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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

ANDRE SHOUKRI

Before: Carswell LCJ, Nicholson LJ and Kerr J

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KERR J

Introduction

[1] The appellant was tried by McCollum LJ sitting without a jury at Belfast Crown Court on an indictment containing four counts:

1. Possession of a firearm and ammunition with intent, contrary to article 17A of the Firearms (Northern Ireland) Order 1981 SI 1981/155 (the 1981 Order);
2. Possession of a firearm and ammunition in suspicious circumstances contrary to article 23 of the 1981 Order;
3. Possession of a firearm without a firearm certificate, contrary to article 3 (1) (a) of the 1981 Order; and
4. Possession of ammunition without a firearm certificate, contrary to article 3 (1) (a) of the 1981 Order.

On 1 July 2003 the judge found the appellant not guilty on the first count but convicted him on counts 2, 3 and 4. He imposed concurrent sentences of six years imprisonment on count 2 and two years on each of counts 3 and 4. The appellant appealed against his conviction on count 2 and against the sentences imposed in respect of counts 3 and 4. At the conclusion of the hearing we announced that we would allow the appeal against conviction,

with reasons to be given at a later date, and reserved our decision on the appeal against sentence. This judgment contains our reasons on the appeal against conviction and our decision on the appeal against sentence.

Factual Background

[2] On 21 September 2002 police officers stopped a motor vehicle on Rathcoole Drive, Newtownabbey, County Antrim. The appellant was the front seat passenger of the car. He was removed from the car and as he alighted an item, later found to be a sock, fell from his person. The sock contained a small Walther pistol and some thirty rounds of ammunition. On subsequent testing, four of the rounds of ammunition were successfully discharged from the pistol; three failed to fire.

[3] The appellant initially denied all knowledge of these items. Later, during interviews by the police, he claimed that police had told him that loyalists had made a threat to his life. He also claimed that a "loyalist friend" had told him that an attempt would be made to murder him. He admitted that he had obtained the weapon and ammunition but stated that the only reason that he had done so was to protect himself. He refused to disclose the name of the person from whom he had obtained the gun and ammunition.

[4] Evidence was given that police had warned the applicant on three occasions about threats to his life in July 2002 and on 17 and 19 September 2002. He claimed to have been particularly affected by the threat that he was told about on 19 September, coming as it did two days after an attack on one Jim Gray. The following day a man called Rodney Black told him of a specific threat made by Johnny Adair that he was to be killed. The appellant gave evidence that he took this threat very seriously.

[5] The appellant gave evidence that he had obtained the gun and ammunition shortly before police stopped the car but he steadfastly refused to reveal from whom he had obtained it or to disclose the circumstances in which it had been provided to him. He said that he had not paid for it. He did not claim to have a firearm certificate for the weapon or ammunition.

The trial judge's findings

[6] The appellant had raised self-defence on his trial and the judge dealt with this in several passages in his judgment. He set out his conclusions in respect of count 1, the charge of possession with intent, in paragraphs 53 and 54 of his judgment:

> "53. I also bear in mind the onus of proof in the present case which means that the defendant is entitled to be acquitted on the first count if the

> prosecution fails to prove that he did not possess the weapon solely for the purpose of lawful self-defence.
>
> 54. In my view having considered all of the evidence the prosecution has not so satisfied me and accordingly I acquit the defendant on the first count in the indictment."

[7] The judge found that the appellant's reaction to the police warnings was such as to suggest that it was more likely that the gun and ammunition were obtained for "an aggressive purpose rather than for defence". He set out his conclusions on this aspect of the case in the following passages:

> "His attitude at interview to my mind was inconsistent with the state of mind that one would expect from a person who, having considered all reasonable alternatives to arming himself, decided to take that course.
>
> Had the defendant's concern been simply to defend himself he would in my view have consulted far more closely with the police and accepted whatever advice and protection they were prepared to offer.
>
> It is clear that the defendant had no intention or desire to rely on any protection that the police could provide. I take it from his attitude when given the later warning when he declined the offer of security advice that his possession of the weapon and ammunition would be likely to include aggressive use of the weapon as well as defensive use. He did not trouble to elaborate on the earlier precautions said to have been taken by him, saying merely 'I'd taken steps, locks on doors etc.'."

> "While there was a real threat to the defendant and there were persons prepared to murder him if given the opportunity, I am not satisfied as a probability that the defendant would not have used the weapon aggressively or that he would have confined its use to self-defence and I am of the opinion that Mr Shoukri's bearing and demeanour is not that of a passive victim who

would only be prepared to use such a weapon in self-defence."

and

"I am therefore satisfied that the defendant was in possession of the pistol and ammunition, that the circumstances were suspicious and he has not satisfied me on the probabilities that his possession was for the lawful object of self-defence and I convict him on count 2 of the Indictment."

The relevant statutory provisions

[8] Article 3 of the 1981 Order provides: -

"3. - (1) Subject to any exemption under this Order, a person who -

(a) has in his possession, or purchases or acquires, a firearm without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate; or

(b) has in his possession, or purchases or acquires, any ammunition without holding a firearm certificate in force at the time, or otherwise than as authorised by such a certificate, or in quantities in excess of those so authorised,

shall be guilty of an offence."

The maximum penalty for an offence under this section when convicted on indictment is five years.

[9] Article 23 provides: -

"23. Without prejudice to any other provision of this Order, a person who has in his possession any firearm or any ammunition under such circumstances as to give rise to a reasonable suspicion that he does not have it in his possession for a lawful object shall, unless he can show that he had it in his possession for a lawful object, be guilty of an offence."

[10] Before the Human Rights Act 1998 came into force in 2000, it was accepted without question that this provision imposed a persuasive burden on a defendant and that he had to satisfy the tribunal of fact on the balance of probabilities that he had the firearm or ammunition in his possession for a lawful object, the test which the judge applied in the present case. The incorporation into domestic law of the European Convention on Human rights now requires the courts to apply the provisions of the Convention, Article 6(2) of which provides :

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[11] Parliament clearly considered that to impose a persuasive burden on a defendant in the circumstances provided for in Article 23 of the 1981 Order would be likely to contravene the provisions of Article 6(2) of the Convention, for in the Terrorism Act 2000 sections 77 and 118 it changed the persuasive burden into an evidential burden. Section 77 provides: -

> "**77 Possession: onus of proof**
>
> (1) This section applies to a trial on indictment for a scheduled offence where the accused is charged with possessing an article in such circumstances as to constitute an offence under any of the enactments listed in subsection (3)
>
> (2) If it is proved that the article—
>
> (a) was on any premises at the same time as the accused, or
>
> (b) was on premises of which the accused was the occupier or which he habitually used otherwise than as a member of the public
>
> the court may assume that the accused possessed (and, if relevant, knowingly possessed) the article, unless he proves that he did not know of its presence on the premises or that he had no control over it.
>
> (3) The following are the offences mentioned in subsection (1)—
>
> …

The Firearms (Northern Ireland) Order 1981

…

Article 23 (possessing firearm or ammunition in suspicious circumstances).

[12] Section 118 of the Terrorism Act provides: -

> **"118 Defences**
>
> (1) Subsection (2) applies where in accordance with a provision mentioned in subsection (5) it is a defence for a person charged with an offence to prove a particular matter.
>
> (2) If the person adduces evidence which is sufficient to raise an issue with respect to the matter the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.
>
> …
>
> (5) The provisions in respect of which subsections (2) and (4) apply are—
>
> (a) sections 12(4), 39(5)(a), 54, 57, 58, 77 and 103 of this Act …"

[13] The effect of sections 77 and 118 of the Terrorism Act on article 23 of the 1981 Order is to transform the burden cast on a defendant who seeks to establish that he was in possession of a firearm or ammunition for a lawful object from a persuasive to an evidential one. In other words, whereas previously it would have been necessary for a defendant to establish as a matter of probability that he had such articles in his possession for a lawful object, now he need only adduce evidence sufficient to raise that issue and the burden falls on the prosecution to prove beyond reasonable doubt that he did not.

The appeal

[14] The appellant appeals against his conviction on the second count on the ground that the trial judge wrongly treated article 23 of the 1981 Order as imposing on him a persuasive burden to establish as a matter of probability

that he had the firearm and ammunition for a lawful object. He claims that sufficient evidence had been adduced on his behalf to raise the issue that he had these articles for a lawful object *viz* his own defence. The trial judge ought therefore to have found that the appellant had discharged the evidential burden that he had them for a lawful object and that the prosecution had failed to prove the contrary beyond reasonable doubt.

[15] The appellant also appeals against the sentence imposed on counts 3 and 4, contending that these are manifestly excessive and wrong in principle.

Conclusions

[16] The trial judge was not referred to sections 77 and 118 of the Terrorism Act 2000. This is unfortunate for it is clear, having regard to the passages from his judgment set out in paragraphs 6 and 7 above, that he considered that article 23 of the 1981 Order required the appellant to prove on the balance of probabilities that he had the weapon and ammunition in his possession for a lawful object. Had he been referred to the relevant provisions of the 2000 Act he would not have reached that conclusion. We are obliged now in this appeal to apply those provisions in the light of the judge's findings on the issue of self-defence.

[17] The judge considered that it was "more likely" that the appellant had the firearm and ammunition for an aggressive purpose than for his defence. The tenor of his judgment clearly indicates, however, that he did not dismiss the possibility of the appellant having had the articles for a lawful object; rather that he had not been persuaded of the probable truth of that claim.

[18] We are satisfied that the appellant had adduced sufficient evidence to raise the issue of whether he had the firearm and ammunition in his possession for a lawful object, namely, his own defence. In order to convict him of an offence under article 23 of the 1981 Order it was therefore necessary for the prosecution to establish beyond reasonable doubt that he did not have those articles in his possession for such an object. It is clear that the judge did not consider that this had been proved to that standard. We were therefore left with no alternative, and are obliged to allow the appellant's appeal against his conviction on count 2 and quash his conviction on that count.

[19] In advancing the appellant's appeal against the sentence imposed on counts 3 and 4 Mr Harvey QC suggested that the possibility that the appellant had the gun and ammunition for his own defence should be reflected in the penalty chosen. On this basis the sentence of two years imprisonment imposed on each count was, he said, excessive.

[20] Although it is possible that the appellant had the articles in his possession for a lawful object, the court is not bound, for the purpose of sentencing, to

accept that this was indeed his purpose. It is necessary to examine carefully all the known circumstances of how the appellant came to be in possession of the weapon and ammunition. It is clear that the gun was obtained illicitly from a person or persons whom the appellant has refused to identify. A significant quantity of ammunition suitable for use in the gun was also obtained. These features clearly distinguish this case from the less serious type of case where, for instance, a firearm certificate has lapsed and through inadvertence has not been renewed.

[21] In *R v Clinton* [2001] NI 207 this court stressed the need for citizens to recognise that they cannot take the law into their own hands and obtain firearms if they do not have certificates for them. A strictly enforced system of licensing those who are permitted to have firearms and prescribing the conditions under which they may hold them is obviously vital for the protection of the public. Those who flout that system, particularly if this involves obtaining firearms from an illicit source, must expect to be dealt with severely. It is, moreover, necessary to ensure that a sentence for this type of offence contains a sufficient element of deterrence to discourage others. We consider that the sentence of two years on each of counts 3 and 4 was fully merited and the appeal against sentence is therefore dismissed.