

Neutral Citation Number: [2019] EWCA Crim 84

2018/02238/A2

IN THE COURT OF APPEAL CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT BLACKFRIARS

(HHJ Dennis QC)

Royal Courts of Justice

The Strand

London

WC2A 2LL

Tuesday 29th January 2019

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE SWEENEY

and

HER HONOUR JUDGE WENDY JOSEPH QC

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

R E G I N A

- v -

VITALIE DAICOV

Computer Aided Transcript of Epiq Europe Ltd, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to
the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr T E Clark QC appeared on behalf of the Appellant

Mr D Atkinson QC appeared on behalf of the Crown

J U D G M E N T

(Approved)

Tuesday 29th January 2019

LORD JUSTICE MALES:

1. On 1st March 2018, in the Crown Court at Blackfriars, the appellant Vitalie Daicov was acquitted of murder but convicted of manslaughter by loss of control. On 14th

May 2018 he was sentenced by HHJ Dennis QC to an extended sentence of seventeen years, which comprised a custodial term of twelve years and an extended licence period of five years.

2. The appellant now appeals against that sentence with the leave of the single judge.

3. There are two grounds of appeal. The first is that the judge was wrong in principle to find the appellant "dangerous" within the meaning of the Criminal Justice Act 2003 in circumstances where that finding was essentially based upon the circumstances of the offence itself. The second is that the judge was wrong to regard the qualifying trigger for the appellant's loss of control as "short-lived and of low measure" and that this error led to him adopting too high a starting point when fixing the custodial element of the sentence.

The Facts

4. The appellant is 27 years of age and is from Moldova. At the age of 17 he left Moldova and lived in Greece for five years doing building and factory work. After a year back in Moldova, including military service, and some further time working in Greece, he travelled to England in July 2017, where again he worked in the construction industry. He has no previous convictions in this country or elsewhere.

5. The offence occurred in Hounslow in the early hours of 8th October 2017. The appellant had been out for the evening and at or about 3am he met a local prostitute in the High Street. She offered him sex and he agreed. They went into an alleyway together. The deceased, Kamil Metlev, a 31 year old Polish construction worker, followed them. He climbed over a wall to reach the part of the alleyway where they were. The deceased then confronted the appellant. A few seconds afterwards, the prostitute ran off.

6. The appellant responded to being confronted by the deceased by launching a sustained attack upon him. He punched him to the ground and kicked and stamped upon his head while he was on the ground defenceless. The deceased suffered multiple and severe injuries concentrated in the region of his head and neck, which were in keeping with a combination of blows from a clenched fist, together with stamping and kicking. His injuries included extensive bruising, grazes which showed scuff marks from a shoe, and cuts to the entirety of his face. The kicks were delivered with such force that they almost severed the deceased's left ear and resulted in damage to and loss of a number of teeth. There were multiple fractures of the

facial bones, the eye sockets, the upper and lower jaw, the nose and both cheekbones. Such injuries would have required the repeated application of severe force. There were no defensive injuries, which indicated that the deceased lost consciousness at an early stage.

7. At one point while the deceased was on the ground, seemingly unconscious, the appellant walked away. However, after only a very short time he returned and delivered two further kicks to the deceased's head, having taken a run up in order to do so.

8. The appellant then left the deceased unconscious in the alleyway and walked back to the High Street where he engaged in conversation with an acquaintance outside a club, as if nothing had happened. The incident lasted about two minutes.

9. The deceased remained unconscious. Death occurred approximately 45 minutes after the violence had ended.

10. When the appellant was arrested, he denied at first that he had been at the scene. He told repeated lies about his movements on the night in question. In his final interview, however, after he was shown CCTV footage which had captured much of what had occurred, he accepted that he had met a prostitute and had used violence towards the deceased.

11. Upon arraignment the appellant pleaded not guilty to an indictment containing a single count of murder, but those acting for him had invited the prosecution to consider whether a guilty plea to manslaughter by loss of control would be accepted. The answer was that it would not. No alternative plea was entered, but the appellant's Defence Statement confirmed that this would be his case at trial.

12. By the time of the trial, therefore, he accepted that he had killed the deceased unlawfully and that he had punched and kicked him with the intention to cause really serious harm, but not to kill him. His case was that he was not guilty of murder but of manslaughter by loss of control.

13. It was the appellant's case at trial that the deceased and the prostitute were acting in concert with a view to ambushing him in the alleyway and robbing him. He said that the deceased claimed that the prostitute was his sister and threatened to call the police. He said that the deceased threatened him with violence and had grabbed his clothes, looking (as the appellant assumed) for his wallet. It was his

evidence that he believed he was under attack and would suffer serious violence from the deceased. He said that he became really angry with the deceased and wanted to hurt him. He did not know how many times he had kicked him. He said that he did not know why he had returned to the deceased and kicked him again when he was on the ground and not posing any threat.

14. The prosecution did not accept that there had been any such set-up. Although the deceased had spoken to the prostitute shortly before the incident when she approached him in the same way that she later approached the appellant, they had then gone their separate ways. There was no evidence of any prior contact between the prostitute and the deceased that night either by telephone or in person. There was no evidence that they knew each other. The prosecution suggested that the deceased had followed the appellant into the alleyway, either as a voyeur to watch their sexual activity or possibly to engage in sexual activity with the prostitute himself and had come upon them when there was an issue between them about payment.

15. When sentencing the appellant, the judge observed that it was unclear and unresolved which of these explanations for the deceased following the appellant into the alleyway was correct. He said that the uncertainty "may well have underpinned the jury's verdict, given the burden and standard of proof that is placed on the prosecution with regard to the partial defence of loss of control". At a later stage of his sentencing remarks, the judge made clear that he did not accept that this was an attempted robbery. He added that the true position remained uncertain and unresolved.

16. In our judgment, when determining the factual basis on which he was to sentence the appellant, the judge was entitled to conclude that the appellant was in fear of serious violence (that being what the jury must have accepted), but not that this was a pre-planned robbery with the deceased and the prostitute acting together.

Dangerousness

17. Manslaughter is a "serious offence" for the purpose of the provisions in the Criminal Justice Act 2003 which deal with "dangerous" offenders. It is, therefore, necessary for the sentencing court to consider whether a defendant convicted of manslaughter is "dangerous", that is to say, whether "there is a significant risk to members of the public of serious harm occasioned by the commission by him of further [specified] offences". In making that assessment, the court must take into account, among other things, "all such information as is available to it about the nature and circumstances of the offence": see section 229 of the 2003 Act.

18. In a case of manslaughter by loss of control, the court is required to make a number of assumptions in favour of the defendant. These were set out in relation to the common law offence of manslaughter by reason of provocation in *Attorney General's Reference Nos 74, 95 and 118 of 2002* [2002] EWCA Crim 2982 , [2003] Cr App R(S) 42, and in the guideline on that offence issued by the Sentencing Guidelines Council in 2005, as follows:

"First, the offender had, at the time of the killing, lost self-control; mere loss of temper or jealous rage is not sufficient.

Second, that the offender was caused to lose his self-control by things said or done, normally by the person killed.

Third, that the offender's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control."

19. The need to make these assumptions was reiterated by this court in *R v Brook* [2012] EWCA Crim 136 , which, although decided in 2012, was a case of manslaughter by provocation at common law.

20. The same assumptions, with appropriate adjustments to reflect the differences between the common law offence and the new statutory offence of manslaughter by loss of control must plainly also be made when a defendant is convicted of the statutory offence. This was explained in *R v Gale* [2018] EWCA Crim 120 , [2018] 4 WLR 132 at [24]:

"... the judge must make assumptions in favour of the offender that (a) at the time of the killing he had lost his self-control, (b) he was caused to lose his self-control by things said or done, normally by the person killed, (c) the loss of control was reasonable in all the circumstances, and (d) the circumstances were such as to make the loss of control sufficiently excusable to reduce the gravity of the offence from murder to manslaughter ..."

21. Thus, the jury's verdict in the present case meant that the appellant had to be

sentenced on the basis of these assumptions. Loyalty to the jury's verdict requires that these assumptions be made. However, provided that they are so made, the judge is entitled to form his own view of the facts of the case, so long as it is consistent with the jury's verdict.

22. The significance of these assumptions in the assessment of dangerousness was considered in *Brook*. In short, this court held that a verdict of manslaughter by provocation (or, now, by loss of control) does not preclude a finding of dangerousness, but such a finding must not be made solely by reference to the facts of the offence. In delivering the judgment of the court, Owen J said this at [14]:

"As to the facts of the case, whilst the learned judge cannot be faulted for describing the attack as ferocious and relentless, he was bound to make the assumption that the appellant's loss of control was reasonable in all the circumstances. It is difficult to see how such a loss of control could provide the basis for the conclusion that the appellant presents a significant risk to members of the public of serious harm occasioned by the commission of further offences specified in schedule 15 of the Act."

23. In *Brook*, the sentencing judge had relied, in making a finding of dangerousness, not only on the facts of the offence, but also on the contents of the pre-sentence report. The appellant had no previous convictions. This court concluded that the content of the pre-sentence report, although compelling, was based upon the facts of the case, as the author of the report understood them, and in critical respects was inconsistent with the jury's verdict, from which it had to be assumed that the loss of control was reasonable in all the circumstances. It concluded, therefore, at [19]: "that there was no proper basis upon which the learned judge could conclude that the dangerous offender provisions were satisfied".

24. In the present case, the judge rightly recognised the need to be faithful to the verdict of the jury and to have full regard to the assumptions that had to be made in the appellant's favour. He identified five factors which, in combination, satisfied him that a finding of dangerousness should nevertheless be made. These included the nature and extent of the violence used, but he also referred to other factors.

25. Mr Tim Clark QC for the appellant submits that regard may not be had to the nature and extent of the violence used and that, properly analysed, there are no other factors here which could justify a finding of dangerousness. He submits that, leaving aside the nature and extent of the violence used in committing the offence, all that remains is an apparent lack of remorse and a failure to summon help which,

in the case of a man with no previous convictions and no clear evidence of mental illness, is not sufficient to sustain a finding of dangerousness.

26. Mr Duncan Atkinson QC, for the prosecution, supports the reasoning of the judge. He emphasises that the decision in *Brook* was that the violence used in the offence must not be the *only* basis for a finding of dangerousness and submits that this can be taken into account in combination with other factors, including, in particular, the psychiatric evidence about the appellant and the findings made by the judge.

27. We are grateful to both counsel for their clear and succinct submissions.

28. It is necessary to examine the factors relied on by the judge which led to his conclusion. His first factor was the nature and extent of the violence inflicted by the appellant on the deceased. He described this, understandably, as being sustained and going beyond what was necessary when confronted by an unarmed man who had not actually attempted to rob him. It was fuelled by anger on the part of the appellant, rather than self-protection, even if he was in fear of serious violence. This, of course, is a factor which concerns the facts of the case, but it is only one of the factors identified.

29. The judge's second factor was a preliminary report prepared by Dr Frank Farnham, a consultant psychiatrist. The report was preliminary, in the sense that it was prepared before trial in order to deal with issues of fitness to plead and the possibility of a partial defence of diminished responsibility or loss of control. The judge referred to Dr Farnham's finding of extreme anger on the part of the appellant. Dr Farnham wrote:

"36. It seems to me that there was some abnormality of mental functioning involving extreme anger and disregard for the consequences of his actions and that his ability to exercise self-control is likely to have been impaired. ..."

30. Dr Farnham gave a preliminary view that the appellant had an underlying personality disorder or an autistic spectrum disorder. But he also made clear that it was difficult to make any assessment of that without knowing more about the appellant's background and, in particular, without seeing his medical records. He recommended assessment by a neuropsychologist.

31. The appellant was then assessed by a clinical neuropsychologist, Dr Michael Watts. He too recognised the difficulty of assessing the appellant without access to his medical records. He made clear that his assessment was limited to consideration of the appellant's own account of his history and his presentation at interview. He described the appellant as polite but emotionally blunted, and indicated that he did not observe any major abnormalities in his interpersonal behaviour. He concluded that there were no signs of any psychotic illness, mood disorder or core features of an autistic spectrum condition, although he referred to the appellant's background, as he had described it, as being an emotionally impoverished family environment.

32. Accordingly, although there was ultimately no real support in the psychiatric and neuro-psychological evidence for any finding of mental disorder or personality disorder, there were findings of extreme anger on the part of the appellant based on his own account to the doctors who examined him.

33. The judge's third factor was the pre-sentence report which, as he recognised, needed to be treated with caution, given the assumptions which had to be made in the light of the jury's verdict. Nevertheless, the judge drew attention to the appellant's apparent lack of remorse and apparent lack of understanding of the seriousness of his actions, as described in the report. He rightly disregarded, however, some of the other comments in the report as being inconsistent with the jury's verdict.

34. The judge's fourth factor was the way in which the appellant had walked some fifteen or twenty metres away from the deceased, having left him motionless on the ground, and then returned to deliver two further kicks to the deceased's head. The judge quoted what the appellant had said in evidence about this, namely, that he had accepted that when he returned to the deceased and kicked him again twice to the head as he lay on the ground, the deceased had not been posing any threat at all. The appellant had added, "I don't know why I kicked him again. I can't give an answer". He agreed that he had wanted to hurt the deceased and to hurt him badly. When he came to refer to this aspect of the incident in his list of factors, the judge described this as a matter of considerable concern and referred to the two further kicks to the deceased's head as being in all the circumstances "entirely grotesque".

35. There was some debate before us as to whether this latter part of the incident was to be regarded as part and parcel of the jury's finding that the appellant was subject to a loss of control and that his actions were, in terms of section 54(1)(c) of the Coroners and Justice Act 2009, actions which a person of the appellant's sex and age, with a normal degree of tolerance and self-restraint, and in the appellant's circumstances, might have taken; or whether, on the other hand, this was distinct from and subsequent to the period during which the appellant had been subject to a

loss of control. The judge took the latter view. He pointed out that the appellant's evidence about it was not that during this particular part of the episode he was still suffering from a loss of control or was in fear of serious violence and that, plainly, with the deceased on the ground posing no threat, it is difficult to see how any such fear could have continued.

36. In our judgment, the judge was entitled to regard this part of the episode as having taken place after the appellant had regained his self-control and as being an aspect of the incident which was motivated by the appellant's extreme anger, rather than by any fear of violence or serious violence from the deceased. That, in our judgment, is consistent with and loyal to the jury's verdict, but is a view of the facts to which the judge was entitled to come.

37. The judge's fifth and final factor was the way in which the appellant left the deceased lying bleeding and motionless on the ground, making no effort to see what his actual state was or to summon help and displaying a complete disregard for his plight. The judge regarded that also as a matter of concern. That is a point with which we would agree.

38. In the end, in our judgment, taking these factors in combination, the judge was entitled to form the view that the appellant was dangerous. It is plain that he undertook his task, as we have said, being faithful to the verdict of the jury, not relying solely upon the nature of the violence inflicted while the appellant was suffering from the loss of control, but identifying other factors which in his view justified the finding which he made. In our judgment he was entitled to do so and therefore to impose an extended sentence.

The Starting Point

39. We turn next to the second ground of appeal, that the judge was wrong to regard the qualifying trigger for the appellant's loss of control as "short-lived and of low measure", and that this error led to him adopting too high a starting point.

40. As the judge observed, and as is common ground, the applicable sentencing guideline was the Guideline on Manslaughter by Provocation, issued by the Sentencing Guidelines Council in 2005, as the new Sentencing Council Guideline on Manslaughter was not yet in force. The application of the former guideline to loss of control cases was explained in *R v Ward* [2012] EWCA Crim 3139 , [2013] 2 Cr App R(S) 233 at [19], and in *R v Gale* [2018] EWCA Crim 120 , [2018] 4 WLR 132 at [24]. We quote the latter passage, part of which we have already set out above:

"The authorities ... variously make clear that in loss of control manslaughter cases: (1) the Sentencing Council Guideline in relation to manslaughter by provocation still applies; (2) however, the court must take into account the existence of a higher and different threshold for loss of control manslaughter than that which existed at common law for manslaughter by provocation; (3) on the other hand, the court must also take into account the greater significance now given to the loss of life in manslaughter cases ..."

The fourth point is concerned with the assumptions, which we have already set out.

"... (5) nevertheless, even where the loss of control is on the basis of fear of serious violence, it is still necessary to decide where in the spectrum the offence falls which may result in the conclusion that there was significantly less than a substantial degree of provocation. All will depend on the particular facts of the individual case. Thus, whilst the Guideline indicates that actual or anticipated violence by the victim will generally be regarded as involving a higher degree of provocation, and that if the offender's actions were motivated by fear culpability will generally be lower, the actual outcome is highly fact-specific and dependent upon the judge's analysis of the particular case."

41. These principles were not in dispute before us.

42. In the present case the judge had the terms of the guideline well in mind and he referred to the guidance in *Gale* which we have set out. He considered that the starting point for the custodial element of the sentence should be approached on the basis that the trigger for the loss of control was both short-lived and of low measure. On that basis he took a starting point of twelve years' custody (the highest category within the guideline). He identified a number of aggravating factors: sustained violence; the use of severe force, including multiple kicks with a shod foot targeted at the deceased's face and head while he was lying defenceless on the ground and offering no threat; the return to deliver two further kicks after the appellant had moved away; the fact that this took place late at night in a dark alley after the appellant had been drinking (albeit there was no evidence that he was drunk); and the failure to summon medical assistance for the deceased or to do anything to assist him once the incident was over.

43. On the other hand, there were also mitigating features: the appellant's previous

good character; the absence of premeditation; and the fact that the appellant intended to cause really serious harm and not to kill.

44. Weighing these factors, the judge concluded that the sentence after a trial for manslaughter would have been sixteen years' custody. He gave credit of 25 per cent for the appellant's acceptance that he was guilty of manslaughter, thus reducing the custodial term to twelve years.

45. Mr Clark submits that, although the qualifying trigger was short-lived, it was nevertheless substantial, as the judge was required by the jury's verdict to accept the defence case that the appellant was in fear of being the victim of a serious crime, namely robbery, in which the deceased and the prostitute were working together. That is, in fact, the sole point taken on this aspect of the case. He submits, therefore, that the judge should have taken a starting point of eight years (the middle category in the guideline), although he accepts that this would have required some upward adjustment to take account of the aggravating and mitigating factors. There is no challenge to the credit which the judge allowed for the appellant's acceptance from an early stage of the manslaughter offence.

46. We do not accept this submission. As this court made clear in *Gale* , even in a case where a defendant is in fear of serious actual or anticipated violence by the victim and in this case there was no reason for the judge to sentence on the basis of actual, as distinct from anticipated violence the appropriate sentence is highly fact-specific and dependent upon the judge's analysis of the particular case. Clearly, the provocation or the qualifying trigger in this case took place over a very short period (a matter of seconds) and it was for the judge, who had the benefit of hearing the evidence, to assess how that should be characterised. He was, in our judgment, entitled to reach the conclusion which he did reach. We, therefore, see no grounds on which his analysis can be regarded as having resulted in a sentence which was manifestly excessive.

Disposal

47. For the reasons which we have explained, the appeal against sentence will be dismissed.