five years. He said:

> "The need for a deterrent sentence in relation to offences of this type is all too clear. The intention of Parliament in setting that provision was to place what is the highest weight in deterring gun culture and deterring the use of guns, because those who live in areas where there is a gun culture and where that gun culture is prevalent and fortunately it is all too prevalent in areas and districts of Manchester, where there is organised crime, that those who use and need guns need places to store them. Guns that would go out on the street and be used to kill inflict injuries of upmost severity, to impose terror on others, to enforce criminal activity and those who are engaged in those sorts of activities need a safe place to store their weapons and it is because of that that the courts -- that the courts are directed through Parliament to impose such a minimum term, and it is only if there are what can be said to be truly exceptional circumstances relating to the particular offence or yourself that I would be justified in not following the will of Parliament. That is the question I have to address today."

9 Then, having set out various matters of fact, taken from the basis of plea and making reference to the sentencing guidelines, the judge turned back to address the question of exceptional circumstances. He reminded himself that he could not apply that provision too readily because to do so would undermine the intention of Parliament. He concluded that the appellant's response to the package and her personal circumstances did not amount to exceptional circumstances. He went on to say:

> "The fact that you did not own up immediately again does not point to me being able to say there were exceptional circumstances here, but looking at your own personal circumstances I have great sympathy with the fact that this is your first conviction, that you are young and you are in a position of being pregnant. Unfortunately those who are looked at to be a refuge for those with guns and nefarious intent look to people exactly like you, which is just the reason why there has to be that deterrent impact. You are young and may be relatively immature. As far as your physical condition is concerned, I do not regard those as being either together or in themselves amounting to what can constitute exceptional circumstances. I put them all together to reach my overall conclusion and in my view I cannot reach a conclusion that

> there are in your case such exceptional circumstances which would warrant my imposing anything less than a five year minimum term."

The Advice and Grounds of Appeal

10 The Advice and Grounds of Appeal submit that a lesser sentence should have been imposed because of: the circumstances of the offence as set out in the basis of plea; the fact that it was the appellant who revealed the existence of the weapon to the police; the appellant's vulnerability to exploitation; her previous good character; her age at the time of the offence; the fact that she was a single mother of a daughter aged four; the fact that she was pregnant; and her health problems.

11 The concept of 'exceptional circumstances' is not itself referred to in the Advice until after all those mitigating factors had been set out. At paragraph 12 of the Advice, the point is put in this way:

> "It is submitted that the learned judge failed to take sufficient account of the mitigating circumstances in this case, both in relation to the offence and to the offender. Whilst it is the case that none of the mitigating factors alone would justify departing from the minimum term, those factors taken together ought to have led to a finding of exceptional circumstances. The sentence of 5 years in a Young Offender Institute in this case can be properly described as 'arbitrary and disproportionate'. The sentence imposed was manifestly excessive, having regard to the mitigation available."

Again, therefore, the emphasis is on what are called the mitigating factors, rather than the precise state of knowledge of the appellant.

12 However, when permission to appeal was granted by the single judge, the question of state of knowledge moved to the front and centre of this appeal. The single judge said:

> "I consider that it is arguable that there were exceptional circumstances in your case given that the basis of plea said that you were suspicious about the bag which you were asked to store 'but it did not cross [your] mind that the bag would contain a firearm or ammunition'. The Judge appears to have been sceptical about this, and if so I share her scepticism, but it is arguable that her characterising the case as one of 'wilfully shutting your mind to what was there' was inconsistent with this aspect of the basis of plea and/or the Judge was wrong to dismiss this as a possible exceptional circumstance. If this was a case in which you were suspicious but, in good faith, it genuinely never occurred to you that the item might be a firearm, it may be that this, in itself or taken in conjunction with the other circumstances of the case,

> would give rise to exceptional circumstances: compare *R v Boateng* [2011] EWCA Crim 861 although I am not clear that this was cited to the Judge."

13 Accordingly, it was the single judge on the s.31 application who identified the significance of the appellant's state of knowledge and the potential relevance of the decision in *Boateng*.

The Law

14 There is a considerable body of reported cases dealing with what may or may not comprise exceptional circumstances for the purposes of this legislation. In summary those cases make it plain that exceptional circumstances mean precisely that, and that it will be a rare case in which that high hurdle is surmounted.

15 The leading case is the case of *R v Rehman; R v Woods* [2006] 1 Cr.App.R (S) 77, [2005] EWCA Crim 2056. The Lord Chief Justice said at paragraph 12:

> "Parliament has therefore said that usually the consequence of merely being in possession of a firearm will in itself be a sufficiently serious offence to require the imposition of a term of imprisonment of five years, irrespective of the circumstances of the offence or the offender, unless they pass the exceptional threshold to which the section refers. This makes the provision one which could be capable of being arbitrary. This possibility is increased because of the nature of section 5 of the Firearms Act. This is different from most sections creating criminal offences. In the majority of criminal offences there is a requirement that the offender has an intention to commit the offence. However, firearms offences under section 5 are absolute offences. The consequence is that an offender may commit the offence without even realising that he has done so. That is a matter of great significance when considering the possible effect of section 51A creating a minimum sentence."

16 The Lord Chief Justice noted that the purpose of the statutory provisions was to ensure that, absent exceptional circumstances, the court would always impose deterrent sentences. At paragraph 14 he said:

> "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. 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."

17 In the older case of *R v Avis* [1998] 2 Cr.App.R (S) 178, this court said that the sentencing judge should ask himself or herself four questions:

1. What sort of weapon was involved?
2. What use if any was made of it?
3. With what intention did the defendant possess it?
4. What is the defendant's record?

18 In *R v Edwards* [2007] 1 Cr.App.R (S) 111, this court emphasised that strong personal mitigation on its own was unlikely to be sufficient to amount to exceptional circumstances. That was because, if it were so, there would be a risk that those looking for a safe haven to harbour dangerous firearms would target those whose personal circumstances might excite the sympathies of the court. If that exercise were successful, it would undermine the very policy of the minimum term.

19 That concern was also identified in *R v Boateng*. Spencer J, giving the judgment of the court, said:

> "15. To a degree the same principle applies in a case such as this. If those looking for a safe haven to harbour dangerous firearms target persons who they can trust not to look inside the bag which is left with them so that such persons can claim truthfully that they did not know the bag contained firearms, the policy of the minimum term would in the same way be undermined."

20 Although it was not cited to the judge, *R v Boateng* is a case with many parallels to the present appeal. There the defendant suspected that the bag might contain "something bad" but she said she did not know it contained a gun. The judge presided over a *Newton* hearing and concluded that the appellant was telling the truth, but still imposed the five-year minimum term. This court allowed the appeal on the basis that there were exceptional circumstances. The court said:

> "16. On the other hand, applying the reasoning of the court in *Rehman* the fact that an offender may commit an offence without even realising he has done so is a matter of 'great significance' when considering whether the operation of section 51A in a particular case leads to an arbitrary and disproportionate sentence.
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> 17. The crucial feature of this case is that the judge was satisfied after holding a full *Newton* hearing that the appellant was genuinely unaware that the bag contained firearms and ammunition. That is a high threshold for any defendant to achieve. We would expect any court dealing with such a case to subject to the closest scrutiny any plea of lack of knowledge of the contents of a bag or container.

...

> 19. In the present case the appellant's criminality lay in being prepared to receive into her flat a bag which she suspected was somehow linked to crime. In doing so she acted at her peril but she did not know the bag contained firearms and ammunition. In our judgment there were exceptional circumstances, which, had the point been argued, would have entitled the judge not to impose the minimum five year sentence. It is clear that had the judge believed such a course was open to him he would have taken it."

21 In *Attorney General's Reference No 37 of 2013 (R v Culpepper)* [2014] 1 Cr.App.R (S) 62, this court held that agreeing to store a firearm following pressure and threats by criminals did not amount to exceptional circumstances. The court noted that the use by criminals of individuals apparently unconnected to them to store firearms was a common feature of this type of offending. As Hallett LJ noted in the latter case of *Attorney General's Reference No 115 of 2015* [2016] EWCA Crim 765, that was a direction to sentencing judges that citizens, even if subjected to threats, would not store firearms and that to conclude that pressure amounts to exceptional circumstances, even in combination with other factors, would to a large extent blunt the effect of section 51A and Parliament's intent.

22 More recent cases on this topic include *R v Beaman* (supra) and *R v Nancarrow* [2019] EWCA Crim 470 but they add nothing of relevance on the particular issue we have to decide. Furthermore, although it is necessary to consider the issue of exceptional circumstances in a holistic way, it is convenient for the purposes of this appeal to address separately the appellant's personal circumstances generally, and her state of knowledge in particular.

Exceptional Circumstances: The Appellant's Personal Circumstances

23 As summarised above, this appeal was originally advanced on the basis that the appellant's personal circumstances were exceptional and therefore justified a sentence that was less than the minimum term. As we have noted, the judge rejected that submission, pointing out that it was many of those same personal circumstances (her vulnerability, her lack of previous convictions and so on) which led to the appellant being used as the storekeeper for this prohibited weapon in the first place.

24 On this point, we agree with the judge. Unhappily, the personal circumstances of this appellant explain why she was chosen to keep this dangerous weapon. There was nothing exceptional or even unusual about the decision of Mr Barnes to leave the appellant with his gun. She was precisely the sort of person chosen as a storekeeper by those who trade in and use illegal weapons. If this court were to hold that the appellant's personal circumstances were exceptional, then the point and purpose of this legislation, and the statutory minimum term, would immediately be lost. That was the very point made in *R v Edwards*.

25 In our view, there is also a direct comparison between this sort of situation and those cases in which vulnerable people, usually females, often pregnant and with small children, and sometimes the partner or former partner of a serving prisoner, are routinely used to smuggle drugs, SIM cards and the like into prison. Those offences almost always carry a term of imprisonment, notwithstanding the extremely difficult personal circumstances of the defendant in question. As the President of the Queen's Bench Division said in *R v Severn* [2018] EWCA Crim 1441:

> "We have no doubt that the supply of drugs into prison is an offence of exceptional gravity which must, notwithstanding Mr Majid's careful submissions on the subject, be visited with immediate custodial sentences. If that is not the case, then the greater will be the pressure on the weak and the vulnerable to take drugs into prison and thereby contribute to the disorder that results from the misuse of drugs in custodial institutions."

In our view, precisely the same applies to the five-year minimum term for the storage of illegal guns and the use made of the weak and the vulnerable for this purpose.

26 The appellant's personal circumstances are plainly deserving of the utmost sympathy. They were strong mitigating factors, but they cannot be described as exceptional circumstances. On the contrary, they are all too common in these types of cases. Accordingly, that basis for the appeal falls away.

Exceptional Circumstances: State of Knowledge

27 As we have said, the single judge gave permission to appeal on the basis that it was arguable that (a) the judge's remark that the appellant wilfully shut her mind to what she was storing was inconsistent with the basis of plea (which said it did not cross her mind that the bag would contain a firearm or ammunition); and (b) the fact that it did not cross her mind that the bag would contain a firearm or ammunition was possibly an exceptional circumstance.

28 These two points need to be unpicked a little. What the judge said in full was:

> "You clearly were aware that something was not right. You were suspicious. You did not and he told you on the basis of plea not to ask any questions, not to let anybody go near what he had put in your cupboard. Whilst your basis of plea suggests that it did not cross your mind that it might contain firearms or ammunition or something else, wilfully shutting your mind to what it might be, wilfully shutting your mind to what was there and asking further questions and not looking thereafter but allowing it to be stored for a not insignificant period of time, for a week and a half, can not in any shape or form in itself amount to what can properly be viewed as an exceptional circumstance. To do that would have the effect of

immediately blunting the deterrent requirement of this section."

29 We do not agree with the single judge's observation that the appellant 'wilfully shutting her mind to what was in the bag' was arguably contrary to the basis of plea. Indeed, in our view it was entirely consistent with it. On her own account, the appellant knew that she was being asked to store something which was probably illegal. That was why she was, in her own words, "suspicious". Although she did not consider that the bag would contain a firearm or ammunition, that can only have been because she trusted Joshua Barnes at least enough to believe that he would not expose her to such an appalling risk. But it was equally clear that the appellant wilfully shut her mind to what was actually in the bag; otherwise, at the very least, she would have asked him what it contained or she would have looked in the bag herself.

30 For those reasons, we do not believe that there was any inconsistency between the basis of plea and the judge's comments. But what really matters is the second point identified by the single judge, namely whether the appellant's statement that it did not cross her mind that this bag would contain a firearm or ammunition amounted to an exceptional circumstance.

31 In his written submissions to us, Mr Dyer relied heavily on *R v Boateng* to make the point that this lack of actual knowledge amounted to exceptional circumstances. As we have said, the crucial feature of *R v Boateng* was that the judge was satisfied, after a full *Newton* hearing, that although she knew that the bag contained 'something bad', the defendant was genuinely unaware that the bag contained firearms and ammunition. Here there was a basis of plea which said the same thing, and which was not challenged by the Crown.

32 Although for the reasons we have previously given, we think that this point was not flagged up in the way that it should have been, either in the proceedings before the judge or in the grounds of appeal, we recognise that we must deal with it, now that it has been squarely raised before us. On the face of it, because the cases are identical on this particular point, Mr Dyer is entitled to rely on the decision in *R v Boateng* to argue that exceptional circumstances applied here too.

33 We should say that we are troubled at the idea that a defendant can argue that the circumstances were exceptional because, although she suspected she was being asked to do something criminal, she deliberately decided not to find out what was in the bag. That appears to elevate deliberate ignorance into a positive virtue. Furthermore if, as *Culpepper* says, pressure and threats from criminals do not amount to exceptional circumstances, it seems to us potentially illogical to say that deliberate ignorance could do so. Even accepting the particular difficulties created by the fact that this is a strict liability offence, which does not require a mental element, we consider that this approach to deliberate ignorance might be said to be, at best, counterintuitive.

34 It also seems to us that there is a real risk, expressly recognised by the court in the

judgment in *Boateng*, that allowing defendants to rely on their own deliberate ignorance may rob the legislation and the minimum term of meaningful effect. Defendants caught in possession of illegal firearms, arguing that they did not believe that it was a gun, even though they suspected it was something illegal, has become a popular assertion in cases of this sort. Simply by way of example, it is the second time in two days that this particular constitution of this court has had to consider the self-same point.

35 Those reservations might have led us to conclude, albeit tentatively, that *R v Boateng* was wrongly decided. Whatever may be said in the authorities about each case turning on its own facts, on the critical point this case is too close to *R v Boateng* to permit the issue to be entirely ducked. We have therefore given that possibility anxious consideration. However, we do not consider that it would be right, particularly for a two person Court of Appeal, to take such a course. Accordingly, despite our reservations, we consider ourselves bound by *R v Boateng*. We would, however, urge that this issue be looked at again by the full court in an appropriate case.

Sentence

36 On the basis that we are bound by *R v Boateng*, it seems to us that we are bound to find, because of the appellant's lack of knowledge, that this was a case of exceptional circumstances. It is therefore appropriate to quash the minimum term of five years imposed by the judge.

37 What then is the appropriate sentence? There can be no doubt that a term of immediate custody was appropriate. The judge went through a careful sentencing exercise by reference to the applicable guidelines. He concluded that a term of three years and nine months detention was appropriate if the statutory minimum did not apply. That was considerably less than the recommended starting point in the guidelines because it took into account all of the many mitigating factors available to the appellant.

38 Mr Dyer's written advice and grounds do not criticise that calculation or offer any alternatives, and he did not make any submissions this morning to suggest that the judge's careful assessment and resulting calculation of the period of three years and nine months was in any way flawed. Furthermore, in the present case we are bound to note that the appellant was living with her small child who could have easily discovered the gun in its hiding place with potentially catastrophic results. That was, on any view, a significant aggravating factor.

39 In all the circumstances, therefore, we consider that we should revert to the judge's calculation of the appropriate sentence in this case of three years and nine months. We therefore quash the five-year minimum term imposed and replace it with a term of three years and nine months' detention. To that extent this appeal is allowed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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