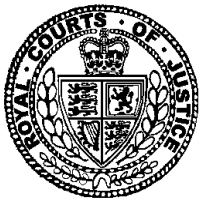

Neutral Citation Number: [2020] EWCA Crim 360

Case No: 202000096 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT NEWCASTLE-UPON-TYNE
LAVENDER J
T20197125

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 11th March 2020

Before:

LADY JUSTICE THIRLWALL DBE
MR JUSTICE SPENCER
and
SIR DAVID FOSKETT

- -

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 CRIMINAL JUSTICE ACT 1988

Between:

THE ATTORNEY GENERAL	**Appellant**
- and -	
ALLY GORDON	**Respondent**

- -
- -

The Solicitor General and **Mr Timothy Cray QC** for the **Attorney General**
Mr Andrew Fisher QC for the **Respondent**

Hearing date: Wednesday 12th February 2020

- -

Approved Judgment

THIRLWALL LJ:

1. Ally Gordon is 20. After a trial in the Crown Court at Newcastle before Lavender J he was convicted of manslaughter as an alternative to murder. He was also convicted of having an article with a blade or point contrary to section 139(1) of the Coroners and Justice Act 1988.

2. He was sentenced to 3 years and 6 months detention in a young offenders' institution for manslaughter with 6 months detention concurrent on the bladed article offence. He was ordered to pay the victim surcharge.

3. This is an application by Her Majesty's Attorney General for leave to refer to this court a sentence which he regards as unduly lenient pursuant to section 36 of the Coroners and Justice Act 1988.

4. The co-accused, Leighton Barrass was convicted of murder and pleaded guilty to having an article with a blade or point (the murder weapon). He was sentenced to custody for life with a minimum term of 20 years, less 289 days spent on remand.

5. Barrass is now 21. The offences took place just before his 20th birthday. At the time of the offences Gordon was 19 and 20 on conviction.

6. The victim of the killing was Connor Brown, He was stabbed repeatedly by Leighton Barrass. He died from the effects of his wounds.

FACTS

7. In the early hours of Sunday 24th February 2019, Connor Brown was out celebrating his 19th birthday with friends in Sunderland city centre. Gordon and Barrass arrived in the city centre at about 1am. It was the Crown's case, which the judge accepted in his sentencing remarks, that they were both intoxicated. Barrass had consumed cannabis and cocaine at some point before the killing. He was carrying a knife. He had boasted to friends that he was carrying a knife. It was agreed that Gordon was not present when he said this.

8. Barrass and Gordon approached Stephen Nunn whose friend Connor Brown was nearby, in an alley. Gordon knew Nunn. Nunn and Brown were both amateur boxers. Barrass was offering to sell drugs to Nunn. Nunn wasn't interested. Barrass then asked Nunn if he would give him £10 in exchange for two £5 notes. Nunn handed over the £10, Barrass handed back £5 then tried to give him 2 tablets instead of the other £5. There was an argument. Nunn punched Barrass in the face, hard, causing his nose to bleed. Barrass retreated down the alley; Gordon followed him down shortly after.

9. It was the prosecution case that Barrass then went back up the alley to Nunn and Brown and others in their group. In the alley he produced a flick knife and was uttering threats, shouting "I'll stab any of you". Connor Brown began a fight with him. Few of those present saw Barrass use the knife and it was not apparent initially that Connor Brown was injured. He had been stabbed but appeared unaware of that. His friends said that he seemed to have a rush of adrenaline, chased Barrass back down the alley and then attacked him near some wheelie bins. This part of the incident is shown very clearly on CCTV footage which we have seen. Blood can be seen on his clothing just below

his ribs. Nonetheless he managed to get on top of Barrass. Barrass was attacking him from below.

10. At this point Gordon joined in. For a short period he kicked Connor Brown repeatedly and stamped on him. It appeared to witnesses that he was endeavouring to dislodge Connor Brown from on top of Barrass. He then desisted and walked away. Connor Brown managed to get to his feet, pursued by Barrass, and can be seen on the CCTV footage staggering, his situation desperate as he was overwhelmed by the effects of the stabbing. He fell to the ground. An ambulance came to the scene and took him to hospital where he died very soon afterwards. In the meantime Barrass had discarded the knife and attempted to leave the scene. He was held by doormen and arrested.

11. After walking away from the fight Gordon had approached the doormen, who had restrained Barrass, and was complaining that Connor Brown had attacked Barrass. He then left the scene and went to his grandmother's home where he lived. He changed his clothing. Later in the day he posted aggressive and self-justifying messages on Facebook. He showed no sympathy or even understanding for Brown and his family. He sent messages on Facebook seeking to explain what Barrass had done. He received short shrift from those who replied. That evening he caught the train to Edinburgh where he was arrested on arrival. He was found to be carrying a lock knife and small quantities of ecstasy and cannabis.

12. He did not give evidence. It was before the jury that he did not know that Barrass had a knife. He had joined the attack by the bins to defend Barrass. The lock knife he was carrying when arrested was a work knife that just happened to be in the pocket of his work jacket which he was travelling in.

13. In due course the jury convicted Barrass of murder, they acquitted Gordon of murder and convicted him of manslaughter.

Sentencing Exercise

14. There was no pre-sentence report for the Respondent. He was of previous good character.

15. Connor Brown's mother had written a moving personal statement which sets out in restrained and heart rending terms the effect upon her and her family of the death of her son. Nothing any court can do will reduce the life-long sadness that she will suffer at the loss of her child and the loss of his future.

16. The prosecution said there were two issues to be determined:-

    i) whether Gordon was aware that Barrass had a knife; and

    ii) whether he was aware that Barrass had used the knife.

    They submitted that the judge should find on the evidence that the answer to both questions was yes. In the absence of any direct evidence to that effect the prosecution submitted that an inference could be drawn from the fact that the respondent had gone up the alley after Barrass had done so. He must have been there when Barrass was using the knife in that part of the incident. The fact that the respondent kicked and stamped on Barrass at the later stage was evidence of his involvement earlier.

17. The prosecution also pointed to the fact that this was city-centre violence at night and highlighted Barrass's background of drug dealing and theft.

18. The prosecution pointed to the Facebook postings, his attempt to justify his actions and to the fact that he left the jurisdiction and went to Scotland, carrying a lock knife.

19. Counsel for the Crown also submitted that the case came within category B, or at lowest the top of category C in the Sentencing Council's Guideline on sentencing for Unlawful Act Manslaughter.

20. On behalf of the respondent Mr Fisher QC, who appeared at trial and on the application, submitted that whilst it was accepted that the respondent did kick and stamp on Connor Brown he did so at a time when Brown was on top of Barrass. There was no evidence that Gordon knew Connor Brown had been stabbed at all, still less that he had sustained a serious stabbing injury at the hand of Barrass.

21. There was evidence from a pathologist who had specifically looked for injuries that might have been occasioned by kicking and stamping. She could find nothing, not even bruising or abrasions.

22. Mr Fisher submitted to the judge that the jury's verdict was consistent only with their not being sure that the offender knew Barrass had a knife. Had they been sure of that, they would have been bound to find that he had the requisite intention for murder. Since they did not do so he fell to be sentenced on the basis that he had encouraged Barrass in his unlawful attack on Brown in the early part of the incident and had tried to help him in the latter part, as we have described – all of his involvement in ignorance of the knife.

23. Mr Fisher submitted that the appropriate bracket was the bottom of category C, at most, and probably Category D on the basis that the respondent had acted in defence of Barrass, not knowing that Barrass had stabbed/was stabbing Gordon.

24. Gordon was ashamed of the messages he had put out on Facebook. Counsel referred to them as contemptible. At the time of the incident he had no idea how gravely Connor Brown was injured. It was accepted that the Facebook posting was an aggravating factor as was the going to Scotland and the taking of the lock knife

25. He was only 19 and of previous good character.

Sentence

26. Having set out the offences, the judge said "Connor Brown was stabbed five times at about 1.24am on Sunday 24th February 2019 in Sunderland town centre, after a night out with friends. I am sure that you, Leighton Barrass, inflicted each of these stab wounds, including the fatal wound to the heart. You, Ally Gordon, assisted and encouraged Leighton Barrass, kicking Connor Brown when he was grappling with Leighton Barrass, although you did not yourself inflict any injuries." Later he said to Barrass "Connor Brown did not give in to your threats but decided to take you on. He punched you but you stabbed him three times in the side and twice in the back. Two of these blows damaged his ribs and one went through his shoulder blade. As I've said, you stabbed him in the heart and that is what killed him. Ally Gordon you encouraged

and assisted your friend by joining in and kicking Connor Brown while he was being stabbed. By their verdict the jury have indicated that they were not sure that you intended that Connor Brown should be caused really serious injury"

27. Later, when dealing further with Gordon the judge said "I am not sure that you knew that Leighton Barrass had a knife. Yours is therefore a case of medium culpability [Category C] for which the guidelines say the starting point is six years imprisonment with a range from three to nine years. The judge rejected the suggestion that he was acting in defence of Leighton Barrass "but in the words of one of the witnesses, you wanted to get your piece in".

28. He went on to consider all the aggravating and mitigating factors. He found that both defendants were significantly intoxicated. There was no premeditation. Connor Brown was the first to use violence albeit in response to the threat of stabbing by Barrass (of which Gordon was not aware).

29. The judge acknowledged the youth of both defendants. He said there was no evidence of particular immaturity for their age. He noted the bad character of Barrass, particularly a recent offence which had taken place in Sunderland city centre. He said that he would give credit to Ally Gordon for his good character and did not consider that he met the test for an extended sentence and that he was full of remorse for what he had done.

30. The judge said that he was going to incorporate the sentences for possession of knives within the sentences for murder and manslaughter and then passed the sentences which we have already outlined.

The application

31. The Solicitor General began his submissions by observing that since the definitive guideline for offences of unlawful act manslaughter became effective in November 2018 there had been no authority in respect of the guideline and it was for that reason (as well as the fact that the sentence was too lenient) that he sought to refer the case to this court.

32. At the centre of his oral submissions was the contention that the judge failed adequately to take account of the fact that this offence took place at night in a city centre. He referred to the decision of this court in ***R v Appleby*** **[2010] 2 Cr. App. R(S) 46**, in particular the well-known passage of the judgment in which Lord Judge CJ observed that a feature of manslaughter cases

> "which has come to be seen as a significant aggravating feature...is the public impact of violence on the streets, whether in city centres or residential areas…Each of these cases involves such public violence. Specific attention should be paid to the problem of gratuitous violence in city centres and the streets…..the manslaughter cases with which we are concerned involved gratuitous, unprovoked violence in the streets of the kind which seriously discourages law-abiding citizens from walking their streets, particularly at night, and gives the city and town centres over to the kind of drunken yobbery with which we

> have become familiar, and a worried perception among decent citizens that it is not safe to walk the streets at night".

33. The Solicitor pointed out that there is no reference in the guideline to the time and location of the offence in the lists of aggravating factors notwithstanding the observations of the court in *Appleby*. It was necessary therefore to refer back to *Appleby* to ensure these factors were taken into account. We disagree.

34. Unlawful act manslaughter cases vary in seriousness. The range of culpability from just short of murder to a relatively minor unlawful act is very wide. The harm is always death. That reality was the focus of the decision in *Appleby*. The court drew attention to the effect of section 143(1) of the Criminal Justice Act 2003:

> "In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused."

35. The effect of the decision in *Appleby* was to increase sentences in cases of unlawful act manslaughter to reflect that the harm is always of the most serious kind, whatever the level of culpability.

36. The involuntary manslaughter guideline is unusual in the range and variety of situations it is required to cover, reflecting the range of culpability to which we have referred. The sentencing range is commensurately wide.

37. The location of a crime is always relevant, the extent to which it is an aggravating factor will depend on the facts of each case. As to timing, the offence in this case would have been no less serious had it taken place in the middle of the day in the middle of town. The absence of specific references to time and location is not an omission or a defect in the guideline. The guideline reads "Below is a **non-exhaustive list** of additional elements providing the context of the offence and factors relating to the offender. Identify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far". In every case there are a number of potentially aggravating factors. It is for the judge to identify them and to accord them the weight he or she considers appropriate.

38. It should by now be well understood that all sentencing guidelines are informed by current sentencing at the time the guideline is drafted. That is the effect of section 120(11) of the Coroners and Justice Act 2009 which provides that when exercising its functions under section 120 (which includes the drafting of sentencing guidelines) the Council must have regard to a number of matters including at paragraphs (a) and (b) respectively:-

    a) the sentences imposed by courts in England and Wales for offences; and

    b) the need to promote consistency in sentencing.

39. In this case the decision in *Appleby* was an important part of the case law preceding the drafting of the guideline. It is unsurprising therefore that the sentences imposed in

Appleby are all within the range of category C in the guideline. A judge who applies the guideline correctly has no need to refer to *Appleby*.

40. Sentencing remarks should contain only that which is relevant. The judge set out the city centre context of the case at the beginning of his remarks (see paragraph 28 above). Economically expressed it was all that was needed to make clear that he had well in mind the fact that this offence took place in a city centre at night when people were around. There is no omission or defect in the guideline. There was no error by the judge.

41. We turn then to the balance of submissions. Whilst the Solicitor General accepts that the judge was entitled to decide that Gordon did not know about the knife he submits that he should have taken into account (in addition to the public nature of the violence which we are satisfied he did take into account) the fact that there was a background of other criminality namely Barrass's earlier drug dealing. We reject this. It had nothing to do with the respondent.

42. It was then submitted that Gordon "kicked the victim when he had already been stabbed and when he was effectively defenceless. The use of a shod foot as a weapon when the victim is down is generally regarded as a serious aggravating feature in violent offences". The description of the offence does not accurately reflect the facts to which we have already referred and which it is not necessary to repeat. The respondent was a secondary party. He did not wield the knife. He did not know there was a knife. He kicked and stamped when Brown was on top of Barrass who was, as he thought, punching Brown from underneath. He caused no injury.

43. The reference accurately sets out the mitigating factors namely his youth, his good character, the fact that Connor had started the violence which led to the attack by Barrass, lack of premeditation and remorse but submits that the judge should not have gone so far below the starting point of 6 years.

44. Mr Fisher QC submits with characteristic focus that the judge had presided over the trial. There is no complaint about the sentence he imposed on Barrass which suggests, he submits, that his approach to sentencing was correct. The Solicitor General's submissions are, he submits, based on a misapprehension of the facts of the offence. Once these are understood the judge's sentence is not lenient, still less unduly lenient given all the mitigating factors that were present, in particular his youth and good character.

45. In our judgment the judge was bound to move up from the starting point to reflect the public nature of the offence. He was then bound to move down substantially to reflect the matters we have set out above. Whilst the judge did not think he was particularly immature for his age he was to be sentenced on the basis that he had the level of maturity of a 19-year-old. As this court observed in *R v Clarke* [2018] EWCA Crim 185 at paragraph 5 and in *R v Hobbs* [2018] EWCA Crim 1003 at paragraph 30 the eighteenth birthday does not represent a cliff-edge and the principles underpinning the sentencing of young offenders have continuing application even after offenders have turned 18.

46. Finally the Solicitor General submits that the lock knife offence should have attracted a consecutive sentence, or the manslaughter sentence should have been longer to reflect the lock knife offence.

47. Mr Fisher points out that this was not an omission since the judge specifically said he was going to include in the sentence for the murder/manslaughter the bladed article offences. In our judgment this was an acceptable approach. The question is whether the overall sentence of 3 years 6 months properly reflected the total criminality.

48. Many judges would have passed a consecutive sentence in respect of the lock knife or would have imposed a longer sentence for manslaughter and a concurrent sentence for the bladed article. We are satisfied that the sentence was lenient. Is it unduly lenient such that this court should interfere? Lord Lane CJ in *Attorney-General's Reference No 4 of 1989* [1989] 11 Cr App R (S) 517 said:

> "... the court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased -- with all the anxiety that that naturally gives rise to -- merely because in the opinion of this court the sentence was less than this Court would have imposed."

49. These observations have been repeated many times since 1989. They remain the guide to our approach. We are not satisfied that this sentence was unduly lenient. We refuse leave. The application is dismissed.