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COURT FINDS SENTENCE UNDULY LENIENT

Summary of Judgment

The Court of Appeal[1] today concluded that the 18 month sentence imposed on Edward Corr for possession of firearms which he claimed he was pressurised into doing was unduly lenient. It directed, however, that the sentence should not be quashed given the way the case was presented by the prosecution to the trial judge and as the offender had already served the custodial element of the sentence and an increase would involve him returning to prison.

Background

On 4 July 2018, Edward Corr ("the respondent") was sentenced to concurrent sentences of 18 months imprisonment (9 months in custody and 9 months on licence) after pleading guilty to two offences:

- Possession of firearms and ammunition with intent to endanger life or cause serious damage to property contrary to Article 58(1) of the Firearms (NI) Order 2004 ("the 2004 Order"); and
- Possession of a prohibited weapon namely a Skorpion sub machine gun, contrary to Article 45(1) of the 2004 Order.

He was arrested on 24 October 2016 after the police carried out a search of a garden shed at the rear of his home and found firearms and ammunition inside a number of bags and a drill box. He provided an account to the police during his fourth interview which formed the basis of his plea which was agreed between the prosecution and defence. He said he was outside his house about midnight when he saw a man attempting to place a bag on his property. He challenged the man who identified himself as a member of a paramilitary organisation and said the respondent was to keep the bag until he was contacted by someone who would collect it. The respondent said he indicated that he refused to do this but that the man produced a handgun, pointed it at his head and threatened him. The respondent placed the items in a bin and then moved them to the shed at the rear of the property, where they remained for between 5-6 weeks. On one occasion the respondent indicated that he was removing items from the shed when the bag fell out. He replaced a number of items in the bag and put it back into the shed.

The respondent argued that he felt in fear for himself and his family. It was accepted by the prosecution that it could not disprove as a possibility that he was placed under the pressure described. The prosecution also accepted that the respondent has a clear criminal record (apart from a driving offence) and is a vulnerable adult with a medical history of very poor mental health and personal tragedy. The prosecution further accepted that the items recovered had not previously been used in any criminal offences nor was there any indication that any of the weapons were being readied for use.

The trial judge's sentencing remarks

[1] The panel was Stephens LJ (who delivered the judgment of the Court), Treacy LJ and Keegan J

The trial judge referred to the case of *R v Avis & Others*[2] which sets out four questions which it would usually be appropriate for a sentencing court to ask in a case such as this:

- *What sort of weapon is involved?* The trial judge said the weapon was a sub machine gun which was functional (but described as being rusted and corroded) and blank firing pistols which while not capable of firing 9 mm rounds could, with work, potentially fire a cartridge with a ball bearing;
- *What (if any) use has been made of the firearm?* In this case there was no history as the weapons had not previously been used in any criminal offence nor was there any indication that any of them were ready for use;
- *With what intention (if any) did the defendant possess or use the firearm?* The trial judge commented that this was "a second limb case" but did not elaborate as to the serious significance of such an intent; and
- *What is the defendant's criminal record?* The trial judge stated that the respondent's record was "to all intents and purposes a clear record and certainly there are no offences or anything of this nature".

The trial judge then turned to Article 70 of the 2004 Order which requires a court to impose an appropriate custodial sentence for a term of at least five years for the offence of possession of a prohibited weapon "unless the court is of the opinion that there are exceptional circumstances relating to the offence or the offender which justify its not doing so". The trial judge found that the respondent was not a sympathizer or "fellow traveller" with terrorists but that he had been taken advantage of by a terrorist organisation. He concluded that "the contents of the medical reports which bear very heavily on the factual circumstances behind the case constitute exceptional circumstances". On this basis, the trial judge exercised his power under Article 70 and imposed a sentence of less than the statutory maximum (the sentence was 18 months imprisonment on both counts to run concurrently).

Director of Public Prosecutions' Reference

The Director of Public Prosecutions ("DPP") challenged the sentence as unduly lenient, making the following core submissions:

- There is specific sentencing guidance to the effect that the appropriate sentencing range (after trial) for an offence of this type is in the region of 10-13 years;
- The judge's decision finding exceptional circumstances to justify departure from the five year minimum was wrong in principle.

Sentencing Guidelines

The maximum sentences for the offences under Articles 58(1) and 45(1) of the 2004 Order are respectively life imprisonment and 10 years or a fine or both. The Court of Appeal stated that deterrent and punitive sentences are required and should be imposed:

> "Sentencing courts must address with deterrent sentences the devastating effect on individual victims and the corrosive impact on both local communities and the wider community in Northern Ireland. Public protection is the paramount consideration.

[2] [1998] 1 Cr App R 420

> We consider that there is a particular need for deterrence in relation to firearm offences that assist terrorism so that those who facilitate the commission of terrorist crimes must expect deterrent sentences when apprehended."

The Court noted that deterrence is also a feature of Article 70 of the 2004 Order. The rationale of Parliament in requiring a minimum term was to send out a deterrent message that an offender can expect to be dealt with more severely. In addition, the Court commented:

> "Article 70 makes it clear that it is the opinion of the court that is critical as to what are the exceptional circumstances. Forming that opinion is more properly characterised as a matter for the evaluative judgment of the trial judge based on the circumstances of the offender or the offence (or both) in the context of the facts of the specific case."

The prosecution submitted that the courts in England and Wales have rejected the suggestion that pressure to hold weapons coupled with mental difficulties could amount to "exceptional circumstances". The Court of Appeal dismissed this by stating that this would fetter the role of the judge: "Such a proposition would result in an unjustified limitation on the power of the sentencing judge in a particular case to evaluate, on the basis of the evidence before him, whether "the court is of the opinion that there are exceptional circumstances …".

The phrase "exceptional circumstances" is not defined in the 2004 Order. The Court of Appeal said that in addressing this, it is correct for the court to adopt a holistic approach. It said there will be cases where there is one single striking feature which relates either to the offence or the offender which cause that case to fall within the requirement of exceptional circumstances but there can also be cases where no single factor by itself will amount to exceptional circumstances but the collective impact of all the relevant circumstances truly make the case exceptional. Evaluation therefore involves critical scrutiny and assessment:

> "In evaluating the evidence as to exceptional circumstances sentencing judges should appreciate that ordinarily pressure and threats is neither unusual nor exceptional just as ordinarily there is nothing unusual or exceptional about mental health difficulties. Accordingly a significant degree of caution has to be exercised in evaluating pressure or pressure and mental health difficulties against the background that the bar is deliberately a high bar and in order to meet it the circumstances have to be truly exceptional. We consider that pressure and personal vulnerabilities are usual in cases of this sort."

The prosecution also contended that the sentence was unduly lenient as the court did not identify or apply the appropriate starting point or sentencing range. The Court of Appeal, however, was not persuaded that the case law to which it had been referred established a sentencing range of 10-13 years for the facts and circumstances of this particular case:

> "The statutory minimum sentence introduced by the legislature in 2004 must have a bearing. We consider that effect must be given to this legislative development so that the bottom end of the sentencing range for the Article 45 offence [possession of a prohibited weapon] must be at least five years' imprisonment. The offence under Article 58(1) is in the hierarchy of offences the more serious offence. The sentencing range for that offence must also be informed by the statutory minimum for the offence under Article 45(1)."

The Court of Appeal then went on to consider whether there were any aggravating features in this case. It said the fact that one of the weapons was a prohibited weapon could be treated as an aggravating feature, however, it did not consider it appropriate to do so on the facts of this case as the Article 45(1) offence had already been taken into account in determining that the starting point for the Article 58(1) offence must be a minimum of five years.

The Court of Appeal concluded that the starting point in this case ought to have been at least five years' custody. The trial judge had stated that had the respondent contested the case the sentence he would have imposed was five years but that there had to be allowance for the plea. The Court of Appeal said that this could only mean that the five year (60 months) sentence took into account all the mitigating features except for the plea:

> "From this it can be seen that even if there were exceptional circumstances and applying to 60 months the maximum discount for the plea of one third, the sentence which ought to have been imposed was one of 40 months, not 18 months. This means that the sentence of 18 months is unduly lenient even if there was no question about the level of discount for the plea and even if there were exceptional circumstances in this case."

The Court of Appeal also considered whether the judge either chose another starting point or had arrived at the sentence on some other basis. It noted that the trial judge said he had to take into account the "powerful mitigating features relating to [the respondent's] mental health which bear heavily on his culpability". This could suggest that the trial judge used the five year starting point then reduced from 60 months to 40 months for the plea and then reduced again by some 22 months for the mitigating factors to arrive at 18 months. If this was so then the trial judge did not follow the approach previously set out by the Court of Appeal in that he must have incorrectly applied the discount for the plea and then applied a further discount for the mitigating factors rather than applying the discount for the mitigating factors and then applying the discount for the plea. The Court commented that the discount of 22 months for the mitigating factors would have been excessive and it did not consider that the trial judge arrived at the sentence on this basis but rather the reference to five years (60 months) took into account all the mitigating features except for the plea.

The Court of Appeal said that even if there were exceptional circumstances, the sentence was unduly lenient on the basis of a number of other points:

- The trial judge's reply to the first question posed in *R v Avis & others* led to an understatement of the seriousness of these offences. The Court of Appeal considered that the answer to the first question ("*what sort of weapon is involved*?") laid inappropriate emphasis on rust and corrosion rather than functionality: "whether a weapon is rusted or corroded is neither here nor there if it is functional and can kill or cause serious injury." It said the answer to the first question should have been:

    - "There were three weapons. The most significant of which was a functional sub machine gun which was a highly dangerous weapon. It was unloaded but there was available for use in connection with this weapon a small amount of ammunition. In addition there were two hand guns capable of firing blank

> cartridges including those containing ball bearings. Furthermore all three weapons could be used to frighten and intimidate victims in order to reinforce unlawful demands."

- The trial judge's reply to the third question ("*with what intention (if any) did the respondent possess or use the firearm?*") drew the valid distinction between the intention by the offender by means of the weapons to endanger life and the intention to enable some other person by means therefore to endanger life. The Court of Appeal commented, however, that this distinction should not obscure that these weapons and ammunition were possessed by the respondent with the intent to enable members of a dissident terrorist organization to endanger life. It considered that by answering the question in the way that he did the trial judge failed to place sufficient emphasis on the specific criminal intent obscuring that this was a most serious offence.

- The trial judge was somewhat generous in relation to the discount for the plea. The respondent did not plead guilty at arraignment either to the offences or to any lesser offence. The Court of Appeal also had concerns as to why disclosure or the discovery of a fingerprint had any impact on the stage at which the respondent pleaded guilty but said that if this was the only criticism it would not consider that the overall sentence was unduly lenient.

- The trial judge found that there were exceptional circumstances. The Court of Appeal said it was the combination of the offence and the offender which has to be considered. The respondent was placed under both verbal and physical pressure to hold the items which has to be evaluated in the context of his psychological condition and his below average intelligence. If the prosecution wished to challenge any of the facts around either the offence or the offender then they should have done so at trial. The Court was not minded *holistically on the facts of this case* to find that the trial judge was clearly wrong to find that *the combination of those factors* amounted to exceptional circumstances but that the trial judge was justified in finding exceptional circumstances having regard to the combination of both the offence and the offender so that the sentence imposed could be less than five years.:

  > "We consider that prior to the plea the appropriate sentence was one of at least five years custody. We consider that the discount for the plea was somewhat generous and that the appropriate sentence ought to have been one of 3 years and 6 months custody."

Discretion as to whether to quash the sentence

The Court of Appeal noted that there is a discretion as to whether to quash the sentence even if it has decided that it is unduly lenient. The appellant has now served the custodial element of his 18 month sentence and accordingly if the sentence was quashed and the court imposed an increase in sentence that would involve him returning to prison. Ordinarily that is a factor to be taken into account by way of a reduction to the sentence to be passed under the principle of double jeopardy, however, on the unusual facts of this case, the Court of Appeal took it into account as a factor of some minor weight in exercise of its discretion as to whether to quash the sentence. The Court of Appeal said that a feature of particular importance in this case and a factor which had considerable weight was that by this reference the prosecution is seeking to advance for the very first time an entirely new case:

> "That is unfair to the appellant because it exposes him to the risk of a significantly greater sentence on an entirely new basis not advanced before the judge. It is also unfair to the judge who gave detailed consideration to the sentencing exercise as it was advanced before him. The prosecution have the obligation to place before the trial judge any arguments or material that is relevant to the issue upon which the judge is called upon to make a decision. We consider that on the facts of this case this amounted to conspicuous unfairness to the respondent."

The Court of Appeal also took into account the countervailing interest in an appropriate sentence being passed on the respondent which would mean that he would return to prison. The Court said that in the exercise of discretion the sentence should not be quashed.

Conclusion

The Court of Appeal concluded that the sentence imposed was unduly lenient but considered that it would be unfair to return the respondent to prison. The Court did not quash the sentence.

ENDS

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