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IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2021] EWCA Crim 1675

Case No: 2021/00358/A2



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 29th October 2021

B e f o r e:

LORD JUSTICE COULSON

MR JUSTICE JEREMY BAKER

THE RECORDER OF LEEDS

(His Honour Judge Kearl QC)

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

DAVID BARCLAY

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Mr D Patience appeared on behalf of the Applicant

J U D G M E N T

Friday 29th October 2021

LORD JUSTICE COULSON:

Introduction

1. These applications for an extension of time of more than 16 years and for leave to appeal against a sentence passed in 2004 have been referred to the full court by the single judge. They raise in stark form the consequences of the legislation of 20 years ago which permitted dangerous offenders to be imprisoned for life, subject to regular review by the Parole Board. In the present case, the applicant was the subject of a mandatory life sentence, but with a specified period of just 16 months before consideration by the Parole Board for his release. He has so far been in prison for over 17 years.

2. On the single judge's referral of these applications to the full court, Mr Patience was engaged as counsel for the applicant. His document entitled "Grounds of Appeal against Sentence" strays far beyond the limits of the applicant's home-made grounds of appeal, but in the unusual circumstances of this case we make no criticism of that. We have carefully considered each of Mr Patience's detailed submissions. We are very grateful to him for his assistance both through the medium of that document and for his oral submissions this morning.

The Background Facts

3. The applicant is now aged 62. On 7th November 1979, when he was 20, he was convicted of wounding with intent to cause grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861. He was sentenced to two years' custody.

4. Between 1981 and 2003, he committed a raft of further offences (28 convictions for 88 offences). They included eight offences against the person. We will return to those in a little more detail in a moment.

5. On the evening of 11th August 2003, a group of men, including Michael Mills and Philip Whiting, were in Mina Park in Bristol. They were drinking and talking when the applicant came into the park and began verbally to abuse them. He left and then returned, brandishing a large metal bar which he waved around in a threatening manner whilst shouting. He returned for a third time, armed with a hammer.

6. A violent assault then took place. The applicant struck Mr Mills with the hammer, causing cuts which required stitches and overnight observations in hospital. Mr Whiting was followed by the applicant into a shop, where he was hit in the face with a bottle, which knocked out several teeth. The applicant then struck Mr Whiting on the head with the hammer, which fractured his skull. Mr Whiting was taken to hospital and transferred to a specialist head injury hospital for further monitoring.

7. Following attempts by the police to find the applicant, on 13th August 2003 he attended Trinity Road Police Station with his legal adviser. He said that he had been in the park and had found it necessary to protect himself and his two sons, but declined to say from whom or what they needed protecting. He declined to comment on his possession of the large metal bar or the hammer. Subsequently, he was identified in video identification procedures by Mr Mills and other witnesses.

8. The applicant pleaded not guilty to three counts of wounding with intent, contrary to section 18 of the 1861 Act. On 6th August 2004, following a trial in the Crown Court at Bristol before His Honour Judge Crowther QC (“the judge”) and a jury, the applicant was convicted of two of those counts of wounding with intent: one in respect of Mr Mills and one in respect of Mr Whiting. He was acquitted of a third offence involving a third man.

The Sentencing Hearing

9. The sentencing hearing took place on 6th October 2004 before the judge. The principal problem for the applicant was that, because of the November 1979 conviction for section 18 wounding with intent, these subsequent convictions for the same offence exposed him to an automatic life sentence, pursuant to section 109 of the Powers of Criminal Courts (Sentencing) Act 2000 ("PCC(S)A 2000").

10. The judge put the central issues in these terms:

"Those convictions – by reason of your having on 7th November 1979 been convicted of wounding with intent to cause grievous bodily harm and been sentenced to two years' imprisonment – expose you to the automatic life sentence for a second serious offence, and I have to consider whether there are exceptional circumstances that mean that I can avoid that consequence. The policy and intention of Parliament was, by that automatic result, to protect the public against a person in respect of whom there is likely to be a need for protection in the future. If the situation before me now is that I am satisfied that that is not necessary, then I can properly impose a sentence of imprisonment of a commensurate nature, simply to punish, to deter and reassure the public that this sort of behaviour will not be permitted."

11. On the critical issue of whether or not this was a case of exceptional circumstances, the judge said that what had been urged upon him on behalf of the applicant was the long gap between the trigger offence in 1979 and the offences in 2003, for which the judge now had to sentence the applicant. As the judge said, there was almost a quarter of a century between those offences. Accordingly, he turned to look at what had happened in the intervening period and in particular at the various offences of violence of which the applicant had been convicted during that time. He summarised those as follows:

"At the age of 24 in 1984 you were fined for offences of assault occasioning actual bodily harm and criminal damage. The following year, at the age of 25, you were sentenced to a total of

21 months' imprisonment for three offences of assault occasioning actual bodily harm, and an offence of causing grievous bodily harm contrary to section 20 of the Offences against the Person Act. In 1988, at the age of 29, for assault occasioning actual bodily harm, contrary to section 47 of the Offences against the Person Act, you were sentenced to imprisonment for nine months consecutive to unconnected offences. There then followed a number of matters which had nothing to do with violence or danger to the public until you were 42 years of age when, before this court for having an article with a blade in a public place – a machete – you were imprisoned for three months. Of course, an antecedent history of appearances before the courts does not give every account. I have to consider also those other matters that I know of you."

12. The judge then went on to consider some of the matters that had been urged on him by way of mitigation. No criticism is made of that part of the sentencing exercise.

13. During his submissions this morning, Mr Patience sought to play down the applicant's conviction for having a machete in a public place. As was pointed out during the course of argument, the account set out in the new Grounds of Appeal would suggest that the applicant was entirely innocent, when in fact the applicant had pleaded guilty to that offence. Furthermore, in our view, contrary to Mr Patience's submissions, possession of a machete in a public place is an offence of violence.

14. The other point that Mr Patience sought to make about the applicant's previous convictions was that there was a relatively long period, between 1988 and 2003, when, although he had a number of convictions for other matters, he had no convictions for violence. Although we accept that submission, the judge did not conclude otherwise, or sentence the applicant on a different basis.

15. The judge then turned to the psychiatric report of Dr Anthony Obuaya, which had been prepared on the applicant's behalf. The judge noted that Dr Obuaya was of the opinion that the

applicant did not suffer from any mental disorder, but that he was prone to perceive threats or exaggerate threats in situations which were not threatening. Dr Obuaya said that the applicant would be particularly sensitive to any situation where any members of his family, such as his children, were likely to be racially, physically, sexually or psychologically abused and to respond in an exaggerated manner, out of keeping with the demand of the occasion. The judge said that that was what appeared to have happened in August 2003.

16. Although Dr Obuaya had expressed the view that the applicant was not dangerous, the judge did not accept that assessment. He said that the applicant was a classic illustration of the sort of person that Parliament had in mind in enacting the mandatory life sentence provisions which he was considering. He concluded:

"I do not find exceptional circumstances to avoid imposing the life sentence."

17. The judge had to fix the minimum term that the applicant was to serve before the matter was referred to the Parole Board. He did so by fixing a term of five years' imprisonment for each of the two offences (concurrent) and then halved that, to allow for the period of time that would actually be served, which produced a figure of 30 months. He then made a reduction to allow for the time the applicant had spent on remand, which produced the specified period of 16 months to be served, before reference to the Parole Board.

Subsequent Events

18. At the start of this week, when this court was provided with the papers in this case, it immediately became apparent that we were being furnished with no information about the applicant since he was sentenced in October 2004. That seemed to us to be a wholly artificial position. It is wrong in principle for this court to be asked to consider applications which might

lead to the immediate release of a long-serving prisoner, without having any regard at all to any information that is less than 17 years old. Accordingly, we sought the assistance of the Parole Board and the Probation Service. Their reports were provided yesterday, and we are very grateful to them for the speed with which they have responded to our request.

19. Mr Patience sought to make two general points about these reports. First, he sought to argue that the up-to-date information was inadmissible. We reject that submission. Mr Patience sought to rely on *R v Beesley and Others* [2011] EWCA Crim 1021, but that is on a different point. In that case the court was concerned with defendants who had been found to be dangerous and who, two years or so after that finding, sought to suggest through further evidence that they were no longer dangerous. That is a very different situation to this. Here the court was simply seeking up-to-date information from the Parole Board and the Probation Service as to what had happened to the applicant in the intervening 17 years.

20. Secondly, Mr Patience argued that, in view of the contents of the new reports, having received them this court should in some way recuse itself from dealing with the full application. We also reject that submission. It is, for the reasons we have given, important that this court should be furnished with all relevant information before coming to a view as to the appropriate course, particularly in a case which is so old.

21. Doubtless both of the submissions made by Mr Patience were engendered by the nature of the information in the reports. In summary, they show that between January 2006 and July 2019 the applicant was the subject of seven separate Parole Board reviews, each of which concluded that the risk of serious harm posed by the applicant had not reduced and that the recommendation was that he remain in closed conditions. The reports make depressing reading. There are numerous references to the applicant's negative attitudes, his refusal to accept that he had done anything wrong, numerous adverse adjudications, his belief in the use

of violence, and his aggression to both staff and other prisoners. It appears that at one point the applicant had received a further sentence of imprisonment for making a threat to kill his offender manager. When we raised this with Mr Patience as an example of why this court needed to know the full picture, it became apparent that Mr Patience had been aware of that offending, but had chosen not to pass that information on to the court. Again, this seems to us to confirm the artificiality of the exercise which he was urging on the court.

22. We do, however, note that at the eighth review, in August 2021, the Parole Board recommended that the applicant be moved to open conditions. Although they express some reservations about certain aspects of the applicant's personality, so that it is by no means clear that he will be released imminently, it is plain that the Parole Board has concluded that some progress has at last been made.

The Arguments on the Renewed Application

23. On behalf of the applicant, Mr Patience raised two arguments. The first was that the judge failed to have regard to the correct test under the PCC(S)A. The second matter advanced by Mr Patience was that, if the court considered that the judge had applied the wrong test, the court should undertake that exercise for itself; and that on the material available in 2004, the court should conclude that the applicant did not pose a risk to the public.

24. It was not entirely clear from his written submissions what Mr Patience said that the court should do, if anything, if it concluded that the judge had applied the right test. During submissions this morning, when the point was put to him, Mr Patience agreed that if that was the court's view, then the court would simply look at the exercise that the judge had undertaken to see whether it could be said that the judge had been plainly wrong, on the material before him, to reach the conclusion that he did.

The Applicable Law

25. Section 109 of the PCC(S)A 2000 provided as follows:

"Life sentence for second serious offence

- (1) This section applies where —
 - (a) a person is convicted of a serious offence committed after 30th September 1997; and
 - (b) at the time when that offence was committed, he was 18 or over and had been convicted in any part of the United Kingdom of another serious offence.

- (2) The court shall impose a life sentence, that is to say —
 - (a) where the offender is 21 or over when convicted of the offence mentioned in subsection (1)(a) above, a sentence of imprisonment for life,
 - (b) ...

unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so."

26. Section 109(5)(d) provided that an offence under section 18 of the Offences Against the Person Act 1861 was a serious offence for the purposes of this section.

27. *R v Offen and Others* [2000] EWCA Crim 96; [2001] 1 WLR 253 CA was concerned with the predecessor provision of section 109. In that case the court said that, when considering exceptional circumstances, the court had to consider whether the defendant posed a significant risk to the public. At [88] of the court's judgment, Lord Woolf CJ put the point in these terms:

"... It therefore can be assumed the section was not intended to apply to someone in relation to whom it was established there

would be no need for protection in the future. In other words, if the facts showed the statutory assumption was misplaced, then this, in the statutory context was not the normal situation and in consequence, for the purposes of the section, the position was exceptional. ..."

28. The decision in *Offen* was further clarified in the subsequent case of *R v Fletcher, R v Smith* [2002] 1 Cr App R(S) 82, and *R v Kelly (No 2)* [2002] 1 Cr App R(S) 85. In *Fletcher and Smith*, it was stressed that, if the case fell within the statute, then the court was obliged to impose the automatic life sentence unless it was determined that in all the circumstances the offender did not pose a significant or an unacceptable risk of serious and continuing danger to the public

29. In *Kelly (No 2)* the court said that the burden of displacing the assumption was on the appellant and that the criterion to be established was that there was no need to protect the public in the future, which was another way of saying that there was no significant risk to the public.

30. Two points should be made about *Kelly (No 2)*. First, we accept Mr Patience's submission that the phrase "significant risk to the public" was not intended to be any different in substance to the concept of "significant risk of serious harm", which applied under the subsequent Criminal Justice Act 2003.

31. Secondly, Mr Patience submitted that Buxton LJ had been wrong to refer to the burden being on the offender. In our view, it is unhelpful to talk about burdens of proof in these sorts of situations. We accept Mr Patience's submission that the question is one of judicial evaluation. The point, however, remains that there are two stages involved. First, do the automatic provisions apply? Second, if they do, the judge has to evaluate whether or not it is a case of exceptional circumstances.

32. There are, of course, a number of subsequent cases decided after those to which we have referred, and indeed decided after the judge sentenced the applicant in this case, which dealt with other refinements of the automatic life sentence provisions. The well-known case of *R v Lang* [2005] EWCA Crim 2864 provided, amongst other things, a long list of factors identified by Rose LJ that should be taken into account when assessing the risk of further offences. A number of those factors (or at least their significance) might fairly be said to be new. It is clearly not possible to reverse engineer our consideration of the judge's observations by reference to a judgment of this court which had yet to be decided when the applicant was sentenced.

The Extension of Time

33. The applicant requires an extension of time of 5,937 days in which to make this application. The reason put forward for the delay appears to amount to no more than the suggestion that, during that time, the applicant had no access to lawyers. In our view, that is not a good reason for delay. If it were otherwise, every prisoner would be able to rely on it in support of any extension of time of any length when an earlier decision is sought to be challenged.

34. In our view, there appears to be no reason to explain why the application for leave to appeal against sentence was not made either at the time of the sentence, or at an earlier stage thereafter. Accordingly, there is no good reason for the delay which has occurred here.

35. That said, of course, this court will go on to consider the merits of the application itself. It would be unjust not to do so. However, the lengthy delay means that some of the relevant material is no longer available. That, coupled with the applicant's case that nothing matters after October 2004, adds further to the air of unreality surrounding these applications.

Ground 1: Did The Judge Apply The Correct Test?

36. Mr Patience suggested that the judge did not apply the correct test for two reasons. First,

he said that, although the judge referred to the need to demonstrate exceptional circumstances, he did not go on to identify the mechanism referred to in *Offen* through which that exercise was carried out, namely whether the applicant posed a significant risk to the public. Secondly, he said that in the passage of the sentencing remarks where the judge refers to the psychiatrist's assessment that "you do not pose any danger to the public", the judge misstated the test, which was whether there was a significant risk to the public.

37. We reject this ground of appeal for three reasons. First, it seems to us that the judge's formulation of the issue and the test was taken directly from the judgment of Buxton LJ in *Kelly (No 2)*. Mr Patience sought to persuade us that Buxton LJ had been wrong in his formulation of the test, because it was inconsistent with *Offen*. We disagree. We consider that the test identified in *Kelly (No 2)* is a simple and straightforward analysis which could be used – and was used – at the time of these sentencing exercises by the Circuit Bench. It provided a clarity which, it might be said, *Offen* did not.

38. Secondly, we consider that this approach is over-pedantic. It requires the court to pick over an *ex tempore* judgment, looking for any words of the judge which might not fully convey or repeat the words of the relevant statute or the relevant authority. It is an approach which elevates form over substance, because it has no regard to what the judge said he was actually doing. That is the important point, and that is the third reason for rejecting this ground of appeal.

39. We have set out in paragraph 10 above the passage in the judge's sentencing remarks where he identified the policy and the intention of Parliament "to protect the public against a person in respect of whom there is likely to be a need for protection in the future". The judge said that, if he was satisfied that such protection was not necessary, then life imprisonment was not required. In other words, it was not required because exceptional circumstances had been made

out. In our view, the passage we have cited demonstrates that the judge had precisely the right approach in mind. The judge knew that what he had to decide was whether protection against a significant risk to the public was required, not simply that any protection was required.

40. As to the criticism of the judge's reference to what the psychiatrist said, the judge was simply quoting his words verbatim. Moreover, as we will come to explain later, it is our view that the psychiatrist's observation was itself a throwaway remark, untethered to any analysis.

41. We are, therefore, entirely satisfied that the judge applied the right test. The delay of over 16 years before the suggestion that he may not have done so only confirms our view that this is not an arguable point.

42. That conclusion means that it is unnecessary – indeed inappropriate – for this court to undertake its own assessment of the position in 2004. If, as we find, the judge applied the right test, then the only remaining question is whether the judge was plainly wrong to reach the conclusion that this was not a case of exceptional circumstances. That, of course, involves an analysis of the material before the judge.

The Judge's Analysis Of Exceptional Circumstances

43. As we have indicated, there were two strands to the judge's analysis. The first was by reference to the principal argument put forward by the applicant, namely the long delay between the two section 18 offences. The judge considered that intervening period, but concluded that there were a number of important offences of violence during that period which meant that exceptional circumstances were not made out.

44. In our view, the judge was entitled to approach that aspect of the matter in that way. As the judge hinted, had there been no offending during that period, then the time gap of almost a

quarter of a century might indeed have led to the conclusion that this was a case of exceptional circumstances. But that is not what had happened. Instead, it was a period in which the applicant was not only repeatedly in trouble with the courts, but engaged in offences of violence for which he received terms of imprisonment. We acknowledge that there was a period when the offences committed by the applicant did not involve violence; but overall there was a consistent history, and the judge was plainly right to conclude that the applicant was a significant risk to the public and someone from whom they required protection.

45. The second strand in the judge's conclusion that this was not a case of exceptional circumstances concerned the evidence of Dr Obuaya. Having identified the applicant's history of violent offending, the judge picked up on the psychiatrist's opinion that the applicant overreacted in an inappropriate and violent way to what he mistakenly thought were slights, rudeness and stress. That, the judge said, had happened here and explained how these offences had come about in the first place. That was why the applicant was a significant risk to the public.

46. Again, we do not think that the judge's approach can be faulted. The judge presided over the trial. Accordingly, he was in the best possible position to come to a view as to the level of risk posed by the applicant. In this way, the psychiatrist's analysis confirmed the judge's conclusion.

47. We acknowledge that at the very end of paragraph 4 of the conclusions section of the report, the psychiatrist said:

"It is therefore my opinion that [the applicant] does [not] suffer from any mental disorder and does not pose any danger to the public."

However, as we have indicated, that latter observation is a throwaway remark. There is no justification for it in the preceding paragraph, which dealt with the various offences of which the applicant was accused. It talked on a number of occasions about violent confrontation. It simply did not follow from paragraph 4 of the conclusions section that the applicant did 'not pose any danger to the public'.

48. More importantly, in our view, that assertion was immediately contradicted by the very next paragraph of the report, paragraph 5. We set that paragraph out in full. Dr Obuaya said:

"5. I would humbly recommend that in sentencing [the applicant] due consideration is given to the emotional scars which his emotional deprivation in his childhood has left on him. Systematic physical abuse was a feature of all his placements in care homes and in his Hereford placement he was subjected to racial intimidation and abuse and sexual abuse. The psychological impact of all these would be to cause [the applicant] to be quite prone sometimes to perceive threats or exaggerate the threats in not so threatening situations. His reactions, particularly towards figures of authority, who he conceivably would perceive subconsciously as being threatening, are more likely to engender conflict. This will be the result of the well known psychological mechanism described as transference, whereby feelings and attitudes from important relationships in the past who have been responsible for his physical, racial and sexual abuse, are transferred to significant others e.g. those in situations where they appear to use their positions of authority or power to abuse others or him. Such situations would subconsciously trigger the same feelings and attitudes that prevailed in his childhood relationships. He would be particularly sensitive to any situation where any members of his family such as his children were likely to be racially, physically, sexually or psychologically abused and respond in an exaggerated manner, out of keeping with the demands of the occasion. [The applicant] will benefit from appropriate psychological work to help him explore and resolve his own inner conflicts and develop appropriate skills in anger management."

That was the very passage that the judge had in mind when he concluded that the applicant did pose a significant risk to the public.

49. Accordingly, it seems to us, the judge's consideration of both the history of offending and the psychiatric report demonstrated that the applicant was a significant risk to the public. At the very least, his judicial evaluation could not be said to have taken into account irrelevant matters or failed to take into account relevant matters, and was not a conclusion that no reasonable judge could have reached. On any view, therefore, it was not wrong.

50. That brings us back to the new reports. Those repeatedly conclude that the applicant continued to pose a significant risk of serious harm. They provide further support for the conclusion that the judge came to, and indeed the reasons why he decided in 2004 that the applicant was a significant risk to the public.

51. For these reasons, we consider that no proper criticism can be made of the judge's assessment. That means that this application also fails.

52. That would mean that, in ordinary circumstances, it would be unnecessary to deal with Mr Patience's detailed argument that the material available did not show that the applicant posed the required risk in 2004. However, in order to ensure that all matters have been dealt with at this hearing, we do go on to consider some of those detailed points.

Ground 2: Significant Risk Not Posed At The Relevant Time

53. Mr Patience's detailed written submissions concerned: (1) the offences in 2003; (2) the history of the applicant's offending; (3) the psychiatric report; and (4) the applicant's thinking. These submissions are offered on the basis that the court would do its own assessment. Although, for the reasons we have given, it is unnecessary to embark on that exercise, it is appropriate to consider these points at least briefly.

54. As to the offences in 2003, we accept that they were not at the top of the range. However, that is not to downplay their gravity, because weapons were used on defenceless victims, and one man had his skull fractured. There was a persistence about the attack which was plainly concerning. In any event, those are the offences that gave rise to the automatic life sentence. It would be an unusual case where a defendant, convicted of two section 18 offences, could rely on the fact that they were not as serious as some section 18 offences to demonstrate exceptional circumstances.

55. As to the previous history of the applicant's offending, we have already dealt with that. We consider that not only was it persistent offending, but there was a belief – and those offences show it time and again – that the applicant believed in and used violence to remedy perceived slights.

56. As to the psychiatric report, we have already said that, when properly analysed, the report supported rather than contradicted the view that the applicant represented a serious risk to the public.

57. As to the applicant's thinking, it seems to us that the key element of that was his belief in violence as a means of resolving issues. On that point, of course, we have the benefit of the subsequent Parole Board reports, which also demonstrate the same view.

58. Accordingly, the real difficulty with Mr Patience's careful submissions on the 2004 material was that they did not allow the applicant to escape from the provisions of the PCC(S)A 2000. There was no debate that he had committed two index offences. There was no debate that the statutory presumption applied to him. There was no debate that exceptional circumstances had to be shown and that they could only be demonstrated if the applicant did not pose a significant risk to the public. On the basis of the judge's evaluation both of the

previous offending and the psychiatric report, it is clear that the judge came to a conclusion which he was fully entitled to reach.

59. For these reasons, these applications are refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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