R v Warren Anthony Bowen

[2001] 1 Cr.App.R.(S.) 82

THE LORD CHIEF JUSTICE:

I will ask Bell J. to give the judgment of the court.

BELL J.:

At the end of March 1999, the appellant, Warren Bowen, was tried at the Central Criminal Court for the alleged murder of two brothers, Brian Harvey (count 1) and Peter Harvey (count 2) on August 1, 1998. On April 2 the appellant was found not guilty of murder, but guilty of manslaughter on each count. On April 7 he was sentenced to 14 years' imprisonment on each count, the sentences to run concurrently. He appeals against those sentences with the leave of the single judge.

At a previous hearing before this court (differently constituted) on February 4, 2000, it became apparent that there was an issue of potential relevance to sentence, namely whether the judge sentenced the appellant on the basis that it was a case of manslaughter by provocation or manslaughter by reason of lack of the necessary intent for murder. The appellant was represented at the hearing before the Court of Appeal by Mr Michael Mansfield Q.C., as he is today. Mr Mansfield was not counsel at the trial. The court directed that transcripts of the judge's summing-up to the jury and defence counsel's mitigation be obtained and that information be sought from both leading and junior defence counsel at the trial and from the appellant's solicitor, and that prosecuting counsel, Mr Victor Temple Q.C., should attend this restored hearing of the appeal. The appellant is now aged 38. For reasons which will become apparent we note that he was born in Guyana of parents of Indian descent. He has previous convictions for offences of violence, but not since 1986. Some 12 years before the events which led to his prosecution he was himself the subject of a severe assault.

On the evening of July 31, 1998 he drank beer and took cocaine. He had a knife which on his account, unchallenged at the trial, he carried to cut cocaine. It had a two-and-a-half inch blade. In the early hours of August 1 he was in a snooker hall in Walthamstow when he was approached and spoken to by Brian Harvey and Peter Harvey. He stabbed Brian Harvey in the neck with the knife and then Peter Harvey also in the neck. He then kicked Brian Harvey over as he crouched, wounded, on the snooker hall floor.

Mr Temple presented the case to the jury as one of double murder where the appellant had made an unprovoked attack on the brothers with intent to kill or to cause really serious injury. The defence was that the appellant was not guilty of any crime because what he had done, which had resulted in the deaths of the brothers, was done in lawful self-defence when under attack or anticipated attack by the brothers.

The question of whether lawful self-defence was disproved by the Crown was the main issue in the trial, but the nature of the appellant's case of spontaneous reaction to what was happening to him raised or potentially raised the question of whether he had any intent or settled intent to cause really serious injury to either of the brothers when he used the knife.

In the course of the prosecution case an eye-witness, Miss Darcy, referred to Brian Harvey calling the appellant a "Paki bastard" before he was attacked by the appellant, and to the appellant saying, "I am not a fucking Paki". Miss Darcy had not included that in her written statement; it came out unexpectedly in her evidence. No other witness spoke of hearing it. When the appellant gave evidence, he said that he had no memory of any such things being said; if they had been said, he would have remembered them. However, during his police interviews the appellant had made references to having "flipped". There was also the question of the effect of alleged aggression by the brothers upon him in the light of his own experience some 12 years or so before. It appeared also to be common ground that he was subject to some tension or anxiety on the night in question because his young son had recently been taken into hospital for an operation.

The appellant's leading counsel at trial has turned up his notes of his final speech. They remind him that he told the jury that he did not seek to rely on the defence of provocation; the appellant did not accept that Brian Harvey had used the words "Paki bastard" or anything to that effect; the appellant's case, quite simply, was that he was acting in lawful self-defence. Nevertheless, the judge, as he was bound to, left to the jury manslaughter by reason of provocation, as he did manslaughter by reason of acts which all reasonable and sober people would realise would be bound to subject his victims to physical harm, albeit not serious harm and without the necessary intent for murder. The judge did not choose to direct the jury to indicate whether any manslaughter verdicts which they might return were by reason of provocation or by reason of the lack of the necessary intent for murder. Nor did he ask the jury after their verdicts were returned whether they were prepared to indicate which view they had taken. It was in the discretion of the judge to take (or not to take) either course: see Jones (February 8, 1999) *per* Rose L.J. The appellant's trial counsel did not expressly mention provocation in his speech. Nor has he expressed an interpretation of the verdicts in answer to inquiries since the last hearing. Junior counsel and the appellant's solicitor appear to have thought that the manslaughter verdicts must have been based on lack of the necessary intent for murder, but they are in no better position than we are to reach a conclusion on that aspect of the case.

Leading counsel's mitigation concentrated on distinguishing the appellant's case from that of *Attorney-General's Reference No. 33 of 1996 (R. v. Latham) [1997] 2 Cr.App.R.(S.) 10*. Mr Mansfield has taken that course this morning. In that case (Kennedy L.J. presiding) it was said that where an offender deliberately went out with a knife which was carried as a weapon and it was used to cause death, even if there was provocation, an offender should expect a sentence in a contested case in

the region of 10 to 12 years.

It was contended by both trial counsel and Mr Mansfield that the appellant had not taken the knife out with him with a view to committing offences on the evening in question. Counsel at trial also contended that the sentence should not be greater by reason of there being two deaths when the case is said to have involved one incident. That is not an argument which Mr Mansfield has advanced today.

The judge did not express a view as to whether the verdicts were based on provocation or lack of the necessary intent for murder. When sentencing the appellant he said:

> "Brian and Peter Harvey were both unarmed when you stabbed them both in the neck with a knife and so suddenly ended their lives. But for the fact that you took a knife out with you from home, they would now be alive; and that is the serious aspect of the knife in this case. In my view, I plainly must take into account that you caused the death of two lives. You were not acting in necessary and reasonable self-defence and I take the view that this can only be regarded as a very serious matter—you have been convicted by the jury of two offences of manslaughter, having carried such a knife out with you."

The judge in his sentencing remarks made no reference to provocation. It follows from what we have said so far that the jury gave no indication of the basis of their verdicts of manslaughter. Nor did the judge indicate what view he took of the basis of the verdicts of manslaughter. Mr Mansfield accepts, rightly in our view, that in those circumstances it is for the Court to form, if it is able to do so, the right basis of the verdicts of manslaughter and therefore the basis upon which the appellant fell to be sentenced.

Despite Mr Mansfield's argument that these were cases of manslaughter without the necessary intent for murder, we take the view that the circumstances point overwhelmingly to the verdicts being of manslaughter by reason of provocation, first, because there was evidence from which the jury could infer provocation in law, as carefully explained to them by the judge; secondly, because it is impossible on any intelligent basis to suppose that the necessary intent to cause really serious injury to both brothers was not established in this case. There was evidence that the force required to cause the fatal wounds in both cases was severe. The stabs must have been deliberate. Each wound was to the base of the victim's neck. There was evidence of other slight injuries to the deceased. It is clear from the security video of events, as well as from the witnesses' evidence, that after stabbing Brian Harvey and then going on to a second deliberate stabbing of Peter Harvey, the appellant kicked Brian Harvey. He walked across the room to do so and then strutted around looking annoyed, pointing at the bodies of the two men. In evidence he admitted that he was annoyed at the time. Although he had taken alcohol and cocaine, he did not pretend

that he was not in a sensible enough state to form the necessary intent to murder.

We therefore approach the sentence in this case on the basis that these were offences of manslaughter with intent to cause really serious injury, but under the force of provocation by the two brothers. Even accepting that the appellant did not have the knife with him with a view to using it to cause injury, he did not have the mitigation of having a lawful purpose for having it. He chose to take it out and to have it with him in the middle of the night when he must have been affected to some extent by drink and drugs which he had voluntarily taken. He chose to use it in circumstances which, as the jury found, did not amount to lawful self-defence. He used it to stab first one brother and then the other with fatal results. The fact of two deaths from two separate and deliberate stabs with a knife is, in our view, an important aggravating feature. It cannot be said that this was a case where the fact of two deaths rather than one was the purely fortuitous result of one unlawful act.

On the other hand, real weight had to be attached to the undoubted mitigation evidenced in the provocation which occurred, as well as the lesser mitigating features which Mr Mansfield has mentioned this morning, such as the fact that the appellant eventually turned himself in to the police and expressed genuine remorse for what had happened. In his sentencing remarks the judge did not mention the mitigation of provocation. Starting afresh, we have come to the conclusion that the proper sentence in this case is a total of 12 years' imprisonment. We therefore quash the sentences of 14 years on each of the counts and substitute sentences of 12 years on each count to run concurrently. To that extent this appeal is allowed.