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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00517/A3



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 19th April 2024

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE JAY

THE RECORDER OF NORTHAMPTON

(His Honour Judge Mayo)

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

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

KRUNAL PRAJAPATI

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Mr P Jarvis appeared on behalf of the Solicitor General

Mr J C Dawes KC appeared on behalf of the Offender

J U D G M E N T
(Approved)

Friday 19th March 2024

LORD JUSTICE SINGH:

Introduction

1. On 24th November 2023, in the Crown Court at Snaresbrook, the offender was acquitted by the jury of murder but convicted of the alternative charge of manslaughter. The victim was his 11 week old baby daughter, Hazel.

2. On 12th January 2024, the offender was sentenced by May J to ten years' imprisonment.

3. His Majesty's Solicitor General applies, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), for leave to refer the sentence to this court on the ground that it was unduly lenient.

The Facts

4. We take the facts for present purposes from the Final Reference submitted on behalf of the Solicitor General. In summary, when his daughter was 11 weeks old, the offender assaulted her in the bedroom when his wife was in the kitchen making dinner. As a result of the assault, Hazel sustained a number of serious injuries, which would have caused her an immense amount of pain. Later that evening she went limp. She died three days later in hospital when staff switched off her ventilator.

5. In 2021, the offender and Rinkalben married in Gujarat, India. Shortly afterwards, the couple came to the United Kingdom to live. They moved into a three bedroom maisonette, which they shared with their landlady's son.

6. Hazel, was born on 1st July 2022. She was well cared for, and her parents loved her very

much. After her birth, Hazel slept in the same bedroom as her parents.

7. On the evening of 16th September 2022, the offender returned home from work at around 7.30 pm. Rinkalben went into the kitchen to make dinner while he stayed in their bedroom with Hazel.

8. After dinner, at around 9.30 pm, Hazel collapsed. The offender called a taxi, and he and Rinkalben rushed Hazel to the hospital. When they arrived she was lifeless.

9. The staff at the hospital were able to revive Hazel but it was obvious by then that she was gravely ill. She survived on a ventilator for three days before tests revealed that she was brain dead. The hospital ceased ventilation, after which her heart stopped and she died.

10. A post-mortem examination of Hazel's body revealed a number of injuries. They are described in the following way in the judge's sentencing remarks:

"Investigations ... indicated a skull fracture and catastrophic hypoxic-ischaemic brain injury. Post-mortem tests and examinations of ribs, skull, eyes and brain showed all the classic signs of a severe shaking injury. ... in addition to the 47 front and back rib fractures and the metaphyseal fractures of arms and legs consistent with gripping and violent shaking, Hazel's head had clearly received two separate blunt force injuries – one causing a complex comminuted fracture on her left side from a point above her ear up over the top of her head and another causing a deep, long bruise further forward on her left forehead. There was also a separate spiral fracture of Hazel's left leg consistent with it being gripped in two hands, twisted and pulled, entirely breaking her tibia. All of these injuries, according to the expert paediatrician, would have been intensely painful to Hazel."

11. Having set out those injuries, the judge then said that, having heard the evidence at the trial and in the light of the jury's verdicts, she was certain that the offender caused all of those

injuries to Hazel.

12. It follows, according to the Solicitor General's Final Reference, that the offender must have caused those injuries to his daughter when he was alone with her in the bedroom. The judge concluded that the offender must have lost his temper with Hazel, which led to him acting out of character in the way he did.

13. Subsequently, on 18th September 2022, the offender was arrested and interviewed by the police. He said that neither he nor his wife had done anything to hurt Hazel. He said that after dinner they had taken Hazel into the bedroom because she was crying, and it was then that she fell asleep and stopped moving, prompting them to call a taxi to take them to hospital.

The Procedural History

14. The offender and Rinkalben were charged and made their first appearance at the magistrates' court on 5th October 2022, from where their case was sent to the Crown Court.

15. They both pleaded not guilty to the murder of Hazel, and to an offence of causing or allowing the death of a child. Their case was set down for trial.

16. By the time of the trial, the offender had admitted that he had dropped Hazel while changing her nappy, causing her to fall to the floor and hit the back of her head. However, he denied unlawfully harming his daughter.

17. By their verdicts, the jury acquitted Rinkalben of both charges against her. They acquitted the offender of the charge of murder but convicted him of the alternative charge of manslaughter. The second count was directed to lie on the file on the usual terms.

The Sentencing Process

18. The offender was born on 15th October 1995. He was aged 26 at the date of the offence and is now aged 28. He had no previous criminal record.

19. There was no Victim Personal Statement. Nor were there any reports.

20. There was a handwritten letter from the offender to the judge, in which he admitted that he had initially lied to the police and to his wife about what had happened to Hazel. Four weeks before the trial he told his wife that he had dropped Hazel. That was the account he had advanced at trial and which he maintained. The offender stressed in his letter that he loved his daughter and had lied initially because he did not want to lose his wife.

The Judge's Sentencing Remarks

21. In the course of her sentencing remarks, the judge said this:

"Taking account of all the various injuries which I am sure you did inflict on your daughter that night, I am quite satisfied that your culpability falls into category B of the sentencing guideline where there is a starting point of 12 years, range eight to 16. The jury acquitted you of an intent to kill or to cause grievous bodily harm, but bearing in mind the nature of the injuries which must have been caused separately from the shaking – the skull fracture, the forehead impact and the spiral fracture to her leg – I conclude that Hazel's death was caused in the course of an unlawful act which involved an intention, albeit in the moment only, to cause harm falling just short of grievous bodily harm. I am also satisfied that your act in shaking your daughter, resulting as it did in 47 rib fractures and the metaphyseal fractures to all her limbs, in addition to the extent of the widespread hypoxic injury and severe damage to both eyes, is properly characterised as an unlawful act which carried a high risk of death or grievous bodily harm which was or ought to have been obvious to you. The undisputed expert evidence at trial was that severe force must have been used to cause such serious shaking injuries."

22. As to matters of aggravation, the judge found: first, that the offence involved a breach of trust; and secondly, that the offender had cast a shadow of blame over his wife, who spent a year on remand in custody before she was acquitted by the jury of being involved in any way in her daughter's death.

23. As to matters of mitigation, the judge observed: first, that the offender had otherwise been a loving father to Hazel; secondly, that his unlawful acts had not been premeditated; thirdly, that he had not used violence against Hazel before; fourthly, that he was a man of hitherto good character; and fifthly, that he was now deeply remorseful.

24. The judge did not consider that Hazel's extreme youth and vulnerability were aggravating factors because those features contributed to placing the facts into culpability B.

25. The judge concluded that the offender was not dangerous because this was a one-off episode of loss of temper and violence, for which he had expressed genuine regret and remorse.

26. The judge concluded that the mitigating factors outweighed the aggravating factors, thus leading to the reduction in sentence to one of ten years' imprisonment. She made no other orders.

The Sentencing Guidelines

27. The maximum sentence for manslaughter is life imprisonment. The Sentencing Council has issued a definitive guideline for unlawful act manslaughter with effect from 1st November 2018. There are four categories of culpability in the guideline: category A (very high culpability); category B (high culpability); category C (medium culpability); and category D

(lower culpability). There are four factors that can indicate high culpability. The first is that death was caused in the course of an unlawful act which involved an intention to cause harm falling just short of grievous bodily harm. This is a subjective factor. Secondly, that death was caused in the course of an unlawful act which carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender. This is an objective factor. The guideline also states that very high culpability may be indicated by either the extreme nature of one or more high culpability factors or a combination of culpability B factors.

28. A very high culpability case has a starting point of 18 years' custody, with a category range of 11 to 24 years. A category B case has a starting point of 12 years' custody, with a category range of eight to 16 years. A category C case has a starting point of six years' custody, with a category range of three to nine years.

The Submissions on behalf of the Solicitor General

29. On behalf of the Solicitor General, Mr Jarvis submits that the sentence of ten years' imprisonment in this case was unduly lenient. Mr Jarvis acknowledges that the prosecution submitted to the judge that this was indeed a category B case. The defence submitted that it fell between categories B and C. The judge agreed with the prosecution. However, submits Mr Jarvis, neither the parties nor the judge appear to have considered whether the combination of the two high culpability factors which the judge herself had found existed should have had the effect either of moving the case up into category A, or of requiring a significant upwards movement within the category B range.

30. Mr Jarvis submits that that is the approach which this court took in *Attorney General's Reference (R v Parry)* [2023] EWCA Crim 421; [2023] 2 Cr App R(S) 35 (in particular at [29] in the judgment delivered by Macur LJ). This is the mainstay of Mr Jarvis' submission

on behalf of the Solicitor General before us. He submits that similar reasoning applies to the facts of the present case. The combination of the offender's subjective intention and the objective risk arising from his actions should have moved the starting point up either into category A or towards the top of the category B bracket.

31. Mr Jarvis accepts that this runs contrary to the submissions that were advanced to the judge by the prosecution. He reminds us, however, that the law officers are not bound by the submissions of prosecution counsel: see *R v Stewart* [2016] EWCA Crim 2238; [2017] 1 Cr App R(S) 48 (in particular [34] and [36] in the judgment of the court delivered by Davis LJ).

32. Mr Jarvis submits that it may be that if the parties had been aware of the decision of this court in *Parry*, then the prosecution would have adopted a different approach before the judge. No criticism is made by Mr Jarvis of the judge's decision not to count Hazel's particular vulnerability as an aggravating factor, because that contributed to the objective risk of her dying or suffering grievous bodily harm. Nevertheless, Mr Jarvis submits that there were here a number of aggravating factors: first, Hazel experienced significant physical suffering; secondly, by denying responsibility for the deliberately inflicted injuries that Hazel sustained, the offender implicitly sought to place the blame on his wife; and thirdly, the offence was committed in breach of trust.

33. On the other hand, Mr Jarvis accepts that there were the following mitigating factors: first, the offender had no previous convictions; secondly, he had shown remorse; thirdly, the offence was not premeditated; fourthly, there was evidence of good character beyond the lack of previous convictions, most notably the care which the offender had previously shown towards Hazel; and finally, there was some evidence of immaturity, even in this 26 year old offender.

34. The judge concluded that the mitigating features in this case outweighed the aggravating features and merited a further downward reduction of two years from the starting point. Mr Jarvis submits that that was a very generous approach to take. However, even if she had been entitled to make that adjustment, he submits that it should have been an adjustment from a much longer sentence than 12 years' custody, with the result that the final sentence should have been significantly longer than ten years' imprisonment.

The Submissions on behalf of the Offender

35. On behalf of the offender, Mr Dawes KC submits that the overall sentence is not out of kilter with similar cases which have been considered by this court, copies of which he has drawn to our attention. He acknowledges that each case depends on its own facts, but submits that this should give the court some comfort that the sentence in the present case was not unduly lenient.

36. Mr Dawes also submits that the guidelines themselves make it clear that the court should avoid an overly mechanistic application of the factors set out in it. Mr Dawes submits that the decision in *Parry* concerned its own particular, very different circumstances. In that case there was no need for the sentencing judge to decide the factual basis of sentence, because the offender's intention and the unlawful act of dangerous driving were caught on dashcam footage which had audio. This also had the consequence that the Court of Appeal was in precisely the same position as the trial judge to say if that case was an extreme example of a finding as to the offender's intention. In contrast, submits Mr Dawes, in the present case the trial judge had to be the arbiter of the extent of both the intention of the offender and its objective assessment. The Court of Appeal is not in as good a position as the trial judge was.

37. More fundamentally, Mr Dawes submits that there is a real danger of double counting as between the objective risk of death and the subjective appreciation of that risk. Where there

is a high risk of death caused by an unlawful act, the offender will rarely be unaware of the obvious risk. Mr Dawes submits that that will be true of most, if not all, baby shaking cases. He also emphasises that the danger of double counting was stressed by this court in *Parry* itself.

38. Finally, Mr Dawes submits that the trial judge was particularly well placed to make the assessments which were required in this case.

Our Assessment

39. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10, at [72], in a judgment given by the Chancellor of the High Court, as follows:

"1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.

2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.

3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.

4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'.

...."

40. In giving the judgment of this court in the seminal case of *Attorney General's Reference (No 4 of 1989)* (1990) 90 Cr App R 366, at 371, Lord Lane CJ said that even where this court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its powers. He also emphasised, as this court has done ever since, that its role is not simply to

retake the sentencing decision as if it were the sentencing court, and that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

41. With respect to Mr Jarvis' submissions, we do not consider that the judgment in *Parry* can be read out of context. Its factual context was a world apart from that of the present case.

The facts of *Parry* can be taken from the headnote:

"V was a member of the Cornish-based motorcycle group called the Red Chiefs, who described themselves as a 'support club' of the Hell's Angels – an international 'outlaw' motorcycle organisation. BP, TP and CB were all members of the Plymouth-based branch of another international 'outlaw' motorcycle group called the Bandidos. CB was the President. The Red Chiefs and the Bandidos were rival groups. The wearing or flying of the group's 'colours' on the other's territory was regarded as insulting and provocative.

One evening, members of the Red Chiefs and Hell's Angels (both wearing their colours) had gathered at a retail park in Plymouth. Members of the Bandidos became aware. There was telephone contact resulting in TP, CB and BP becoming aware of the presence of the Red Chiefs. TP and CB drove towards Plymouth and attended where the Red Chiefs were. Most of the Red Chiefs drove away. However, V drove off in a different direction (that being the direction in which he lived). CB and TP pursued V, and were on the telephone to BP during the pursuit. BP then travelled to the scene. BP struck V's motorcycle causing V's body to [be thrown] upwards and onto the bonnet. The vehicle ran over the motorcycle and V fell underneath the vehicle and became trapped. BP continued to drive and after about 900 metres, V's body came free of the vehicle. V died from his injuries. The post-mortem examination revealed numerous injuries to the body and were in keeping with a prolonged period during which he was trapped/dragged along under the van. The cause of death was multiple injuries."

42. The application for leave to refer the sentence in that case was granted. In giving the judgment of the court, Macur LJ said at [26] that the court agreed with the submission for the law officers in that in so far as it is necessary for the court to do so, this court was in as good a position as the trial judge to assess the objective element of the fatal incident.

43. The court did not disagree with the trial judge that the unlawful act, which he described in accurate and measured terms, carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender. Further, the court was satisfied that the judge sufficiently well recognised the aspect of vigilantism and correctly identified all aggravating features for the purpose of sentencing the three offenders.

44. At [29] Macur LJ said the following:

"However, despite the measure of our agreement with the judge, we are persuaded that he failed to adequately reflect BP's subjective intent and the objective high risk he created of GBH or death into the assessment of overall culpability. There is an overlap between these factors in this case [our emphasis], but these are not two sides of the same coin. Although the judge was not unreasonable, and we find he was right, to 'temper' what would otherwise be arguably the 'extreme' character of the objective risk by reason of the comparatively lesser subjective intent, we consider that the combination elevated the offence into the category of very high culpability. We are persuaded that this error did lead the judge to pass an unduly lenient sentence in respect of BP, and that we should exercise our discretion to re-sentence him for the offence of manslaughter."

45. Before leaving that judgment we should note that at [30] Macur LJ herself emphasised the need to avoid an overly mechanistic application of factors used in the guideline. We entirely agree.

46. In our view, drawing on the experience of each member of this court, baby shaking cases such as the present raise their own difficult and sensitive issues which are far removed from those in *Parry*. We also bear in mind that the definitive guideline does not state that in every case the sentencing court must increase the culpability from category B to category A. Rather, what the guideline says is:

"The characteristics set out below are indications of the level of culpability that may attach to the offender's conduct; the court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence. The court should avoid an overly mechanistic application of these factors."

Then, under the heading "A – Very high culpability", the guideline continues:

" Very high culpability **may** be indicated by:

- the extreme character of one or more culpability B factors and /or
- a combination of culpability B factors."

We emphasise that the bold font is in the original text as issued by the Sentencing Council, no doubt to reflect its desire to convey the importance of the word "may".

47. As that passage itself makes clear, the court should avoid an overly mechanistic approach. In our judgment, that is precisely what the judge in the present case did avoid. Further, we consider that the judge in the present case, who not only had the advantage of seeing all the evidence at the trial but is a very experienced judge in cases of this kind, dealt carefully with all aspects of the sentencing exercise that were called for.

48. We have reached the clear conclusion that the sentence passed in this case can properly be described as merciful, but it was not unduly lenient.

49. Accordingly, we refuse the application by the Solicitor General under section 36 of the 1988 Act.

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

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