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No: 201802937/A1

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 19 October 2018

B e f o r e:

MR JUSTICE JEREMY BAKER

MRS JUSTICE CUTTS DBE

R E G I N A

v

GRAHAM PATRICK WHYTE

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Mr S Stephens (Solicitor Advocate) appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. MR JUSTICE JEREMY BAKER: On 11 July 2018, Graham Patrick Whyte, appeared in the Crown Court at Birmingham and having previously pleaded guilty in the Magistrates' Court and committed for sentence, he was sentenced to 12 months' imprisonment for an offence of possession of a bladed article in a public place, contrary to section 139(1) of the Criminal Justice Act 1988.
2. His application for leave to appeal against sentence has been referred to the Full Court by the single judge. We grant leave.
3. The circumstances giving rise to the offence were that on the evening of 28 July 2017 a motor vehicle was being pursued by firearm officers in the Erdington area of Birmingham. There were three occupants in the vehicle, one of whom was the appellant who initially gave a false name on his arrest.
4. After being conveyed to Perry Barr custody facility, where he was going to be stripped searched, the appellant disclosed that he had a lock-knife clipped to his boxer shorts from where it was recovered.
5. Initially the appellant made "no comment" in interview but later said that he carried the knife for protection as people had tried to shoot him in the past.
6. The appellant is 32 years of age and has a number of previous convictions including robbery in 2003, possession of heroin with intent to supply and having an article with a blade in 2006 and robbery and possession of an imitation firearm in 2009, for which he received a total sentence of 5 years and 3 months' imprisonment.
7. In his sentencing remarks the judge stated that knife crime, including the possession of knives, was regarded by the public with great concern, due to the potential for serious harm or death being caused by those who carry them. He determined that under the Sentencing Council's Guideline for Bladed Articles and Offensive Weapons this was a category 2A offence, culpability A being present due to the possession of a bladed article and harm 2 being indicated in the absence of any of harm 1 factors being present. Therefore, the appropriate starting point was 6 months' custody with a category range of between 3 months and 1 year.
8. However, the judge also indicated that in his judgment the appellant's antecedents disclosed a worrying pattern of his possession of carrying weapons, including a lethal one, the last two convictions showing that he had firstly, a knife and secondly, an imitation firearm in order to facilitate firstly, drug supplying and secondly, robbery. He noted that there was a gap in the appellant's offending since his release from custody in 2012, but maintained that the pattern of offending was a serious aggravating factor of his present offending, such that it was necessary to impose a period of custody outside the category range. He determined that after a trial a period of 18 months' custody would be justified, which after deduction of 33% to reflect the timing of the appellant's plea of guilty would be reduced to 12 months' imprisonment.

9. In his grounds of appeal, it is argued that the judge was wrong to determine this offence justified going outside the category range under the guidelines. Secondly, that the judge failed sufficiently to take into account the mitigation available to the appellant. Thirdly, it is argued that any sentence of custody ought to have been suspended in its operation.
10. The first matter we would observe is that due to his antecedents the appellant was subject to the minimum sentencing provisions of section 139(6A) to (6G) of the Criminal Justice Act 1988, such that in the absence of circumstances relating either to the previous offences, the present offence or the offender, which would make it unjust to impose the minimum sentence, the court was obliged to impose a sentence of 6 months' imprisonment.
11. Although section 189 of the Criminal Justice Act 2015 empowers the court to suspend a sentence of imprisonment, we consider that the reference to "imprisonment" under the minimum sentencing provisions is a reference to a term of immediate imprisonment. Furthermore, in the present case, we do not consider there is anything relating to the previous offences or the present one which would make it unjust to impose the minimum term.
12. We have been asked to consider whether, as the present offence was the first one committed after the appellant's release from custody in 2012, and the appellant has an offer to study for a Certificate of Higher Education Skills in the Workplace at Wales University, these are factors which might make it unjust to impose the minimum sentence. In our judgment, given the nature and extent of the appellant's previous convictions, we do not consider that these matters, taken either in isolation or in combination, would make it unjust.
13. However, although knife crime was rightly described by the judge as a matter of "great public concern", especially, as here, where there has been repeat offending, we are concerned as to whether the facts of this case, taken in combination with his antecedents, justified a sentence outside the recently introduced sentencing guidelines for such offences. It is necessary to have regard to the fact that although the maximum sentence for possession of a bladed article is 4 years' custody, this was not a category 1A offence under the guidelines. Moreover, the last time upon which the appellant was convicted of being in possession of a bladed article was now some 12 years ago.
14. In these circumstances, we are of the view that whereas the judge was entirely correct in treating the appellant's antecedents as a serious aggravating factor, justifying a sentence after trial at the top of the relevant category range, we do not, with respect, consider that it justified going outside the category range on this occasion.
15. In these circumstances, we propose to quash the sentence of 12 months' imprisonment and to substitute a period of 8 months' imprisonment, which reflects a sentence after trial at the top of category 2A of the guidelines, less a full 33% discount to reflect the timing of the appellant's plea of guilty in the Magistrates' Court.
16. To this extent the appeal is allowed.

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165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk