JUDICIARY OF
ENGLAND AND WALES

CENTRAL CRIMINAL COURT

26TH FEBRUARY 2013

SENTENCING REMARKS OF
HIS HONOUR JUDGE DAVID RADFORD

R - V - KEVIN HUTCHINSON-FOSTER

Kevin Hutchinson-Foster it is now my duty to sentence you for the 3 separate offences you have committed.

The first two offences (Counts 1 and 2) were committed on the 29th July 2011. You pleaded guilty on re-arraignment to these offences on the 15th June 2012, having originally pleaded Not Guilty to them on first arraignment on the 8th of February 2012 when a date for your trial was set. Evidence proving your guilt, including CCTV, DNA and the phone cell site evidence was served by the prosecution. For the purposes of sentence I give you credit for your pleas to these counts but their belated timing against a background of highly probative evidence must reduce the extent of that credit.

The facts of those offences can be shortly summarised. You went to the Lagoon Salon in Kingsland Road, Hackney on the 29th July. You got into an argument with one of the staff concerning a lady with whom both you and he were acquainted. The argument ended by you saying that you would be back. You returned armed with a handgun which you said in evidence under cross-examination you did not know if it was or was not loaded. As can be seen in the CCTV, you pointed it at the staff member with whom you had earlier argued intending to cause him to believe he

would be shot. Moments later you used the gun to pistol whip him on the head causing him to be injured, for a while to lose consciousness. You then made your get away by car, taking the sock covered gun with you.

These two offences were premeditated and callous. You did not in the least care that what you decided to do was not only to cause Mr. Osadebay to fear that he was to be shot but also as it did and as can be seen in the CCTV footage to cause fear and panic to wholly innocent members of the public present in and near the Salon that day.

5 days later on the 4th August that self same firearm still in your possession and under your control, was supplied by you, with a bullet in its magazine, in a shoe box you had obtained from a female friend of yours to Mark Duggan when he arrived by taxi in Vicarage Road, Leyton. From Leyton Mr. Duggan continued on his cab journey to Tottenham in possession of the lethal firearm you had supplied him with. When the taxi was stopped by the police in Ferry Lane, Mr. Duggan decided to exit the taxi, leaving behind the now open and empty shoebox which you had given him.

The gun which you had supplied to Mr. Duggan was later found on the grassy area behind where he had fallen after he was shot. It is no part of the function of this court to give its own judgement on the precise circumstances in which Mr. Duggan was fatally injured – that will be for the Coroner's Inquest later this year to decide. I accept your Counsel's submissions that you are not to be held responsible in law for whatever Mr. Duggan decided to do when he left the taxicab or for the response of the police to the situation which then occurred. However, you were responsible for the supply to Mr. Duggan of a loaded prohibited firearm in circumstances in which you must have known or foreseen its criminal use by him and/or others. Exactly what the extent of your knowledge of Mr. Duggan's planned use of that firearm was you have chosen not to reveal, instead cloaking your association with Mr. Duggan and your telephone discussions and meeting with him that fateful day with a farrago of lies. Plainly though, as a matter of commonsense, no one would have supplied such a weapon to another as you did that day believing it was for use for some innocent and lawful purpose.

It is of course beyond argument that all these 3 offences which I have to sentence you for today are so serious that only significant immediate custodial sentences can properly be passed to mark their seriousness. In my judgement, whilst it is right that the sentences on the first two counts (the 29th July 2011 offences) should run concurrently (but reflecting in the

lead sentence for Count 1 the additional criminality involved in Count 2) the sentence on Count 3 involves a different day and quite separate serious criminality and must run consecutively.

In relation to Count 2, as I am required to, in assessing its own seriousness, I have sought to follow the Definitive Guideline for such offences issued by the Sentencing Council. I find that this is a Category 2 offence (lesser harm but higher culpability). Whilst the physical injuries you caused to Mr. Osadebay were not serious the use of a weapon to pistol-whip him and the presence of a significant degree of premeditation plainly constitutes higher culpability. Added to this, the seriousness of the offence – indeed all 3 offences – is aggravated by the fact that at the time you were on licence following your release from prison.

So far as Count 1 is concerned, the evidence is clear and factually undisputed that the firearm you produced in the Lagoon Salon on the 29th July was the self-same prohibited weapon you supplied to Mr. Duggan on the 4th August.

The issue of law which I have troubled Counsel about is whether that means that a mandatory minimum sentence has to be imposed by the Court both on Count 1 as it undoubtedly has to in relation to Court 3.
I drew Counsels' attention to the decision of the Court of Appeal, Criminal Division in **Attorney General's Reference No. 114 of 2004 (Steven McDowell) [2005] 2 Cr. App. R. (S) 6.** Mr. Denney has submitted that the binding result of that decision is that this court is not required to pass a mandatory minimum sentence of 5 years on Count 1 since the count as pleaded at the time of your re-arraignment upon it did not allege in terms that the firearm described in the count was a prohibited firearm. The prosecution though have submitted that the self-same firearm is described in Count 3 as a prohibited firearm, and unlike in the Reference there is no confusion or unresolved issue of fact about the nature of the handgun concerned, which, if there had been, should have lead to the necessity of a further count contrary to Section 5 of the Firearms Act 1968 being added to the indictment.

I have considered the submissions made to me on this question. I agree with the prosecution that the factual matrix of this case is quite different from the confusion at the Crown Court outlined by the Court of Appeal in McDowell.

However, Mr. Denney points out with blunt economy of verbiage in his submissions that the Court of Appeal made clear that it was necessary for there to be a specific count on the indictment relating to the incident concerned which alleged in terms that the firearm was a prohibited weapon before the statutory minimum sentence mandatorily had to be passed and that this Appellate enjoined requirement of sentencing law is binding on me.

I have come to the conclusion that the judgement of the Court of Appeal given by its then Vice-President is clear, namely that the cases where the prosecution seek to invite a Judge to impose (at least) the mandatory minimum sentence they should add such a count to the indictment so as to make clear to a defendant and those advising him, that he is at risk in relation to his then alleged possession of a firearm on that day of a minimum 5 year sentence. That was not done in relation to the Defendant's possession of the firearm on the 29th July 2011. I find that I am bound by the requirement so to have done in this case, and that the charging in Count 3 of later transferring a prohibited firearm on the 4th of August 2011 does not enable me to avoid following the clear statement of the law by the Court of Appeal. Of course, in any event, it is for me to decide what the appropriate length of sentence must be for this serious offence, which as Mr. Denney said in his written submission might be lower, higher or the same as the statutory minimum sentence as I shall determine.

The fact is that Parliament has required the passing of a minimum 5 year sentence if a prohibited firearm is in an offender's possession (with or without the additional specific intent criminalised by Section 16A of the Firearms Act 1968) of course the mandatory sentences proscribed by Parliament are minimum sentences not starting points for all firearms offences covered by the statutory proscription (see the judgement of the Court of Appeal in **Attorney General's Reference (No.6 of 2011) Zephen Rollings [2012] 2 Cr. App. R. (S) 67**. In this case I shall shortly turn to a consideration of the factors affecting your culpability in relation to the offences in Count 1 and 3, having in mind the Appeal Court's clear guidance that such offences call for deterrent and punitive sentences.

Before I do so, I must determine, as the offences pleaded in Counts 1 and 2 on the indictment are specified violent offences as defined in the Criminal

Justice Act 2003 as amended, whether you are a dangerous offender for whom in relation to Count 1 an Extended Sentence should be passed. In that regard I have weighed - as sentencing law requires me to do - the analysis contained in the Pre-Sentence Report the conclusions of the writer of that Report are not binding on me but are of great significance. I acknowledge that until the present offences, you had not previously been convicted of any violent offence, and that you did not discharge the firearm on the 29th July 2011. However, I do find that the facts of all of these offences and the cogent assessment of the Probation Officer who has had more contact with you than simply from the usual one session interview, combined with your minimalising of your offending, properly lead me to conclude that there is a significant risk that you will commit specified violent offences in the future which carry with them as a result a significant risk that thereby members of the public will be seriously injured, either physically and/or psychologically.

Having regard too to the fact that you committed these offences during a standard licence period, it is appropriate that you be subject to an Extended Licence when you are released from the custodial sentences I shall shortly pass on you, if it be the case, as I find it is, that the appropriate sentence on Count 1 (concurrent with that passed on Count 2) is one of at least 4 years imprisonment.

I turn first though to the factors relevant to sentence on Count 3, for which no discount at all for any plea of guilty or any remorse is available to you. The account you have given about the circumstances underlying this offence on the jury's verdict and in common sense has from first to last been wholly mendacious. The true facts are that the firearm concerned was a lethal weapon with a bullet in its magazine which I find you had access to and control over from at least prior to your deployment of it on the 29th July 2011 and which you knowingly transferred to Mr. Duggan for what must have been to your knowledge a serious criminal purpose. In line with clear guidance given by the Court of Appeal, reflecting the very great concern over the transfer by criminals of lethal firearms, this offence merits a condign sentence.

At the time of this offence you had not previously been convicted of an offence of violence or any firearms offence but you were not a man of good character or some wayward youth but a 29 year old adult who was subject to licence conditions consequent upon your early release from offences for Class A drug trafficking for which you had received sentences of 54 months at this Court in August 2009. You also fall to be sentenced on Counts 1 and 2. Concurrent sentences as between those Counts is

appropriate, though taking into account the overall criminality of both Counts in the lead sentence to be imposed on Count 1.
I accept that you did not discharge the handgun at the Lagoon Salon and it is unclear whether or not then it was loaded. I accept that the physical injuries to Mr. Osadebay were in the event not serious. However, as I said previously your decision to return an hour after your first visit armed with a firearm to what you knew was a busy hair salon full of innocent people was wholly premeditated and cynically callous and indifferent to the consequences of the deliberate fear your decision to produce and point that handgun would and did engender in such a place.

You are entitled to credit for your pleas of guilty but they were not tendered at the first reasonable opportunity and in relation to Count 1 by the time you were re-arraigned you had no prospect of mounting an arguable defence to it and I find there to be no true remorse for which additional credit should be given. Before coming to my final conclusions on the appropriate sentences I should pass, I have to judge how far the sentencing law on proportionality or totality should affect their length. In taking such account of totality as I should, I have to have in mind that this principle though applicable should not result in rendering nugatory the mandatory minimum sentences Parliament requires to be passed for qualifying firearms offences. So far as the effect of your recall to custody by the Parole Board is concerned the time you have been in custody to date represents a previous portion unserved of your 2009 sentences. Your recall does not in fact expire until July 2013 and so the sentences I will pass on you will run concurrently to that remaining period of recall.

I have considered all the matters in mitigation put both in writing and orally by your able leading Counsel.

Having regard to all the factors bearing upon sentence

I sentence you on Count 3 to 7 years imprisonment.

I sentence you consecutively on Count 1 to an Extended Sentence made up of a custodial term of 4 years and 3 years extended licence and concurrently with that sentence on

Count 2 I sentence you to 9 months imprisonment.

I direct that you must pay the statutory surcharge of the appropriate amount.