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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA CRIM 1298



No. 202100025 A2

Royal Courts of Justice

Friday, 30 July 2021

Before:

LADY JUSTICE CARR
MR JUSTICE SPENCER

HIS HONOUR JUDGE MICHAEL CHAMBERS QC

REGINA

V

DANIEL HODGES

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MR. M. MAGARIAN QC appeared on behalf of the Appellant.

J U D G M E N T

NOTE: this is the final revised version of the judgment and replaces the unrevised version previously published in error, which has been withdrawn.

MR JUSTICE SPENCER:

- 1 This is a renewed application for a very lengthy extension of time in which to apply for leave to appeal against sentence, following refusal by the single judge.
- 2 As long ago as 25 January 2013, in the Crown Court at Chelmsford, the applicant pleaded guilty to the murder of Gillian Andrade, who had been his partner. On 15 February 2013 he was sentenced by His Honour Judge Gratwicke to imprisonment for life with a minimum term of 17½ years. There was no appeal against sentence at the time. This appeal was not lodged until 30 December 2020. The extension of time required is in excess of seven years and nine months. There is also an application for leave under s.23 of the Criminal Appeal Act 1968 to adduce fresh evidence from a consultant psychiatrist, Dr Longhitano, in the form of a report dated 10 June 2015.
- 3 We are grateful to Mr Magarian QC for his written and oral submissions. He and his instructing solicitors came into the case only in December 2020. We also have the benefit of a respondent's notice settled by prosecuting counsel at trial.
- 4 When the appeal was lodged, and the application to adduce fresh evidence, the Registrar enquired, unsurprisingly, why there had been a delay of almost five years since the preparation of the psychiatric report which was being advanced as fresh evidence. The applicant's solicitors were unable to provide an explanation immediately, but in a letter dated 16 March 2021 the applicant set out the reasons himself. He acknowledged that he had received Dr Longhitano's report in 2015. He realised that the report did not afford any belated support for a partial defence of diminished responsibility. Recognising the severity and complexity of his post-traumatic stress disorder (PTSD) and associated mental disorder, he had decided to concentrate on engaging with psychotherapy at HMP Grendon, where he has been detained. That very demanding therapeutic process spanned a period of four and a half years. He did not feel capable emotionally of committing to that therapy as well as the pursuit of an appeal. Only when he had completed all the therapeutic work, and when the targets set for him had been met, did he contact his present solicitors for a second opinion on the prospects of an appeal.
- 5 We observe at the outset, as Mr Magarian acknowledges, that the delay in pursuing this appeal is so exceptionally long that the court would have to be satisfied that there is very good reason to extend time. It is totally unacceptable for an appellant to pick and choose when he will pursue his appeal, regardless of the passage of time. Nevertheless, we shall consider the merits of the proposed appeal before returning to the issue of delay and the application for the extension.
- 6 The grounds of appeal in short are: first, that the judge made insufficient allowance for the applicant's guilty plea; second, that he made insufficient allowance for the applicant's mental health issues; third, that he wrongly concluded that the applicant had gone to the kitchen specially to fetch the knife or, in the alternative, that this was not properly to be regarded as an aggravating factor. We observe that those are all grounds which could and should have been put forward at the time if they had merit.

The factual background

- 7 In view of the narrowness of the grounds of appeal, we need summarise the facts only very briefly. The applicant and the deceased, Gillian Andrade, began a relationship in the Spring of 2012. She was 40 years old and had a nine-year-old daughter from a previous

relationship. She worked as a sales adviser in Loughton, Essex. The applicant was 30 years old. He worked on oil rigs and his working pattern took him off-shore for long periods. He lived intermittently with a friend in Loughton.

- 8 The applicant's relationship with Gillian Andrade was fine at first, but the applicant soon became jealous of her previous relationships. He became convinced, in particular, that she was seeing her gym instructor behind the applicant's back. He began to behave in an increasingly violent way towards her. She reported to a friend that the applicant had tried to strangle her and had held a knife to her throat. She confided in other friends that he had threatened her and inflicted violence upon her in the months leading up to her death. Nevertheless, she had continued to see him. They appeared to have been in something of a love-hate relationship.
- 9 The murder took place on the night of Saturday 7 July 2012 into the early hours of the Sunday morning. The applicant and the deceased spent the Saturday evening separately before returning to the address where he was living at the time. His housemates returned at around 3.00 a.m. The applicant and the deceased were then still up drinking and appeared to be happy in one another's company. During the night a friend of the deceased received two phone calls timed at 3.00 am and 5.15am. She did not answer either of the calls at the time. The second call went to voicemail. When that voicemail was retrieved by the police, it turned out that the phone had recorded the murder itself and the applicant's dying minutes.
- 10 In the recording the applicant can be heard accusing the deceased in foul language of having sex with her gym instructor and demanding to know why she had cheated on him. The call was punctuated by groans from the deceased and unintelligible speech, although, with the assistance of expert interpretation for the purpose of the criminal proceedings, she can be heard referring to her "little girl" and asking for help. She was clearly dying and aware that she was dying. The applicant continued to quiz her later in a more confidential tone. The recording then stopped. The recording was played to the court during the prosecution opening. In his sentencing remarks the judge said that nobody who had sat in court and listened to the recording could feel anything but horror and shock as the deceased's life slowly ebbed away and the applicant swore at her.
- 11 At 6.00 a.m. the applicant woke his housemates and told them he had done something bad. He admitted he had killed the deceased by stabbing her. He claimed that she had tried to cut his throat and there were traces of what looked like dried blood on his neck. He showed them the deceased's body. She was holding a knife, which appeared to have dried blood on the blade. He was panicking. The knife was one of a set normally kept in the kitchen. He said:

"It's all over for me now. It's fucked. I want to commit suicide."
- 12 In fact, the applicant had moved and repositioned the deceased's body in order to support his story that she had attacked him with a knife. As Mr Magarian helpfully points out, there is some suggestion in the evidence that initially he had been given the idea of this by one of his housemates. Be that as it may, the fact is that he went through with it.
- 13 When the police attended they found the applicant walking away from the house. There was blood on his neck and he said he had been stabbed. The police found the deceased's body with the knife placed in her hand. The prosecution case was, and plainly was correct, that the scene had been carefully arranged. There was evidence that both the deceased and the applicant had been drinking and had taken cocaine that evening.

- 14 The post-mortem examination revealed bruises to the deceased's head and face, indicating the infliction of blunt force trauma. This included a significant head injury which had caused bruising within the brain itself. Those injuries could have been inflicted by a fist or a shod foot or by impact with the ground in the course of the assault. There were defence injuries to both the deceased's hands. She must have been trying to fight off the knife in her attacker's hand. There were two stab wounds to the back. One was to the left side of the back of the chest cutting into the underlying bone. That would have required significant force. The fatal stab wound was also to the left side of the back of the chest, again, cutting into the bone. That wound also punctured the left lung, leading to relatively slow internal bleeding. The pathologist estimated that the period of survival could have been up to about half an hour.
- 15 When interviewed by the police, the applicant said he had drunk five pints of lager and taken half a gram of cocaine. There were marks on his neck which appeared to have been self-inflicted. Blood found in the sink in the bathroom suggested that it was there that he had cut himself in front of the mirror, nicking his neck. He claimed that the injuries he inflicted had been caused accidentally and/or in self-defence. He said that the deceased had "gone nuts" and attacked him with a knife, slashing his throat. He had grabbed her in the struggle and they went to the floor. He had gone to fetch an asthma pump and when he returned she was unconscious. He assumed that the knife had gone into her accidentally.
- 16 The prosecution case was that the applicant had become jealous of the deceased being friendly with other men. A text message recovered from her phone had been sent to her at 4.34 a.m, so about three-quarters of an hour before the call that she made to her friend containing the recording of the murder, and that text message had sparked off a rage within him. It was sent by a man with the same first name, Jason, as the gym instructor and it appears that the applicant assumed that this was a communication from the gym instructor whom she was seeing behind his back.
- 17 After the killing, realising the magnitude of what he had done, he attempted to cover up his actions. In fact, he had subjected her to a sustained and brutal attack in which she had tried to defend herself but was unable to do so. She was only 5'6" tall. The applicant was 6 foot tall and powerfully built. The repeated use of the knife, coupled with the nature of the other injuries and the content of the voicemail recording, demonstrated very clearly that there was an intent to kill rather than only to cause really serious injury.
- 18 There was a victim personal statement from the deceased's mother which made harrowing reading. As the judge put it:
- "Dreams and hopes have been dashed and those close to the deceased have been left with an unfillable void."
- 19 The applicant had previous convictions for violence. They included two convictions for wounding, one in 2002 and the other in 2003. On the first occasion he was sentenced to five months' detention in relation to a fist fight in a public house in which he broke the victim's jaw. On the second occasion he was sentenced to nine months' imprisonment. That involved a fight with the new partner of his ex-girlfriend and the use of a glass as well as punching and kicking. He has also been convicted of criminal damage and public order offences in 2011, the year before the murder.
- 20 There was no pre-sentence report, nor was any report necessary. There was a comprehensive psychiatric report dated 23 February 2013 from Dr Blackwood, a consultant forensic psychiatrist. His conclusion was that the applicant was conduct-disordered as an adolescent and met the diagnostic criteria for antisocial personality disorder, but not

psychopathic disorder. He met the criteria for borderline personality disorder in adulthood. There was no basis, Dr Blackwood concluded, for advancing a defence of diminished responsibility. He noted that there was a family history of criminality and that the applicant had been severely maltreated by his father as a child, both physically and emotionally, and had been sexually abused by someone else. The applicant had a history of harmful use of alcohol and cocaine. No formal psychiatric disposal was indicated, but Dr Blackwood considered that the applicant would benefit from participating in prison programmes designed to address his antisocial behaviour. Engagement in individual and group psychotherapy might be helpful in the medium term in helping him address longstanding issues of trust within intimate relationships which might further serve to reduce the risk he posed to women.

The judge's sentencing remarks

- 21 In his sentencing remarks the judge described it as a brutal, vicious and senseless attack caused by the applicant's jealousy and rage arising out of the mistaken belief that the deceased was being unfaithful to him with her gym instructor. In his rage the applicant took the knife and plunged it into her with significant force as she fought to keep him away. The applicant, the judge said, was clearly a violent man. This was not the first occasion he had threatened the deceased. He had previously held a knife to her throat. Tragically, she had remained with him in the relationship with devastating consequences.
- 22 Applying the provisions of Schedule 21 of the Criminal Justice Act 2003, the judge considered that the starting point for the minimum term was 15 years. He found it was an aggravating factor that the applicant had used a knife which he had gone to the kitchen to fetch. Second, it was an aggravating factor that he had moved her body and placed the knife in her hand in an attempt to suggest that she had initially attacked him, although the judge accepted counsel's submission that it was an absurd attempt which was bound to fail. Third, the offence was aggravated by the applicant's previous treatment of the deceased. The judge was satisfied that there was an intent to kill. That was not an aggravating factor, but it meant that there was no corresponding mitigating factor of a lesser intent.
- 23 As for mitigating factors, the judge rejected the suggestion that the arrival of the text in the early hours of the morning amounted to provocation as a mitigating factor under Schedule 21. The judge accepted that the offence was not premeditated. He also accepted that the applicant had made concerted efforts to improve himself by undergoing counselling whilst in prison on remand. The judge said that he had considered the report from Dr Blackwood with care and accepted that the matters raised in the report amounted to mitigating factors. We infer that the judge was speaking there of mitigation in general terms rather than suggesting that those matters amounted to any mitigating factor listed in Schedule 21. We shall return to this aspect and to Dr Blackwood's analysis, because it is central to part at least of the proposed appeal.
- 24 The judge said that in arriving at the minimum term he gave the applicant full credit for his plea of guilty. We note from the court records that the guilty plea was entered on what in fact was the applicant's seventh appearance in the Crown Court. We do not have the benefit of any information as to what had happened on the previous occasions. We note that there had been a change of solicitors in October 2012, which may account in part for multiple hearings and it may be that in the usual way with as serious an offence as murder there was an unwillingness for final advice to be given on plea until the psychiatric report had been obtained, although curiously Dr Blackwood's report postdates the plea. In any event, the judge said "full credit", and by that we infer that he meant one-sixth of the maximum permitted reduction for murder in accordance with the Sentencing Guideline Council's

Definitive Guideline for a reduction for a guilty plea current at the time. That was the previous guideline and not the present guideline.

- 25 We therefore assume, and Mr Magarian has arrived at the same conclusion, that the judge must have reduced by one-sixth the minimum term which he had arrived at after balancing the aggravating and mitigating factors. As a matter of arithmetic, the final figure of 17½ years represents a starting point of 21 years. We proceed on that basis.

The grounds of appeal

- 26 The main thrust of the appeal, which has presented with great skill and force by Mr Magarian, is that the minimum term of 17½ years was manifestly excessive for a variety of reasons.
- 27 First, we address the application to adduce fresh evidence. The contention is that at the time of sentence there had been no diagnosis of the applicant's PTSD. Reliance is placed on para.7.2 of Dr Longhitano's report in which he says that the applicant presented with "a significant degree of PTSD" and demonstrated "the full range of PTSD symptoms and behaviours" described in that paragraph of the report. We note, however, that it is not suggested that this PTSD, assuming it was present at the time of the offence, in any way reduced the applicant's culpability so as to amount to a mitigating factor under Schedule 21.
- 28 Dr Longhitano says that Dr Blackwood had not considered a diagnosis of PTSD in his otherwise comprehensive report at the time of sentence. This omission was, Dr Longhitano says, rather surprising, but the explanation might be that the applicant's account at the time was masked by avoidance which prevented a full examination of PTSD symptoms. Dr Longhitano is clear in his opinion that the diagnosis of PTSD would not have affected Dr Blackwood's conclusion in relation to diminished responsibility nor does Dr Longhitano suggest a contrary conclusion himself.
- 29 We note in Dr Blackwood's report at para.1.5 that there was reference to severe physical and emotional maltreatment of the applicant by his father as a child and sexual abuse by another. This was detailed in para.3.4 of the report. We also note, and Mr Magarian has mentioned this as well in his oral submissions, that there was before the judge at the sentencing hearing a letter from the applicant's sister which referred in graphic detail to the abusive treatment that her brother and she herself had suffered at the hands of their father. The judge was, therefore, fully aware of the underlying facts of the applicant's traumatic childhood abuse, even if it had not been diagnosed at that stage as PTSD. As we have already indicated, the judge said in terms that he took into account Dr Blackwood's report and regarded it as affording mitigation.
- 30 In these circumstances, we cannot see that there could be any grounds for the court to receive the report of Dr Longhitano as fresh evidence under s.23 of the Criminal Appeal Act 1968. We do not consider that the evidence is even arguably capable of affording a ground of appeal.
- 31 In relation to the other grounds of appeal, Mr Magarian submits that the minimum term would not have been higher than 17 ½ years after a trial and that there cannot therefore have been any proper credit for the applicant's guilty plea. In his oral submissions, Mr Magarian has developed this point. He submits that to have ended up at 21 years the judge must have started at a figure considerably in excess of that before taking into account the mitigating factors. Mr Magarian suggests 24 years. Mr Magarian submits that the aggravating factors here did not and could not have justified going up to anything like 24 years. He suggests that perhaps an increase from 15 years to 19 years or so would have been the most that the

aggravating factors justified. There would then have to be a reduction for the mitigating factors, perhaps to 16 or 17 years, and then a reduction of one-sixth for the guilty plea bringing the figure down to somewhere in the region of 15 years, the starting point under the guideline.

32 Mr Magarian also suggested that, if the judge had gone up to 24 years, the mitigating factors should have justified more than a three-year reduction. In general terms, he submitted that the judge had simply not given sufficient weight to the additional mitigation of the applicant's acknowledging his guilt, as reflected in the guilty plea.

33 The question posed by Mr Magarian's is whether 21 years after trial was manifestly excessive.

Discussion

34 Having considered the matter carefully, we think the answer is: no, it would not have been manifestly excessive. This was a brutal murder with several aggravating factors. One aggravating factor under Schedule 21 which the judge did not articulate as such in his sentencing remarks, although it was implicit and was clearly at the forefront of his mind, was the mental or physical suffering inflicted on the victim before death. The pathologist estimated that the deceased would have survived for about half an hour. Rather than mere inference from the circumstances, unusually in a case of this kind the recording provides direct evidence of such mental and physical suffering. It demonstrates, first, that she was well aware of what was happening to her throughout that call and, second, that she was well aware of what the outcome was likely to be: hence, her reference to her "little girl" and her plea for help.

35 Instead of lapsing into unconsciousness untroubled by anything else than thinking about her little girl, the applicant was first shouting at her and then whispering poisonous comments about what she had done and why he was killing her. That voicemail recording in our view is the clearest possible evidence of extreme mental and physical suffering before death. We have each listened to the recording ourselves. It is chilling.

36 The applicant's previous convictions for violence generally were an aggravating factor, quite separately from the violence inflicted on the deceased previously. That violence towards her was serious: strangling and threatening her with a knife. Mr Magarian submits that the judge was wrong to regard it as an aggravating factor that the applicant fetched the knife from the kitchen, although he has not pursued that so firmly in his oral submissions. It is plain that the judge was not suggesting that this in any way equated with the higher starting point of 25 years for a knife brought to the scene, although there are authorities which suggest that taking a knife from one part of the building to another can sometimes satisfy that test. Rather, the judge regarded it as an aggravating factor that in the course of his rage, discovering what he believed to be further evidence of the deceased's infidelity, he had deliberately gone to the kitchen to fetch a knife. That was in our view properly to be regarded as an aggravating factor. We do not know precisely at what time he read the message from "Jason", but we have already said that it was sent about three-quarters of an hour before the murder.

37 It was also a serious and unusual aggravating factor that the applicant had attempted to cover his tracks by repositioning the body and placing the murder weapon in the deceased's hand in order to present a false picture to the police and to enable him to construct a lying account, as he did. The judge acknowledged that it was an attempt that was bound to fail and we acknowledge that he may have got the seed of the idea from someone else, but his

persistence in the attempt demonstrates a cynical presence of mind even after committing such a savage murder.

Disposal

- 38 Having considered all the circumstances of the case and all Mr Magarian's submissions, written and oral, we are quite satisfied that the combination of all the aggravating factors, even allowing for the mitigating factors identified by the judge and put forward so ably by Mr Magarian, amply justified the minimum term of 17½ years. It is not arguable that it was manifestly excessive.
- 39 It is greatly to the applicant's credit that he has made good use of his time in prison and has diligently worked through the counselling sessions. Those are all matters which will no doubt go in his favour when the time eventually comes for the parole board to consider the question of his release. But that is very different from affording a ground of appeal for interfering with the sentence which was properly passed by the judge in 2013.
- 40 Accordingly, we are satisfied that there is no merit in the proposed appeal and, in any event, there is no good reason to extend time after such a long and unreasonable delay. We refuse the extension of time and we refuse leave to appeal.
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