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No: 201802258/A2

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 20 February 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE FARBEY DBE

THE RECORDER OF LIVERPOOL
HIS HONOUR JUDGE GOLDSTONE QC
(SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

R E G I N A

v

DEAN LOWE

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Miss J Martin QC appeared on behalf of the **Appellant**
Mr P Dunkels QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 10 May 2018, after a trial before May J and a jury in the Crown Court at Truro, this appellant was convicted of the murder of his former partner, Kirby Noden who throughout the proceedings below was referred to as Kirby. On 15 May 2018 he was sentenced to life imprisonment with a minimum term of 28 years, less the days spent remanded in custody. He appeals against that sentence by leave of the single judge.
2. The appellant and Kirby (as we too shall call her) had known each other since childhood. They lived together for a number of years. The appellant was a user of drugs of all kinds. Kirby was besotted with him. She had a son by another man and a second child by the appellant. Under his influence, she abandoned them both to move to the southwest with him. She later gave birth to another child of whom he was the father. That child too was taken from her. She followed him wherever he went and did whatever he asked her to do. She became largely estranged from her own family. She described the appellant as the love of her life. He on the other hand spoke of her in dismissive and disrespectful terms.
3. Having travelled for some years, homeless and sleeping rough, Kirby managed to secure for the couple a small, damp basement flat. The appellant's evidence at trial was that between them they received about £1,500 per month in benefits with their rent paid. Virtually all of the benefit money was spent on drugs.
4. Kirby was last seen alive on 10 January 2017. By 14 January the appellant was using her bank card in unsuccessful attempts to draw cash, which were thwarted by his not knowing the PIN. In the intervening days he had murdered Kirby in their flat. It was a dreadful murder, the circumstances of which we will summarise without dwelling on distressing details. It was not discovered for some four months. During that period the appellant was able to use Kirby's debit card to make some purchases from the funds which were credited to her bank account by the social services. He arranged for his own benefits to be paid into an account in his name rather than, as previously, an account in her name, telling social services that his girlfriend and he had split up.
5. In mid-May 2017 the appellant began to send Facebook messages to relatives in which he said that there had been a body on the floor in their flat and he had chopped the body up and put it in bins and down the toilet. He said that either he had killed Kirby or Kirby and a man called 'Dan' were setting him up. He said he had last seen Kirby in the wheelie bin. He sent photographs of the blood splattered on the walls and ceiling of their bedroom. In his messages he went on to make bizarre references to imagined events in his past.
6. The police were contacted and an officer went to the flat. The appellant told him that he had killed Kirby and got rid of her in the wheelie bin. He showed the officer the blood in the bedroom. He said that he must have killed her and that he wanted help because he could not get it out of his head. He also said that he had made a necklace from Kirby's teeth. He was arrested.
7. The scene was of course investigated. As no body was found it was necessary for DNA samples to be taken from Kirby's parents and son, which enabled the scientists to

establish that it was her blood in the bedroom of the flat. There was blood spatter on the walls caused by impacts into wet blood. On the ceiling there were blood patterns consistent with the swinging of a heavily bloodstained weapon. A section of the carpet had been removed. Blood staining on the concrete surface below had largely been cleaned away. There was also blood spatter on a wall caused by impact into wet blood in a separate incident. The mattress had heavy blood staining on the underside and marks indicating that Kirby had been moved across it. The bed frame was also bloodstained, from which it could be inferred that the mattress had been turned whilst the blood was still wet. A heavily bloodstained rock was on the floor at the end of the bed and pieces of rock were in the bedroom and living room. These pieces could be fitted together and the pattern of blood staining indicated that they had broken in the course of the attack.

8. There was a metal pole found with screws projecting from it. The appellant's evidence was that that had usually been kept by the front door in case someone aggressive came. On it was found Kirby's blood. There were hair swipes on the pole indicating that it had made contact with hair wet with blood. The appellant's palm print was on the pole. Police also found two rucksacks in the flat which had Kirby's blood inside. They appeared to have played some part in the removal of parts of her body from the flat.
9. The general distribution of blood in the flat suggested that the appellant had attacked Kirby with a rock which fractured into pieces with the force of his blows. He had also used the metal pole on her with blows which must have been directed at her head. She may have been lying on the bed when he attacked her. She was bleeding heavily whilst on the bed and the lines of blood on the ceiling above were probably projected from the blood-soaked weapon with which the appellant was striking her. She ended up on the floor beside the bed where further blows were delivered.
10. Having killed her, it seems the appellant removed her body, probably in pieces, and cleaned up the worst of the blood. Between mid-January and mid-May the appellant and his two dogs continued to live in the flat, which was in the state we have described.
11. In a series of interviews the appellant gave an account that he had had an argument with Kirby and after that there was a body on the floor which he had removed in pieces. He surrounded that account with a series of lies in which he said he had been set up by Kirby and a man called Dan Entwistle. He said that Kirby was still alive; she had not only cheated him but had sent men to rape him. The police conducted extensive enquiries. There was no trace of Kirby being alive after mid-January and there was no trace of any Dan Entwistle. At trial the appellant maintained this lying account.
12. Following his conviction, there was before the court a moving victim personal statement from Kirby's mother which we have read and which we have well in mind.
13. In her sentencing remarks the learned judge said that she was sure that the appellant had first attacked Kirby by hitting her with the rock. When it broke, he went upstairs to the bathroom to get the metal pole which he kept there. He used that to finish her off on the floor. It was not known, said the judge, whether this was one continuous attack or

whether the appellant might have attacked her on one day before finishing her off on another. Whether it was the work of minutes, hours or even days, and for how long she had been conscious with the appellant raining blows upon her, the appellant had not said and there was no body to reveal the extent of the attack upon her. Whatever the time frame, said the judge, this was a pitiless attack on someone who had done nothing but love the appellant devotedly.

14. The appellant's lies, said the judge, demonstrated the opposite of remorse. He had never expressed any regret at all for what he had done. The only possible piece of mitigation was that the attack did not seem to have been premeditated. Although the trial had been adjourned to allow for psychiatric reports to be prepared, no reports were relied upon either at trial or at sentencing. The judge concluded that the appellant was not ill when he killed Kirby and that the drugs which he was taking could not have accounted for any part of his extreme violence. The judge was satisfied that when the appellant fetched the metal pole and bludgeoned Kirby's head with it, he must have intended to kill her.
15. When Kirby was dead the appellant had just left the corpse where she lay. He must have eaten, slept and taken his drugs next to it for several days. Over a weekend before the bin men came on the Monday, the appellant cut up what remained, wrapped some in the carpet and took the rest in rucksacks to the bins. From there the bin men collected them and the waste was taken to the local incinerator. As the judge put it, in this bleak and desolate manner was Kirby's life ended and her remains obliterated. Not only had the appellant deprived her and her family of a life, he had also taken from them the dignity of commemorating her death. The judge recorded that the victim personal statement spoke of Kirby's mother's loss of hope, the grief of being unable to bury her daughter and the torment experienced by herself, Kirby's step father and her son then aged 11.
16. The judge then referred to the provisions of schedule 21 to the Criminal Justice Act 2003 which, as is well-known, sets four starting points for the minimum term in cases of murder committed by an adult. By paragraph 4, if the court considers that the seriousness of the offence or the combination of the offence and one or more associated offences is exceptionally high, the appropriate starting point for an offender aged 21 or over is a whole life order. Examples are given of the type of case which would fall into that category. By paragraph 5, if the court considers that the seriousness of the offence is particularly high, the starting point for an offender aged over 18 is 30 years. Again, examples are given of cases falling into that category. By paragraph 5A, a minimum term with a starting point of 25 years is appropriate where the offender has taken a knife or other weapon to the scene, intending to commit any offence or have it available to use as a weapon and use the knife or other weapon in committing the murder. By paragraph 6, in cases which do not fall within any of the preceding paragraphs the starting point is one of 15 years.
17. Reflecting on the application of those provisions, the judge said that the pole used by the appellant had been in the flat albeit up some stairs and she thought it was debatable whether that could be regarded as a case of taking a weapon to the scene. Similarly, although the use of Kirby's bank account by the appellant after her death approached

the seriousness of a murder done for gain, the judge said she could not be sure that that was the reason why the appellant had killed her. His actions in breaking a large rock over Kirby's head and then collecting and using a metal pole with protruding screws to beat her further came close to but fell just short of qualifying as sadistic behaviour as referred to in the schedule.

18. The judge concluded that the specific factors set out in paragraph 5(2) of the schedule did not apply, but that the paragraph did not provide a complete list of all the circumstances in which a 30-year starting point would be appropriate. She concluded that the combination of aggravating features in this case rendered the seriousness of the offence particularly high. Those features were that Kirby had loved and trusted the appellant; she had been in her own bedroom when without any apparent provocation he had attacked her; it was a vicious prolonged assault during which the appellant meant to kill her; having broken a large rock over her head he went upstairs to fetch a metal pole with which to finish her off; after killing her in this remorseless way he had cold-bloodedly lived next to her corpse with his dogs in the room for several days, before cutting up her remains and disposing of them in the bins. The judge acknowledged that what happened afterwards could not make the death itself more serious, but it was a very serious aggravating factor. The judge referred to the appellant's previous convictions, none of which were for particularly serious offences, and indicated that she would disregard them in deciding the minimum term. She was sure that notwithstanding his habitual drug use the appellant was entirely sentient when he murdered Kirby. Thus she came to the minimum term of 28 years from which were to be deducted 361 days spent on remand in custody.
19. In written and oral submissions, presented with admirable focus, Miss Martin submits that the judge was in error in taking a starting point of 30 years. She acknowledges the seriousness of the case and the very distressing features to which we have referred, but submits that the seriousness was not "particularly high" so as to bring it within paragraph 5 of schedule 21 and so to attract the 30-year starting point. She accordingly submits that the judge should have taken a starting point of 15 years. The judge was entitled to treat as aggravating features the prolonged nature of the attack and the steps subsequently taken to dismember and dispose of the body. Counsel accepts that the latter feature is a particularly serious aggravating feature because of the additional grief which it causes to the bereaved: see Attorney General's References Nos 108 and 109 of 2005 [2006] EWCA Crim. 513. Nonetheless, Miss Martin submits the judge having taken the wrong starting point passed a sentence which went beyond what was commensurate with the seriousness of the offence.
20. For the respondent, Mr Dunkels QC in his written and oral submissions emphasises, as indeed is accepted on behalf of the appellant, that paragraph 5(2) of the schedule provides examples of cases which will attract a 30-year starting point but does not constitute a conclusive list of all such cases. He submits that the facts justified the judge's finding that the seriousness of the offence was "particularly high." We note however that in a helpful sentencing note submitted to the judge, the respondent had submitted that the starting point was 15 years, unless the judge found that the metal pole had been taken to the scene in circumstances bringing the case within paragraph 5A of the schedule.

21. This was on any view a serious case. We do however accept the submission on behalf of the appellant that it was not a case in which the seriousness was "particularly high" for the purposes of schedule 21. With every respect to the judge, the case is in our view more appropriately viewed as one in which the starting point was 15 years, but that a number of grave aggravating features increased that starting point very substantially. The important issue in our view is not the starting point taken by the judge, but rather the finishing point of her sentence.
22. In that regard, the following features are important. First, the savage manner in which Kirby was murdered is in itself a gravely aggravating feature. The judge was correct to conclude that on the evidence it could not be said that the metal pole which was at the top of a short flight of stairs was "taken to the scene" so as to come within paragraph 5A: see Dillon [2015] EWCA Crim. 3. On the evidence, the rock had not been taken to the scene within the meaning of that paragraph either. The circumstances were however that the appellant first attacked Kirby with the rock using such force as to break the rock. It can safely be inferred that that initial attack incapacitated her and rendered her defenceless to what followed. The appellant then fetched his second weapon, a particularly vicious one, with screws protruding from the pole, and with that he beat Kirby to death. The blood distribution which we have summarised told its own story of the violence used. As the judge observed, there was no way of knowing over what period of time that was done.
23. The structure of schedule 21 presupposes an intent to kill. That much is apparent from the indication in paragraph 11 of a specific mitigating factor, an intention to cause grievous bodily harm rather than to kill. The starting point was therefore not to be increased because of the intent to kill which the judge clearly correctly found proved. But it certainly was to be increased, and substantially so, by the manner in which the deceased was murdered in her own home by the man to whom she had devoted herself and to whom she was entitled to look for love and protection.
24. Next, we regard the conduct of the appellant after the murder in taking prompt financial advantage of what he had done was a second serious aggravating feature. The judge correctly concluded that it was not a case of murder for gain, but it was a case of almost immediate use of the deceased's bank card - unsuccessfully in one respect, but successfully in others. We are not able to accept the submission on behalf of the appellant that this was at most a neutral feature.
25. A third and in our view particularly grave aggravating feature was the appellant's treatment of Kirby's body after her death. The circumstances scarcely bear thinking about. For a period of time he and his dogs lived with the body in the flat. He then somehow cut up the body of the woman who had been devoted to him and disposed of the pieces in ways which meant that all trace of her would soon be obliterated. Thus the appellant compounded the indignity with which he had treated her body by dishonouring her memory. Every murder not only ends one life, but also harms and often damages irreparably many others. In the present case, the appellant in the months after murdering the deceased could hardly have done more to increase the anguish of Kirby's family. To set against that, the judge rightly found that the only possible mitigation was the lack of premeditation, but that could carry very little weight

given that the murderous assault must inevitably have continued over at least some time.

26. It is beyond argument that the combination of these features justified a very substantial increase from the 15-year starting point which we have found to be appropriate. The person best placed to assess the proper extent of that increase was the trial judge, who had heard all of the evidence. Her conclusion that the appropriate minimum term was 28 years was a severe sentence and high in the range properly open to her. We are not however persuaded that it was manifestly excessive. For those reasons, this appeal is dismissed.

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