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[2023] EWCA Crim 1575
IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO: 2022/02733/B2

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday 5 October 2023

Before:

THE VICE PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION)
LORD JUSTICE HOLROYDE

MRS JUSTICE MAY DBE

MRS JUSTICE ELLENBOGEN DBE

REX

v

THOMAS MICHAEL NUTT

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Non-counsel application

J U D G M E N T

MRS JUSTICE ELLENBOGEN:

1. The applicant renews his application for leave to appeal against his conviction by a jury, on 10 August 2022, at the Crown Court at Snaresbrook, for the murder of his wife, an offence for which he was later sentenced to imprisonment for life with a minimum term of 21 years, less 289 days spent on remand. Having entered a plea of guilty to (unlawful act) manslaughter on his arraignment in April 2022, the sole issue at trial was whether he had intended to kill, or to cause really serious harm to, the deceased.

The Background Facts

2. The applicant and his wife married on 27 October 2021. A reception followed at a public house. Separate CCTV footage later obtained by the police showed the couple (1) arriving at the reception at 3.03 pm and leaving at 10.20 pm, and (2) arriving home at 10.26 pm.
3. On the evening of 28 October 2021, the applicant travelled by car to the Skegness area, towing a caravan. He returned home at approximately 5.30 pm on 30 October 2021. At 12.22 pm on 31 October 2021, the applicant telephoned the Police to report that his wife was missing. He said that she had left home at around 9.30 that morning, to meet her daughter at a local shop, but had not arrived. That afternoon, at 1.20 pm, a police officer attended the applicant's home address to take a report, and, at 4.38 pm, the Police received an anonymous telephone call reporting that a body had been found in a suitcase in a field in Lightcliffe. The field was located very close to the applicant's home address. The body was that of his wife. At 5.13 pm, the applicant presented himself at Halifax Police Station. He was arrested on suspicion of murder and cautioned, in response to which he made the following significant comment:

"We got married on the 27th and went to Skegness in a lay-by for 2 days. We came back and she has got bipolar and is depressed, said she wanted to get divorced. She put me in jail before, said I had tried raping her and assaulting her, said she was going to do it again. She started screaming and I have hit her in the face and put my arm around her neck."

4. In the course of the police interviews which followed, the applicant variously described the wedding and his arrival home with his wife. He went on to give detailed accounts of their journeys to and from Skegness and of his activities on their return. He asserted that his wife had "flipped", for no reason, and had demanded a divorce, threatening falsely to claim, and not for the first time, that he had raped her. He said that his wife had suffered from 'Bipolar' and that she had attacked him around his neck. He had struck her, once, to the face, with an open palm; to her nose and, possibly, her eye area. This had made her more aggressive and she had screamed, so he had been obliged to grab her around the neck (demonstrating a choke hold), he believed for a short time, and had begged her to stop screaming. The applicant said that he had not meant to kill his wife and that he had just wanted to shut her up. He said that, after what had felt like a few seconds, her body had gone limp and she had fallen to the floor. That, he said, had happened at the back door in the kitchen on the Saturday, 30 October, 30 to 40 minutes after they had arrived home. He had checked for a pulse and, in its absence, had put his wife's body in the kitchen storage area. Detailed accounts were given of his activities thereafter.
5. Following the post-mortem on 1 November 2021, the Home Office pathologist concluded that the deceased had suffered blunt force trauma to her face, sustaining injuries compatible with more than one blow, which could have been caused by a punch, or by her head having struck an unyielding surface. In the pathologist's opinion, certain neck injuries had been caused by application of forceful pressure to the neck; "... *the account provided by [the applicant] of using a choke hold around [the deceased's] neck readily accommodates the postmortem findings*". Nothing in the pathologist's report assisted with determination of the time of death.
6. The particulars of the offence set out in the indictment alleged that the deceased had been killed between 27 and 31 October 2021. At trial, the Crown's case was that she had been

killed at around midnight on 28 October. Reliance was placed upon the neighbour's evidence of 'banging' sounds, when the applicant and his wife had arrived home on 27 October; CCTV footage which had not shown the deceased having left their home thereafter; and ANPR images, said to indicate that the front passenger seat of the applicant's car had been empty during his journeys to and from Skegness. It was said that the diffuse and substantial injuries sustained by the deceased pointed to a sustained attack, consistent with, at least, an intent to cause her really serious harm. The applicant did not give evidence at trial, nor was any other witness called on his behalf.

Jury Note

7. A little over two hours after the jury had retired to consider its verdict, the court received a note in the following terms:

"If someone is drunk or under the influence of alcohol or drugs and unlawfully causes death, is there a difference in terms of the law compared to someone who is not drunk/under the influence?"

In the usual way, that note was discussed with counsel for the Crown and with counsel standing in for those who had appeared at trial for the Defence, who had then been unavailable. We have been shown and have considered with care a transcript of the relevant exchanges. The judge then answered the jury's question as follows:

"...

Let me deal with this as best I can with you. In the first place there is no evidence whatsoever that the defendant was at any time during the period that you're concerned with under the influence of drugs. So, the reference to drugs in this note, put that completely out of your mind. There is no evidence of him taking or being under the influence of any drugs at all.

What about alcohol? In a sense, ladies and gentlemen, there is a question for you to consider before you get to the issue of alcohol because that issue is when the killing of Dawn Walker took place. It is the prosecution case that it took place on the night of the wedding, that is the 27th to the 28th of October. The burden of proof being on them, you have to be sure that it took place on that night before you can move on to the next stage.

The defence case, on the other hand, is that the killing took place on the night of Saturday the 30th, into Sunday, the 31st. If you think that Dawn Walker was killed or that she may have been killed on the night of Saturday, the 30th to the 31st, that is the defendant's version of events, there is no evidence whatsoever that he took any alcohol at all on the 30th or the 31st. So, the question would not arise if you think that Mrs Walker died on the Saturday Night or the very early hours of the Sunday morning. Do you follow me? Yes? Good.

It is only if you are sure, as the Prosecution assert, that her life was taken on the night of the wedding, which is the 27th to the 28th, that the issue of alcohol arises at all and it arises because, of course, they had been to a wedding reception and as Mr Nutt said in his interview -- you will remember the directions I've given you about his interview as opposed to him giving evidence -- but, in his interview, he did say that he had had a drink, he'd had a few shots of Pernod and Black, and that was the reason that he gave for not driving until he had got that alcohol out of his system.

So, the two factual scenarios are relevant; when it happened. If, on the defendant's account, on the Saturday night/Sunday morning, forget alcohol because there is no suggestion he drank. If on the Wednesday night into the Thursday, there is evidence that he had taken alcohol but there is no evidence that he was drunk and you have to consider all of the evidence.

So, you have to consider the CCTV footage that you have of him inside the public house where the wedding took place and the evidence from CCTV of him walking to his car -- sorry, to the taxi -- as they leave; the evidence of him seen on CCTV coming into his house; the evidence of him going out later on and, importantly -- how important is a matter for you -- the evidence of him leaving the house at shortly after half past 12, arriving at the cashpoint at 00.44, where he withdraws money and you've got CCTV footage of that, and you will assess that as indicators of whether this is a man in drink or not.

It is important, however, that I tell you the following. The defendant, who hasn't given evidence but gave an account in interview, at no point has said that he did what he did because of the effect of drugs. He has not claimed that the killing of Mrs Walker was because he was under the influence of drink. It has not been submitted by Mr Wood of Queen's Counsel that the explanation for the killing is anything to do with him taking drink -- the defendant taking drink.

You may think, and I have given you this direction -- you decide this case on the evidence, not on speculation -- and you may think that, although the defendant speaks of taking drink at his wedding, he does not assert that he was drunk, he does not assert that he was drunk when he took the life of Mrs Walker. But I say to this -- if you like, on top of this -- I am trying to stop you, if you don't mind me doing so, from speculating that he was drunk when he did it, but even if you considered that he was under the influence of alcohol, self-induced intoxication does not provide him with a defence to murder. A

drunken intent, if you like, is still an intent.

So, I think you should approach it, if I may say so, in those stages. If you think the killing took place Saturday night/Sunday morning, forget alcohol anyway. If you think that it took place Wednesday night/Thursday morning, i.e., the night that -- the wedding night, if we may call it -- you have limited evidence that he took drink. You have evidence from CCTV footage and from his behaviours as to whether he was affected by drink or not. It is not his case and it has never been his case that he was drunk and that's why he did what he did. Mr Wood has never submitted that, but, in any, event self-induced intoxication would not afford him a defence."

The Grounds of Appeal

8. The applicant seeks leave to appeal on the grounds that, in response to the jury's question, the judge ought to have given a full intoxication direction (see below); he had fallen into error when stating, during his exchanges with counsel, that there had been no evidence of intoxication at the time of the killing; the effect of the material misdirection which he had given had been to instruct the jury to ignore the issue of intoxication, whereas it ought to have been instructed that it was for it to assess, in light of all the evidence, whether or not it was sure that the applicant had intended either to kill or to cause really serious harm; and to have rendered the applicant's conviction for murder unsafe.

9. The particular evidence of intoxication on the evening of 27 October on which reliance is placed derives from: (1) the police interviews, in the course of which the applicant had stated that, following the wedding, he and his wife had been "pissed" and that he had been unable to drive until he had had time to sober up having had a few shots of Pernod and Black; (2) the evidence of a neighbour, to the effect that, ordinarily, the applicant rarely drank alcohol; and (3) the evidence, adduced by way of agreed fact, of the taxi driver who had driven the applicant and his wife home from the reception, that *"he could smell alcohol from them and thought they seemed to be talking gibberish, as people do when they have a drink"*.

The Crown's Position

10. The Crown's position, as set out in the Respondent's Notice, is that a judge is only required to provide a direction in relation to a matter upon which the jury could reasonably come to a particular conclusion: **Alexander Von Starck v The Queen** [2000] 1 WLR 1270. At no point had the applicant advanced a defence to the effect that he had been incapable of forming the necessary specific intent required for murder, whether by reason of intoxication or at all. From a point immediately prior to his arrest on 31 October 2021, when he had presented himself at the police station, he had given a coherent and detailed explanation of his actions, including in the course of a number of interviews under caution. At no stage had he made any reference to any incapacity to "think straight", whether born of intoxication or otherwise. His acceptance that he was guilty of manslaughter had been based upon the explanation of events which he had given and had not involved any suggestion that he had been incapable of forming the intent required for murder. He had not given evidence at trial, such that the only account which the jury had received had been that given to the Police, on arrest and in the course of subsequent lengthy interviews. Thus, there had been no evidential foundation for a finding by the jury that lack of intent caused by intoxication was a live issue for consideration. The judge had considered, with care, whether a full direction would be appropriate and the submissions advanced in that connection. His ruling had suitably adapted section 9 of the Crown Court Compendium, Part 1 to reflect the circumstances of the particular case. All CCTV footage of the night of the wedding and the early hours of the following day had shown the applicant walking and behaving normally. The judge had answered the jury's question in a satisfactory way, having regard to the evidence as a whole. For reasons detailed in the Respondent's Notice, the case against the applicant had been strong and had included bad character evidence relating to his earlier use of serious violence against both his wife and a previous cohabitee. No complaint had been made about any other part of the legal directions or rulings which the judge had given, or as to the fairness of his summing-up. At no stage had the Defence sought an intoxication direction until the jury question had been raised. In all the circumstances, the applicant's conviction had been safe.

Discussion and Conclusions

11. Following the refusal of leave to appeal by the Single Judge, the applicant raised certain criticisms of the conduct of his defence by his legal representatives. He also took the opportunity to advance a substantive position regarding the events the subject of his trial; the CCTV evidence; and his own health and that of his wife, and to indicate his desire to vacate his plea of guilty to manslaughter. Following his waiver of privilege, the renewal hearing was adjourned to enable the court to consider that material and any response to it. In responding to the documents which the applicant had submitted, his former legal representatives rejected all criticism made of their conduct, and, in certain respects, its factual premise, providing cogent and coherent explanations for the position adopted, together with supporting documentation in the form of attendance notes of their discussions with the applicant and a memorandum which he had signed recording the advice which he had been given. They noted that some of the substantive assertions now made had either been before the court or had not been communicated/apparent at or before trial. The applicant's correspondence and reply advanced matters no further, for current purposes. We are quite satisfied that none of the matters raised by the applicant himself, following the decision of the single judge, constitutes or supports a properly arguable basis for his appeal against conviction.

12. We turn to consider the perfected grounds of appeal, arising from the judge's approach to the jury's question. In **Aidid v The Queen** [2021] EWCA Crim 581, this court addressed the circumstances in which a direction on intoxication ought to be given; the essential elements of such a direction; and the consequences of a failure to give such a direction when one is judged to have been necessary. At [87] and [88], it held:

"87. It follows that, although we agree with McCloskey J in *Ward* that the authorities tend to speak with the same voice on the issue of the '*threshold test*', namely that there must be an issue about alcohol

consumption having extinguished the necessary mens rea, it is desirable nonetheless to resolve the potential tension that we have sought to describe in the jurisprudence as to when the consumption of alcohol or drugs *'is an issue'*.

88. Juries in criminal cases are not limited in their consideration of the evidence to the arguments advanced by the prosecution and the defence. They are the finders of fact and it is open to them to reach conclusions that do not match the particular contentions advanced by the parties. They are free, for instance, to reject an accused's account but nonetheless to acquit him or her (or convict of a lesser charge) because they conclude that they are unsure that one or more of the ingredients of the offence of specific intent have been made out. A defendant, for instance, who had been drinking heavily may have advanced a case that he or she knew exactly what was happening when the victim was killed, and that they had acted in lawful self-defence. If the jury reject self-defence, they would still need to consider whether they were sure he or she had the intent to kill or to cause really serious bodily harm, notwithstanding the consumption of alcohol or drugs. The judge must avoid conjuring fanciful factual scenarios, but if there is sufficient evidence as to the consumption of alcohol or drugs such as to make it, viewed realistically, a potential issue as regards intent, then regardless of the nature of the accused's defence, in our judgment the correct position was described by Waller LJ in *Groark*: *'if there is evidence of drunkenness which might give rise to an issue as to whether specific intention could be formed by the accused, a direction should normally be given to the jury that a drunken intent was nevertheless an intent, but that they had to feel sure, having regard to all the evidence, that the defendant had had the intent.'* Or as the court observed in *Bennett*, *'voluntary intoxication had to be treated like any other evidence which tended to show the defendant may have lacked the state of mind necessary to support the offence'.*"

13. As is clear from the above dicta, the nature of the accused's defence is not itself determinative of the need for a direction on the effect of intoxication and the judge in this case did not treat it as such. In our judgement, consistent with the approach set out in **Aidid**, the judge rightly focused on whether there was evidence of drunkenness *which might give rise to an issue as to whether specific intention could be formed by the accused*, were the jury to conclude that the deceased had been killed on 27/28 October, permissibly concluding that there was not. In so doing, he viewed, realistically, whether a potential issue had arisen as regards intent so as to require that both limbs of the intoxication direction be given. As the Crown submits, irrespective of his alcohol consumption on 27 October, the applicant had given, repeatedly, a detailed account of the events leading to

his wife's death. He had not, at that time or since, suggested that his mental capacity or recollection had been materially impaired. On his own case, there had been no suggestion that, at the time at which he had killed his wife, he had been consuming alcohol. There was also the CCTV evidence of, and that relating to the applicant's behaviour on, 27/28 October, to which the judge alluded when answering the jury's question. In short, viewing the evidence in this case realistically and holistically, the threshold test, as explained in **Aidid**, had not been met. We consider it to be of significance that, in advance of the jury's question, notwithstanding the evidence on which the applicant relies for his renewed application, neither the Crown nor the Defence had sought a direction on intoxication having regard to the prospect that the jury would conclude that the deceased had been killed on 27/28 October.

14. But even if we are wrong about the need, in this case, for a full intoxication direction, we have firmly in mind the further dicta of the then Vice-President in **Aidid** [94], that:

"... the failure to give the direction, or, we would add, to deliver it precisely in conformity with the formula set out by Lane LJ in *Sheehan and Moore*, may not necessarily result in an unsafe verdict. This will depend on all the evidence and the issues in the case, along with the directions otherwise given by the judge."

15. The case against the applicant undoubtedly was powerful. No criticism has been made of any other aspect of the judge's conduct of the trial, directions of law or summing-up. In all the circumstances, it is not properly arguable that the applicant's conviction is unsafe.

16. We refuse leave to appeal.

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

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