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19/00178

IN THE CROWN COURT OF NORTHERN IRELAND
SITTING AT LONDONDERRY

R

V

LIAM WHORISKEY

Judge Babington

1) After a trial lasting some 18 days the defendant was convicted of Manslaughter, contrary to common law, and of Cruelty to a Child contrary to section 20 (1) of the Children and Young Persons Act (Northern Ireland) 1968. He had originally been charged with murder but during the course of the trial the Bill of Indictment was amended to one of manslaughter rather than murder.

2) The factual background to this trial is as follows. On 17 September 2017 Kayden McGuinness, who was born on 25 March 2014 and was then aged nearly 3 ½ was found dead at his home at Colmcille Court in Londonderry. He was living at that property, which was a Northern Ireland Housing Executive flat, together with his mother, Erin McLaughlin and his younger sister. The defendant, who was Erin's partner and had become Erin's fiancé just a week before this happened also lived at this address.

3) On the previous evening – 16 September 2017 – Kayden had been left in the defendant's care as Erin McLaughlin had gone out to see her family. Erin left the

flat at about 7 PM and it was noted that Kayden had no injuries when she departed.

4) Shortly before 10 AM on 17th September the defendant went into Kayden's room and found Kayden lying on his bed. He had to let himself into the room with the aid of a knife as the lock on the door was broken. It is quite clear that he was dead at that stage. A neighbour, John Deery, was asked by the defendant to check Kayden but he insisted on calling the police first.

5) The defendant told police that Kayden had gone to bed at about 7 PM the previous evening. The defendant said that he himself had slept through the night with Kayden's younger sister until about 9:50 AM. He thought it was unusual that he had not seen or heard Kayden as he told police that Kayden would usually be up and about between 6 AM and 7 AM.

6) A post-mortem examination took place and a number of injuries were observed predominantly being bruising to the face and scalp of Kayden. In particular there was extensive bruising to his face and at least 15 bruises to his scalp. The bruises were of a broadly similar age and Dr Ingram, the Deputy State Pathologist for Northern Ireland, said that they were caused by blunt force trauma to the head.

7) Bleeding in the form of a subdural haemorrhage had occurred as a result of one or more of these blows to Kayden's head. This had caused the brain to swell and a cerebral oedema had formed. The medical evidence was that it was a combination of the subdural haemorrhage and the cerebral oedema that was responsible for Kayden's death. Kayden's death was unlikely to have been immediate as there were subtle changes in his brain indicating a period of survival of at least half an hour after the fatal head injury was sustained.

8) There was considerable medical evidence placed before the jury by prosecution and defence and although there were differences in emphasis there was no dispute between these various experts that the injuries sustained by Kayden to his face and scalp were what is termed and known as non- accidental injuries.

9) The defendant spoke to police on 17th September when he made a significant witness statement. He was interviewed following arrest on 23rd September and

again on 12th June 2018. He denied that he was the person responsible for the infliction of any of the injuries sustained by Kayden. He said that when Kayden went to bed he did not have any bruising to his face.

10) At trial he told the jury that he couldn't account for the bruises on Kayden's face. His counsel at one stage when cross-examining Erin McLaughlin about events on the Friday asked her did she lose control and grab Kayden by the head. It was put to her that there was a distinct possibility that injury could have been caused when the defendant was not present. She said that she wouldn't harm her child.

11) The jury heard and saw evidence of what had occurred during the day of 16th September – the day before Kayden was found dead. The defendant had taken Kayden into the city and in particular to the Richmond Shopping Centre. He also visited a shop in Shipquay Street called Cash Converters. CCTV was placed before the jury which showed Kayden lying on the floor on at least two occasions. Evidence was given by a shop assistant as to the manner in which the defendant had addressed Kayden whilst in the shop which the shop assistant described as being "abusive and vile". The jury saw extensive CCTV footage of the defendant and Kayden walking in the Richmond Centre and also around the city centre. It could be seen that the defendant was holding Kayden principally by the hood of his jacket or taking him by the wrists. It was clear that the defendant could be seen walking at his own pace with the child struggling to keep up on occasions.

12) Count Three on the indictment – the cruelty charge – related to an incident that had occurred on 15 August 2017 this being a month or so before the events of 16th/17th September. On that date the defendant phoned Erin McLaughlin to tell her that Kayden had a mark across his nose. Erin had been out attending a bonfire when she received the phone call. The defendant told her that Kayden had been in his bedroom when he had heard a noise and he took it that Kayden had been struck on his nose with a toy. Erin came home late and it was not until the next morning when she was able to properly look at Kayden she observed bruising which consisted of two black eyes. A photograph was taken which was placed before the jury as Exhibit 26.

13) Erin phoned the defendant who was at work and told him to return to the flat and explain what had happened. He then told her that a small toy car had fallen

on Kayden's face. She said that he kept swearing to her that was what happened and promised that was all.

14) Dr Ingram viewed the photograph (Exhibit 26) and described what he saw as follows "dissipating fading bruising on the bridge of the nose, extending onto the inner aspects of both the right and left upper eyelids. At least moderate force would have been required to inflict such an injury". As to how this might have occurred he said the bruising "could have been sustained as a result of a fall against an unyielding surface or a blow"

15) The prosecution made an application to place before the jury bad character evidence in relation to the defendant, involving his relationship with a former partner. He had been convicted on two separate occasions of assault in a domestic setting. His former partner gave evidence as to her concerns relating to the defendant and their own child. She told the jury that she would always have had someone stay with the defendant when she would have asked him to babysit their son. She also told the jury of an occasion when she was arguing with the defendant and he was aggressive towards the child going directly into the child's face and being verbally abusive to the child about her. She also said that after the defendant had 3 to 4 drinks he had a habit of becoming angry, agitated and sometimes violent. He would roar and shout at their son telling him to fuck up or shut up when he himself was trying to watch TV. There was no evidence that he had used actual violence against a child before.

16) There are a number of factors that aggravate the offending in this case and they are as follows:

a) The age of Kayden. He was about 3 ½ years old when he was killed. At the time of his death he was being assessed in relation to autism. He had very little by way of communication skills and his speech was very limited. All in all he was a particularly vulnerable child.

b) The defendant was in the position of a parent or guardian at the relevant time. He could be said to have been in the position almost of stepfather and lived in the same accommodation as Kayden. His treatment of Kayden represents an extremely serious breach of trust.

c) The acts leading to the unlawful killing of Kayden were not isolated as the jury found that he had previously assaulted Kayden on 15 August 2017. As

the prosecution suggest his actions represent a progression from the earlier event.

d) The defendant's behaviour illustrated that he had a propensity for aggression and violence in a domestic setting and in particular the former relating to children. This can be seen from evidence that was placed before the jury from a previous partner.

e) Kayden received multiple injuries as a result of the act or acts occasioned by the defendant in the form of bruising to his head and scalp. Medical evidence indicated that one or more blows caused the bleeding and consequent swelling to his brain which led to his death.

f) There is evidence before this court of a very significant victim impact shown in the statements from Kayden's mother and grandmother.

g) The prosecution suggested that the nature of the defence raised during the trial aggravates the offending. I have already referred to the cross examination of Erin McLaughlin and one cannot ignore the fact that it was suggested on one occasion that she was potentially the person responsible for the injuries causing Kayden's death and that this had occurred on the Friday prior to his death.

17) Turning now to sentencing, the offence of manslaughter does carry a discretionary life sentence. I have been referred to various authorities by Mr Irvine and in particular the following – R v William Desmond Gallaher (2004) NICA 11, Attorney-General's Reference No. 32 of 1996 (Whitaker) (1997) 1 Cr App R (S) 261 and R v WL (2017) NICA 36. From these it is clear that for a discretionary life sentence to be imposed two conditions must be satisfied. The first is that the sentence is being imposed for a very serious or very grave offence. In this case there is no doubt that the unlawful killing of a child does fit within that condition. The second condition is that it is likely that there will be further offending of a grave character, or put slightly differently, but in a similar vein as in the Whitaker case that there should be good grounds for believing that the offender may remain a serious danger to the public for a period which cannot be reliably estimated at the date of sentence. Mr Irvine referred me to various matters contained within the presentence report and in particularly those that relate to risk. Having considered all these matters I do not consider that the second condition is met in this case and therefore I do not intend to impose a life sentence. I will refer to the various assessments of risk later in these remarks.

18) In regard to sentencing the next matter that the court has to consider are the provisions of the Criminal Justice (Northern Ireland) Order 2008 ("the 2008 Order"). Under those provisions the offence of manslaughter is a specified serious offence (Article 12). This legislation allows a court in appropriate circumstances to impose either an indeterminate sentence or an extended sentence provided that the court finds a defendant to be a significant risk to members of the public of serious harm or in other words "a dangerous offender".

19) The way in which a court should assess whether a defendant is dangerous is set out in Article 15 of the 2008 Order and in short-term the court must take into account everything it knows about a particular defendant. The way in which courts should approach this was set out by the English Court of Appeal in Lang (2005) EWCA Crim 2864 which approach was adopted and illustrated by our Court of Appeal in R v EB (2010) NICA 40 and R v Owens (2011) NICA 48.

20) Of crucial and fundamental importance in any such assessment is any presentence report that has been obtained. In this case a very full and detailed report was compiled and has been carefully considered by the court. The defendant has been assessed as presenting as a high likelihood of reoffending due to a number of factors set out in the report as follows:

a) His personal relationships and the history of difficulties, including violence and aggressive behaviour, in two of those relationships

b) His alcohol misuse and its role in previous aggressive behaviours and offences.

c) His interpersonal and social skills.

d) His distorted reasoning and thinking skills.

e) His history of aggression.

f) His impulsiveness.

g) His lack of responsibility and

h) His lack of victim empathy.

21) Consideration was given to whether the defendant presented as a significant risk of serious harm and it was stated in the presentence report that such an assessment reflects upon past harmful behaviour and the likelihood of the

offender committing a further act of serious harm. To that end PBNI convened a risk management meeting on 21st November and that meeting concluded that the defendant met the criteria for being assessed as presenting as a significant risk of serious harm.

22) The author of the report set out the risk factors which contributed to this assessment and they include:

a) The fact that serious harm was caused to a child – an assault resulting in death.

b) The pattern of offending in that the child had been assaulted by the defendant a number of weeks prior to his death in a separate incident.

c) The aggressive behaviour towards the child which had been evidenced both by CCTV and oral evidence on the day of his death.

d) His lack of insight into his ability to cause serious harm, particularly to a child who was vulnerable through age and who had communication difficulties.

e) His previous convictions.

f) His victim blaming in regard to previous offending.

g) His limited victim awareness and regard to the devastating impact on the child's mother and her family.

h) His use of alcohol as a factor both in the index offence and in previous offending.

i) His distortions in regard to behaviour which is acceptable or normal in personal relationships.

j) Evidence of his aggressive attitudes

k) His pattern of entering relationships quickly which on two occasions had led to unplanned pregnancies.

l) His apparent lack of emotional response to the enormity of the harm that he had caused in this case.

m) His minimisation of previous domestic abuse.

n) His lack of transparency.

o) His use of impression management so that others would perceive him in a positive light.

p) His lack of acknowledgement of the risk that he presents.

23) In order to accept and agree with the finding set out in the presentence report the court must be satisfied that the risk of serious harm occasioned by the commission of further specified offences must be significant. As has been stated in previous jurisprudence this is a higher threshold than a mere possibility of occurrence and could be taken to mean noteworthy, of considerable amount or importance.

24) It is necessary to carefully consider every known aspect of the defendant's previous offending as if the foreseen specified offence or offences are not serious there would be relatively few cases in which risk of serious harm would properly be regarded as significant. As our Court of Appeal said in Owens at paragraph 16 "Repetitive violent or sexual offending at a relatively low level without serious harm did not of itself give rise to a significant risk of serious harm in the future. There might, in such cases, be some risk of future victims being more adversely affected than past victims but this, of itself, did not give rise to a significant risk of serious harm."

25) This defendant has a criminal record comprising six convictions. As previously stated this was a factor taken into account in the assessment of significant harm. On 12 August 2014 the defendant was convicted of criminal damage, assault occasioning actual bodily harm and possessing an offensive weapon in a public place. That offensive weapon was a bottle and all these offences effectively arose out of the same incident that occurred on 24 December 2013. The defendant disputed those charges and after evidence was heard he was convicted. He was given suspended sentences.

26) Those offences had occurred whilst he was in a previous relationship and the actual offending could be said to be domestic type offending. His relationship with that partner ended and it was sometime after that that he committed a common assault on her on 14 August 2015. He was put on Probation for 18 months and a Restraining Order was imposed. He was not able to finish the Probation Order due to this matter.

27) The author of the presentence report sets out other matters relating to his relationships including the fact that there had been a police call-out history. The

author also referred to the fact that the defendant maintained that he and his partner had equal culpability for arguing and fighting. Indeed he says that he limited his own behaviour to pushing and that this was mainly to protect himself. The author goes on to say that he views himself as the victim of domestic abuse and does not take responsibility for the physical and psychological harm he caused when he was in that particular relationship.

28) In coming to the conclusion regarding an assessment of dangerousness a court can look, in effect, at anything that may be relevant. I regard all these matters as being relevant in this case but even in so doing it is clear that such an analysis does not make me satisfied that this defendant should be assessed as a significant risk of serious harm. That being so it is not appropriate that either an indeterminate or extended sentence can be passed in this case.

29) It has already been indicated that the court has had access to a detailed presentence report. The defendant is now 25 years old. He is a single man and the father of two sons by two different women. He told the author of the presentence report that he recalled a positive upbringing with a very supportive family including his extended family. He said that he was not exposed to any negative impact in the home and that there were no domestic abuse or addiction issues that impacted on his family life. He did however learn that he had been the victim of a very serious assault inflicted on him as a baby by his birth father. He had little or no contact with his father growing up. He learnt of this very serious assault when he was 18 or 19.

30) As far as education is concerned he was positive about primary school but did not engage constructively at secondary school and therefore left at the age of 16 with no qualifications. He did however involve himself in third level education with a Workshop and gained four GCSEs and three NVQs. He has had a number of temporary jobs in catering and in a call centre. Generally he regards himself as having good health.

31) As far as his previous relationships are concerned he had been in one and the woman became pregnant. He told the author that they separated amicably in November 2016 with their son being born in April 2017. As became clear at the trial he entered into a relationship with Erin McLaughlin, Kayden's mother, in February 2017. He says that they had known each other for many years and would have had previous online contact. He told the author that he fell in love

with her on their first night and they then commenced a relationship. At that time she was expecting Kayden's younger sister and by April 2017 when she was born he was staying overnight and reports to have looked after Kayden when Erin was in hospital. The defendant says that he moved in full time in July or August 2017 and he became engaged to Erin seven days or so before the incident leading to Kayden's death.

32) The defendant contested the case and the author of the report says that he continues his denial of the offences. He says that he spent the evening watching films, listening to music and having 4 ½ cans of Guinness. Erin left the house at about 7 PM and although Kayden was just 3 ½ years old the defendant never saw fit, on his evidence, to even check that he was all right before going in to his room at about 10 AM the next morning. Even if that were in some way true and the jury obviously did not believe that due to their findings of guilt it is a complete failure on the defendant's part in not properly looking after Kayden that night. He himself knew that Kayden was being assessed and that autism was a possible diagnosis. He himself knew that Kayden had communication problems as well as behavioural difficulties.

33) The defendant contested this case and is entitled to no credit. The leading case on sentencing for manslaughter in this jurisdiction is R v Stephen Magee (2007) NICA 21. In that case, Lord Chief Justice Kerr said this at paragraph 26:

"We consider that the time has now arrived where, in the case of manslaughter where a charge has been preferred or a plea has been accepted on the basis that it cannot be proved that the offender intended to kill or cause really serious harm to the victim and where deliberate, substantial injury has been inflicted, the range of sentence after a not guilty plea should be between eight and fifteen years imprisonment. This is, perforce, the most general of guidelines. Because of the potentially limitless variety of factual situations where manslaughter is committed, it is necessary to recognise that some deviation from this range may be required. Indeed, in some cases an indeterminate sentence will be appropriate. Notwithstanding the difficulty in arriving at a precise range for sentencing in this area, we have concluded that some guidance is now required for sentencers and, particularly because of the prevalence of this type of offence, a more substantial range of penalty than was perhaps hitherto applied is now required".

34) In R v in Darren Fagan (2018) NICA 2 our present Lord Chief Justice spoke about sentencing when very young children were the injured party or victim. At paragraph 22, he said this:

"In section 18 cases involving very young children the focus has to be on the vulnerability of the child. That vulnerability affects the victim in two ways. First the child has absolutely no defence mechanism against the person who intends to inflict grievous bodily harm upon him. Secondly, because of the child's state of development the harm likely to be caused by the application of severe force is greater than that which would be expected in relation to an adult".

35) At paragraph 23, the Lord Chief Justice goes on to say "sentencing policy must, therefore, reflect that vulnerability. Where significant force is applied to a young child with intent to cause a child grievous bodily harm, the increased likelihood of significant damage to the child renders the conduct itself highly culpable".

36) The case of Fagan was a Section 18 case and the child victim was two or three years old – not dissimilar to Kayden. The comments regarding a child's vulnerability in that case are just as applicable in this case.

37) I have read victim impact reports from Erin, Kayden's mother and from Kathleen McGuinness, his grandmother. Both are devastated by not only Kayden's death but in Erin's case by not being there to help him. This court can only express its sympathy as any sentence imposed on the defendant pales into insignificance when contrasted with the fact that a very young child has died in this way. One can only hope that this trial brings some form of closure for the greater family circle and particularly his mother.

38) Mr Mallon did not accept that this was a wholly exceptional or truly exceptional case as had been suggested by Mr Irvine. He rather suggested that it might be unusual and said that there were no guidelines in this jurisdiction involving babies and young children. He referred me to a number of English authorities which I have carefully considered. He suggested that the Court should look carefully at the gravity of the conduct and the intent. In particular he referred to the collective view, as he put it, of the medical experts who used words such as mild, minor and moderate to describe the level of force. That of course ignores the fact that the defendant submitted Kayden to a battering which can be seen by the number of separate injuries on his face and scalp which produced a large number of separate bruises and marks as illustrated by the photographs and the

medical examination evidence. Although conceding that these type of cases are very fact specific Mr Mallon suggested that the cases that he had referred to were to be preferred to those mentioned by the prosecution. I took the view that the most relevant case law was the Northern Ireland case of Magee.

39) When one stands back from this case as one has to it is clear that it is an exceptional case of the utmost seriousness. The jury came to the conclusion that the defendant did something – only the defendant knows exactly what – that caused the death of Kayden – and the defendant then left him to die. He only summoned help when he himself woke up many hours later. The defendant was left to look after Kayden but for reasons that are still not clear caused his death. There are few worse crimes than causing the death of a young child. In my view the appropriate sentence in respect of the count of manslaughter is 13 years imprisonment.

40) In respect of Count Three the jury convicted the defendant of cruelty to a child. Many of the aggravating factors already referred to in relation to the manslaughter count are also relevant here. Again Kayden was very vulnerable, again it was a serious breach of trust and it was a totally unprovoked assault. I have already referred to what Dr Ingram said regarding this matter after inspecting and examining the photograph of the injuries to Kayden's face. It seems to me that the correct sentence in relation to Count Three is two years imprisonment.

41) Mr Irvine suggested that the court should give careful consideration to whether consecutive sentences should be imposed. I have done this. The two acts of offending are some four or five weeks apart and are completely separate incidents. Indeed it shows that the defendant should never have been left in charge of a child following the first incident but of course he was able to convince Kayden's mother that he was not responsible. It is my view that the sentences should be consecutive and thus the sentence being imposed by this court is therefore one of 15 years imprisonment. In coming to this decision I have considered the totality of the total sentence and feel that it is appropriate. This will be a determinate sentence meaning that he will serve seven and a half years in custody followed by seven and a half years on licence in the community.

42) During this period of licence I am recommending that licence conditions be imposed relating to the following matters

a) You must permanently reside at an approved address and must not leave to reside elsewhere without obtaining the prior approval of your probation officer and generally you must reside as directed by your probation officer.

b) You must not reside without the prior approval of your probation officer in the same household as any child under the age of 18 without the prior approval of your probation officer.

c) You must not have unsupervised contact, either directly or indirectly, with children under the age of 18 or any vulnerable adult without the prior approval of your probation officer and/or social services.

d) You must not undertake work or other organised activity, whether paid or unpaid, which will involve a person under the age of 18 without the prior approval of your probation officer.

e) You must not develop any personal relationships with a female unless verifiable disclosure of all your convictions have been made.

f) You must actively participate in any programme of work recommended by your supervising officer, designed to reduce any risk you may present and to attend and cooperate in all assessments by PBNI as to your suitability for programmes and other offence focused work.

43) You will have to engage in an open, honest and transparent manner during the supervision process so as to manage the risk you present and avoid causing further harm. You should be aware that if you do not you will in all likelihood be returned to prison.

44) By virtue of your conviction under Count Three – Cruelty to Children – the Independent Safeguarding Authority may include you on the Barred list relating to children and vulnerable adults.

45) In addition by virtue of your conviction for manslaughter I am imposing a Disqualification Order which disqualifies you from working with children under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003.

46) Mr Irvine made application that the Court consider the imposition of a Violent Offences Prevention Order and the proposed terms are set out in the presentence report. The vast majority of those terms are similar to proposed licence conditions which the defendant will be subject to for a lengthy period after

release from custody. Although I am satisfied that the grounds for such an Order are made out – that there is a risk of serious violent harm to the public from the defendant I do not consider that it is necessary to impose such an Order because of the sentences already passed.

47) There will be an offender levy of £50.