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No: 201900698/A3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 9 April 2019

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE SWEENEY

MR JUSTICE DINGEMANS

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A

v

KRISTIAN WILLIAM JOSEPH BAILEY

Mr J Polnay appeared on behalf of the **Attorney General**

Mr I Hughes QC appeared on behalf of the **Offender**

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J U D G M E N T

(Approved)

1. LORD JUSTICE FULFORD: This is a Reference by the Attorney General, under section 36 of the Criminal Justice Act 1988.
2. Kristian William Joseph Bailey is 28 years old, having been born on 24 July 1990, and for convenience we will refer to him as "the defendant" throughout this judgment.
3. On 23 January 2019 a jury at Bristol Crown Court found the defendant not guilty of the murder of Joe Jennings but guilty of his manslaughter. On 24 January 2019 he was sentenced by His Honour Judge Parker QC to 6 years' imprisonment, the sentence which is the subject of this Reference.
4. The relevant facts can be shortly stated. On the evening of 14 July 2018 the defendant, Joe Jennings, and others were sharing heroin in the defendant's flat. An argument developed between the defendant and Joe Jennings. When the latter picked up a substantial wooden ornament the defendant simultaneously picked up a large kitchen knife with a 13 centimetre blade. A fight started.
5. The judge did not make a finding as to who first resorted to physical violence or who first used a weapon. Within seconds of the start of the altercation, Joe Jennings pursued the defendant onto the balcony, beating him across the back and shoulders with the ornament with sufficient force that he caused it to break. The defendant, who may have been on the ground for part of the incident, fought back with the knife swinging it five times at Joe Jennings. The latter received four stab wounds to the upper parts of his legs and a single deeply penetrating fatal stab wound to his heart. The fatal blow was inflicted with at least a moderate degree of force.
6. The defendant made off, leaving Joe Jennings fatally wounded, first concealing and then disposing of the weapon in panic (he threw it away as he ran). Joe Jennings died at the scene within minutes.
7. The defendant has 18 convictions for some 50 offences, mainly for offences of dishonesty, but some of them have particular relevance to the present proceedings. First, on 8 August 2012, for an offence of robbery and assault occasioning actual bodily harm, he was sentenced to 30 months' imprisonment. The defendant punched and kicked a man to the ground before searching his pockets and taking his mobile telephone. Second, on 28 March 2015, for an offence of battery, he was sentenced to 18 weeks' imprisonment. The defendant threw a pint glass towards a group of young people striking one of them on the arm. Third, on 31 July 2017, for an offence of malicious wounding, he was sentenced to 10 months' imprisonment. He used a knife to stab a man in the leg in retaliation for that man having stabbed him in the back with a hypodermic needle some moments before.
8. Shortly after his arrest the defendant told a criminal justice mental health practitioner that he used five bags of heroin daily and took crack cocaine every few days. He said his memory is very bad due to heavy drinking and his mental health "has been deteriorating over the last couple of years".

9. The defendant was tried on the single count of murder. He maintained that he was acting in self- defence when he killed Joe Jennings. The jury, as we already indicated, found him not guilty of murder but guilty of manslaughter. No pre- sentence report was ordered.
10. Addressing the Sentencing Guideline Unlawful Act Manslaughter that applies to all defendants sentenced on or after 1 November 2018, prosecuting counsel at trial, Edward Burgess QC, submitted that there were elements of category C and category D present, albeit he contended there were a number of important aggravating features. The Crown's case was that although there was plainly an element of self- defence, this death was caused in the course of an unlawful act which involved an intention by the offender to cause harm or recklessness as to whether harm would be caused thereby positioning the case between high and lower culpability.
11. The defendant's counsel, Ignatius Hughes QC leading Nicholas Fridd, submitted that the offence fell within category D, on the central basis that the defendant had wanted to defend himself albeit Mr Hughes realistically, indeed inevitability, accepted the jury's verdict must have involved other considerations. His submission to the judge in this regard was that the most likely explanation for the jury's verdict was 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 defendant. We observe that if correct, this would - if standing alone - have put the case in category B, that of high culpability. One issue we need to consider on this Reference is whether Mr Hughes correctly made a concession in this regard that went further than the prosecution's sentencing submissions on the 24 January 2019. Otherwise, Mr Hughes highlighted the short period of time that this incident lasted (8 - 12 seconds) and on this basis, he argued that although there were a number of stab wounds this was not a sustained or lengthy incident. It was not premeditated given the defendant simply grabbed the knife rather than having armed himself in advance.
12. Mr Hughes' core contention in this context was that notwithstanding the factors that tended to indicate higher culpability, this case was squarely in category D due to the central element that the defendant was, in all material respects, acting in self- defence, albeit falling short of providing him a defence to either murder or manslaughter.
13. In her victim personal statement Annie Wadham has stated:
 - i. "That day changed our lives forever and life will never be the same again. Joe leaves behind a large family and a great number of friends, the majority of whom live in and around Yeovil. Joe was particularly close to his sister, Tabitha and the day after he was [killed], Tabitha and Joe were due to meet up and remember their mother's anniversary. Sadly, she was told about Joe's death instead and the affect sent her into a steep decline, which resulted in her being hospitalised for some

time. Tabitha is still suffering and struggling to come to terms with losing the closest relationship that she had. Joe was her rock and she misses him terribly.

- ii. I have struggled with his death too ... after every update and meeting, I have had to pass the news around a deeply upset and grieving family and of course life has been suspended throughout.
- iii. On 18 July 2018, I attended the mortuary and formally identified Joe. It was the hardest thing I have ever done. [His] death upset me so deeply that I have had to give up work and somehow manage the financial and family impact of that decision. I helped with his funeral arrangements, the scattering of his ashes and I have attended every day of Kristian Bailey's trial so I can hear the evidence against him and see him face to face. There are too many members of Joe's family to mention here but I can say on behalf of all of us that life without Joe is empty and painful. Next month would have been his 34th birthday and he was taken too soon. His father misses his son, his nephews and nieces miss their uncle and his sisters miss their brother. We miss him more than words can say and there will always be a place for him in our thoughts and hearts ... "

14. In passing sentence the learned judge interpreted the jury's verdicts as follows:

- i. "You were convicted by a jury of the manslaughter of Joe Jennings and, by their verdict, the jury concluded that at the time that you killed him you were not acting in lawful self-defence and that by your deliberate actions either you intended to cause Joe Jennings some physical harm, short of grievous bodily harm or you deliberately took a risk to do so."

15. He then turned to the unlawful act manslaughter guidelines. First, he addressed the starting point as follows:

- i. "My reading of the latest guidelines from the Sentencing Guidelines Council is that they suggest that before considering

any aggravating or mitigating features, the starting point for the inevitable sentence of imprisonment should be 6 years. I have in mind the element of self- defence here and I will come to that later, it seems to me to be more appropriate to address that as part of the mitigating features in due course. Principally, because by the time of this stabbing and indeed by the time of the stabs before the fatal injury, self- defence was no longer in issue."

16. We interpolate to note, with great respect to this experienced judge, that he misled himself when he adopted this approach to identifying the starting point. It was wrong in principle to move consideration of issues such as self- defence to a later stage in the sentencing process, namely when he took into account the relevant mitigating factors. The judge, in our view erroneously, ignored self- defence for the purpose of identifying the offence category because, as he put it, "by the time of the stabs before the fatal injury, self- defence was no longer in issue."

17. We will return to this issue in a moment. But we underline that self- defence is clearly relevant to identifying the offence category when it does not amount to a defence, certainly with facts such as these (see category D of the guideline). The judge then moved on to the aggravating features:

- i. "As far as aggravating features are concerned your situation is made significantly worse by your use of a knife. I accept that here the knife was present at the scene at the start of the argument, that you picked it up rather than bringing it to a fight intending to use it, but your behaviour on 14 July has to be seen against a background in particular of your guilty plea the year before to an offence of unlawful wounding, when you attacked somebody else with a knife in retaliation for being stabbed in the back with a hypodermic needle.
- ii. On that occasion you were sentenced to 10 months' imprisonment. That no doubt reflected the powerful element of provocation on that occasion which is not present here.
- iii. A further statutory aggravating feature in the present case is that, by your own admission and by all of the evidence, at the time that you killed Mr Jennings you were heavily under the influence of drink and Class A drugs."

18. As to mitigating factors, the judge said:

- i. "What are the mitigating features? On the other side of the coin, in your favour I note that this was obviously not a planned or premeditated assault. Importantly, on the evidence which the jury heard it is certainly possible to conclude that you began by trying to defend yourself but, as I have already noted, subsequently you went far beyond what was necessary for that purpose. That element does not bring the starting point down to within Category D within the guidelines, but the fact that this incident may have started out as self-defence does amount to significant mitigation."

19. Thereafter the judge concluded that the mitigating and aggravating features balanced each other out and, as a result, he arrived at the decision that the appropriate sentence was 6 years' imprisonment.

20. The offence of manslaughter carries a maximum sentence of life imprisonment.

21. The first step in the process is to determine the offence category. It is worth setting out in full how the Sentencing Council introduces this stage in the process:

- i. "Culpability
- ii. 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.
- iii. The court should avoid an overly mechanistic application of these factors."

22. Focusing on the potentially live issues in this case, the judge needed to determine whether the case fell into: first, category B high culpability (viz. the death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling just short of grievous bodily harm or 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); second, category C, medium culpability (viz. where death was caused in the course of an unlawful act which involved an intention by the offender to cause harm or recklessness as to whether harm would be caused but falls between high and lower culpability); or, third, category D lower culpability (viz. he acted in defence of himself but not amounting to a defence).

23. The defendant would have been acquitted of all charges if he had been able sustainably to rely on self- defence. As the guideline makes clear, the rejection by the jury of this defence however did not mean it was irrelevant to the judge's consideration of culpability.
24. Having determined where within the category range the case falls (including potentially somewhere between them), the judge should then use the starting point he has identified to reach a sentence, bearing in mind the aggravating and mitigating features, but irrespective of the accused's plea or any assistance that has been provided to the prosecution. Of particular relevance to the present application, when a case does not fall within one of the four categories, the judge will need to identify a starting point somewhere between them before any adjustment is made for aggravating or mitigating features.
25. A category B offence has a starting point of 12 years' custody, with a category range of 8 to 16 years' custody. A category C offence has a starting point of 6 years' custody with a category range of 3 to 9 years' custody. A category D offence has a starting point of 2 years' custody with a category range of 1 to 4 years' custody.
26. Next, it falls to the judge to consider the aggravating and mitigating features. The following aggravating factors were present in this case: the convictions we described earlier; the use of the weapon (if not taken into account in assessing culpability); whether the offence was committed whilst under the influence of alcohol and class A drugs; and any steps taken to conceal and dispose of the weapon. The offence was mitigated by the lack of premeditation and planning.
27. Against this background, it is submitted by Mr Polnay, for the Attorney General, that the sentence passed was unduly lenient. He suggests, following the Attorney-General's Reference (R v Stewart) [2016] EWCA Crim 2238 (which described the ability of the Attorney to depart from the stance of the Crown in the court below), the culpability level was higher than prosecuting counsel identified at trial. He contends that given the defendant swung a large kitchen knife at least five times at the deceased during a fight, the death of Mr Jennings occurred 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 defendant (category B).
28. In this context he emphasises that the judge found the repeated use of a knife went far beyond what was necessary for self- defence. In those circumstances, he submits that the judge ought to have found that the defendant was within the high culpability bracket albeit perhaps slightly below the starting point for category B or, at the very

least, within the medium culpability category, but with a significant uplift from that starting point, before the judge went on to consider the aggravating and mitigating features.

29. Moreover, he argues that having determined the defendant came within the medium culpability category, he double counted the mitigation by making a further reduction for the element of self- defence.
30. Mr Hughes, appearing before us as he did in the court below, submits that the Attorney General is inviting the court to adopt an overly mechanistic approach to the Sentencing Guidelines. He reminds us that the judge had heard the evidence in this trial, including as to background, and was well placed to make the final decision as to the appropriate length of sentence.
31. It is emphasised that there was evidence that the defendant had been bullied by his companions somewhat earlier on during this incident. The statue used to attack him was of African hard wood which shattered on impact with the defendant. He submits that during this very fast incident the defendant fell to the ground and, during that part of the incident, he inflicted some, if not all, of the serious injuries. He therefore simply over responded to an attack on him.
32. As before the trial judge, Mr Hughes contends that the central feature, as far as sentencing is concerned, is this element of self- defence and that this is, accordingly, a category D case, with perhaps some elements of category C. He suggests that this accords with the judge's observations during sentence.
33. As to the aggravating features, he submits that the attempt to conceal the weapon was of minor significance, because it amounted to no more than the defendant hiding the knife under his jacket and then jettisoning it when he ran away.
34. Turning to the merits of these arguments, as to Mr Polnay's second argument it is clear that the judge opted for category C on the basis that Mr Jennings' death was caused in the course of an unlawful act which involved an intention by the defendant to cause harm or recklessness as to whether harm would be caused. The judge expressly put self- defence to one side when he was considering the relevant category. Certainly given the way the judge described his approach, he did not, in our view, double count this element of mitigation.
35. We accept however, Mr Polnay's principal contention that the judge incorrectly approached the categorisation of this case. As the judge found, the defendant went well beyond actions that were necessary for self- defence and he delivered five blows, one of which was a deeply penetrating fatal stab wound to the heart. It is impossible, as Mr Hughes conceded before the judge, to escape the conclusion that Mr Jennings' death was caused as the result 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 defendant (category B). When the defendant repeatedly swung a large kitchen knife with a 13 centimetre blade, stabbing the upper parts of Mr Jennings' legs and penetrating his heart, in our judgment, it ought to have been obvious to him that there

would was a high risk he would kill Mr Jennings or cause him grievous bodily harm. There is no other sustainable conclusion.

36. Category B has a starting point of 12 years' imprisonment. However, we consider that the element of self- defence has some real significance in the categorisation of this case, in that it provided the context in which this very short- lived altercation occurred and we remind ourselves that category D has a starting point of 2 years' imprisonment.
37. In evaluating the considerable divergence between the starting points for these two categories, by the time the repeated injuries were inflicted this had ceased to being an incident in which the defendant was defending himself and he had gone on the attack. Therefore, the factors most immediately relevant to the fatal stabbing, indicate this was a category B case, for which there needs to be significant downward adjustment to reflect the underlying context of self- defence.
38. In the result, in our view, the starting point should have been 6 years' imprisonment. Critically to that needs to be added the aggravating features, namely that the offence was committed whilst the defendant was under the influence of heroin, the steps taken by him to conceal and dispose of the weapon and, perhaps most particularly, his poor criminal record which included at least one notable instance of violence. There are no material mitigating factors given self- defence has already operated to reduce the starting point. The aggravating factors viewed cumulatively are significant, leading to an increase from the 6 years starting point to 8 years' imprisonment.
39. We therefore allow this application. We quash the sentence of 6 years' imprisonment and substitute a term of 8 years' imprisonment. The other orders of the judge, for instance, as to time served are undisturbed.
40. Mr Polnay, Mr Hughes, thank you both very much for your assistance.

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