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Neutral Citation No. [2023] EWCA Crim 1083

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202102832/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 27 July 2023

Before:

LORD JUSTICE DINGEMANS
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE LICKLEY KC
(Sitting as a Judge of the CACD)

REX
V
PATRICK McDONAGH

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MR J DEIN KC and MISS K ROWAN appeared on behalf of the Appellant
MR P PANAYI KC appeared on behalf of the Crown

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction

1. This is the hearing of an appeal against sentence pursuant to leave granted by the full court.
2. On 18 May 2021 in the Crown Court at Leicester the appellant was convicted of the murder of Abubaker Abbas under count 1 on the indictment which had occurred on 23 August 2020 when the appellant was aged 20 years. He was also convicted of possession of an offensive weapon as count 2 on the indictment.
3. The appellant was sentenced to imprisonment for life with a specified minimum period of 26 years, less 266 days spent on remand on count one. He received a concurrent determinate sentence of 15 months' imprisonment on count 2 and a surcharge order was made. The appellant is currently being held at St. Andrews Hospital, Northampton.
4. Daniella Hill was acquitted of murder (she was a co-defendant) but convicted of possession of an offensive weapon. She was sentenced to 15 months' imprisonment.
5. So far as the appeal is concerned, it is submitted on behalf of the appellant that the specified minimum period was manifestly excessive: because the judge was wrong to find premeditation and the absence of any self-defence not amounting to a defence in law; because fresh psychiatric evidence should be admitted which would show the mitigating factor of a mental disorder; and because the judge had given insufficient weight to the mitigating factors.
6. It is submitted on behalf of the prosecution that the sentence was appropriate. The judge had made proper findings based on the evidence before him, the fresh evidence should not be admitted, and the judge had had proper regard to the mitigating and aggravating factors.

7. We are very grateful to Mr Dein KC and Miss Power and Mr Panayi KC and their respective legal teams for their helpful written and oral submissions.

The factual background

8. In the early hours of 23 August 2020 in Leicester the appellant slashed Mr Abbas in the neck. He severed his carotid artery causing catastrophic brain injury. Mr Abbas died in hospital two days later.
9. The appellant had been in a casual relationship with Miss Hill. That evening they joined a number of her friends drinking in the Mamba Cafe on Market Street. When the bar closed the group took a taxi to the Braunstone Gate area to continue drinking. Mr Abbas had been talking to one of the girls and went with the group in the taxi. The prosecution case, which the jury must have accepted, was that although previously unknown to each other the appellant took a dislike to Mr Abbas whilst in the taxi. He started to bully and to goad Mr Abbas by using very unpleasant words. When they arrived in Braunstone Gate the verbal argument progressed into an aggressive confrontation between the two.
10. The prosecution alleged that the appellant was the aggressor, repeatedly pursuing Mr Abbas, encouraged and assisted by Miss Hill. During the incident, Miss Hill handed the appellant a knife that she had secreted in her bra earlier that evening. Eventually there was a final physical altercation between the three. Miss Hill kicked at Mr Abbas who then kicked the appellant with sufficient force that the appellant fell to the floor. He got up and chased after Mr Abbas. As Mr Abbas tried to punch the appellant, the appellant swung the knife twice towards the neck area of Mr Abbas, connecting to cause the fatal injury.
11. Mr Abbas suffered huge blood loss, collapsed in the street and was assisted by other members of the public. Miss Hill and the appellant immediately left the scene and ended

up sleeping at Miss Hill's flat. They disposed of the knife and put their bloodstained shoes in the washing machine. Miss Hill and the appellant were arrested at the flat a few hours later. Miss Hill gave an account over several interviews but the appellant answered no comment to all of the questions asked. There was CCTV footage of the incident, which we have seen.

12. The defence case was that the appellant had slashed at Mr Abbas in self-defence. He had no intention to cause serious injury or to kill. When Miss Hill had given him the knife he had only intended to wave it in order to scare Mr Abbas so that he would back off.
13. The appellant gave evidence at the trial in support of his defence of self-defence. He said that it was Mr Abbas who was spoiling for a fight. The appellant had not intended to connect and that was why he had panicked and run off after the event.
14. The appellant's previous convictions for violence had been admitted at trial. He stated he had been drunk on those occasions. Miss Hill also gave evidence at the trial. The jury rejected the appellant's account of self-defence and convicted him of murder.

The sentence

15. There was a victim personal statement from Mr Abbas' sister about the traumatic two days in the hospital as the family hoped that Mr Abbas would survive the attack. The victim personal statement went on to deal with the effect of Mr Abbas' death on the family, his life and his journey to university to read engineering, as well as the difficulty of having to listen to the evidence given by the appellant about Mr Abbas which the jury must have been sure was false evidence.
16. At trial the judge had various reports before him, including that of Dr Waheed dated 30 December 2020. In that report at page 8 the appellant was diagnosed as having a depressive disorder, current episodes were severe without psychotic symptoms, and he

was suffering from severe depression. There was also reference to his mother's report that he had suffered mental health difficulties in the past.

17. There was a further report from Dr Singh dated 24 March 2021 which assessed the appellant's fitness to plead in advance of trial. Dr Singh's report outlined that the appellant had a clear history of having special needs as he was growing up. He was chronologically lagging behind his peers in intellectual development, as indicated by his abilities in reading, writing and with numbers. Dr Singh observed that there is a very clear cut history of ADHD because of which he was described as being impulsive, losing his temper, frequently getting into fights and generally being restless and fidgety with a shortened attention span. The report noted that the appellant had been protected by a caring family. The report noted the appellant's difficulties reading and high level depression with accompanying risk of suicide. There was a further short report dated 13 April 2021 about the desirability of his mother assisting him at the trial.
18. There was a further report from Leigh Pinsent, a psychiatric nurse of the Liaison and Diversion Team which dealt with a suicide attempt reported by the appellant during the trial, against the background of depression and anxiety.
19. In submissions on sentence to the judge, leading counsel then appearing on behalf of the appellant referred to paragraph 10c of schedule 21 to the Sentencing Act. This provides that relevant mitigating factors include: "The fact that the offender suffered from any mental disorder or mental disability ... which lowered the offender's culpability". It was submitted that this was a young man with ADHD which lowered his ability to think and increased his impulsivity.
20. When sentencing, the judge stated that this was yet another case underlying the perils of young men taking knives out onto the street and worse, young men so often fuelled by

drink (as the appellant was) using such deadly weapons. The judge questioned why the appellant had taken a young man's life who had his whole life in front of him and had a partner at the time bearing his child. The judge found that the evidence showed that Mr Abbas was unarmed, cornered and slashed at twice in the neck by the appellant. The appellant had never faced up to his responsibilities. He had left the scene and destroyed evidence and sought to blame his co-accused Miss Hill at the trial. The judge entirely rejected the suggestions that the appellant at any time and in any degree was acting in self-defence. He also found that the knife was the appellant's, although the actions of Miss Hill had ensured that it was available to him in Braunstone Gate. The appellant had a worryingly casual willingness to take up weapons.

21. The judge said that the sentence was dictated by law and had to be life imprisonment. Turning to schedule 21 of the Sentencing Act 2020 and the minimum term, the judge concluded that the starting point was 25 years due to the knife being taken to the scene. The aggravating factors were the appellant's bad character, a significant degree of premeditation in the eight minutes or so before the attack, dragging Miss Hill into the criminality and concealing evidence. The judge said there was significant mitigation in the appellant's age - he was, the judge said, an immature 21-year-old - and the judge found that he had not an intention to kill. The judge said that putting those two matters together the minimum term would therefore be one of 26 years reduced by 266 days to reflect the time spent in custody.

The appeal

22. We therefore turn to the issues on the appeal. The first issue is whether the judge should have found that there was a significant degree of premeditation and self-defence, albeit not amounting to the defence of self-defence. It is relevant to note that the appellant was

aggressive earlier that night in the Mamba Cafe to other patrons. The appellant had used unpleasant racial slurs and was aggressive and threatening to Mr Abbas in the taxi in an attempt to provoke him, although the judge did not find that this was a murder motivated by racial hatred. The appellant had initiated the violence, beginning by taking the knife from Miss Hill and then running towards and attempting to attack Mr Abbas. That was some eight minutes before the fatal stabbing. When the appellant had returned from the Bloomsbury flat area he had used aggressive words and behaviour towards Mr Abbas in a further attempt to provoke him. Having succeeded in doing so, the appellant followed Mr Abbas and was seen on CCTV to approach Mr Abbas while holding the knife behind his back and then began the final attack on him. For over a minute the appellant had pursued Mr Abbas, knife in hand, until Mr Abbas was cornered with his back to the wall.

23. In our judgment, the judge was the person best-placed to determine whether there was premeditation and whether there was any aspect of self-defence or fear of violence on the part of the appellant. The judge had heard over four weeks of evidence, including the evidence of the witnesses, the extensive CCTV and the evidence of both defendants. The judge found in terms that this was not a two-sided argument; this was an entirely one-sided volley from the appellant designed to provoke a reaction from Mr Abbas. The judge said that the loss of Mr Abbas' life was as senseless as it was repellent. There is, in our judgment, no inconsistencies in the findings made by the judge on the facts or inconsistency with uncontroverted evidence. The findings are based on the evidence which was before the judge and there is no basis on which this court could interfere with those findings of fact.

24. We therefore turn to the second ground of appeal and that is whether fresh evidence in the form of psychiatric reports from Dr Farnham should be admitted.

25. Although Mr Dein referred to authorities recognising that the Court of Appeal Criminal Division frequently receives evidence after sentence which is relevant to an appeal without going through section 23 of the Criminal Appeal Act 1968, that is limited to matters such as prison reports, or reports of assistance provided by an appellant to the police, or where the point about fresh evidence has not been taken. Here the prosecution has submitted that the court should not admit the evidence unless section 23 of the relevant Act is satisfied, and in our judgment that submission is correct.
26. We therefore note section 23(2) of the Criminal Evidence Act which provides that the Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to (a) whether the evidence appears to the court to be capable of belief, (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal, (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal, and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.
27. In this case Dr Farnham, a consultant psychiatrist, has produced three reports dated 7 May 2022, 8 July 2022 and 20 March 2023. These were obtained because it became apparent that the appellant's mental condition was deteriorating in prison as he developed psychotic symptoms and there were concerns that this may have been due to a mental disorder present at the time of the offence but undiagnosed. In fact on 6 June 2022 the appellant was transferred to hospital and he remains there.
28. The reports show that the appellant is suffering from depression but that is reactive to his situation and not relevant to any mental disorder at the time of the offence. Further, he might be suffering from Post-Traumatic Stress Disorder but again that was as a result of his actions murdering Mr Abbas and does not assist in relation to sentencing. Finally, he

is suffering from an emerging functional psychosis. The evidence shows that this had not emerged at the time of the offence.

29. In these circumstances, we will admit the evidence of Dr Farnham because it is capable of belief. It might have been relevant to the assessment of sentence, it was admissible below and there was a reasonable excuse for not adducing it below because the appellant had not yet then developed psychotic symptoms. However, on analysis, the fresh evidence does not take the position any further than it was before the sentencing judge. As to that, at trial the judge had certain reports before him, including that of Dr Waheed and Dr Singh and Dr Singh's observation that there is a clear-cut history of ADHD because of which he was described as being impulsive, losing his temper, frequently getting into fights and generally being restless and fidgety. The evidence from Dr Farnham shows that there was no undiagnosed medical condition relevant to sentence which was unknown to the judge.
30. We turn therefore to the third main ground of appeal which is whether the judge should have given a greater discount for mitigating factors so that the final sentence should be below that of the minimum period of 26 years less days spent on remand.
31. It was common ground that the starting point for the minimum period was that of 25 years. That was because the appellant had taken a knife to the scene. It is also right to record that there were very important aggravating factors. There were convictions for previous violence and we have seen CCTV footage of the appellant with a blade on the outside of a pub and CCTV footage of the appellant throwing bricks at a person. It was a significant aggravating factor that the appellant involved Miss Hill in the crime, who was the mother of a small child, and at the time was infatuated with the appellant. There was an aggravating factor in that the appellant disposed of his shirt and phone which were not

found and attempted to hide his trousers and gave a false name to the police.

32. There was mitigation in that there was an intention to cause serious bodily harm and not to kill, but the prosecution is right to note that this was limited because the appellant had slashed towards Mr Abbas' throat on two occasions. There was the appellant's age and the judge's finding that he was an immature 21-year-old at trial, meaning that he was an immature 20-year-old when he committed the offence.
33. The appellant was an adult at the time of the offence and sentenced as such, but the age of 18 is not a cliff edge and the finding of immaturity was important. In those circumstances many might have felt that the sentence of life with a minimum term of 26 years was severe but that sentence could not sensibly be described as manifestly excessive without more.
34. There was however another mitigating factor. This was the presence of ADHD. ADHD is a recognised mental disorder for the purposes of the Sentencing Council Guideline on Sentencing Offenders with a Mental Disorder. It is listed in that guideline under the main causes of mental disorders and presenting features. It was evidenced from the material before the judge that ADHD is a disorder of the brain in that the wiring of the brain develops at different times from other people without ADHD, and the condition can lead to impulsive behaviour and diminish the ability to think. All of that is apparent in the appellant's actions that dreadful night which led to Mr Abbas' death. It is not apparent from the sentencing remarks that the judge reflected this factor at all in the mitigation and he should have done pursuant to paragraph 10c of schedule 21 of the Sentencing Act 2020.
35. We consider that to reflect all of the aggravating and mitigating factors, the sentence on the appellant should have been life with a minimum term of 24 years, less days spent on

remand, and that a sentence of life with a minimum term of 26 years less days spent on remand was manifestly excessive.

36. We record that this alteration to the sentence does not in any sense affect the loss suffered by Mr Abbas' family because no sentence can bring back Mr Abbas. We should also make it clear that the sentence of life with a minimum period of 24 years less days spent on remand is a minimum term and the appellant may never be released even after the expiry of the minimum term, unless authorised by the Parole Board. The fact that the appellant is suffering from an emerging psychosis means that that issue will need to be very carefully considered.

Conclusion

37. For the detailed reasons that we have just given, we will allow the appellant's appeal against sentence and impose a sentence of imprisonment for life with a minimum term of 24 years less days spent on remand. The other sentence remains as it was.

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

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