

Neutral Citation No. [2019] EWCA Crim 923

No: 201802128/A1

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Thursday 23 May 2019

Before:

LORD JUSTICE DAVIS

MR JUSTICE JEREMY BAKER

THE RECORDER OF CARDIFF

HER HONOUR JUDGE REES

(Sitting as a Judge of the CACD)

R E G I N A

v

EMDADUL ISLAM

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Mr B O'Neill QC appeared on behalf of the **Appellant**

Miss S Whitehouse QC appeared on behalf of the **Crown**

APPROVED JUDGMENT

MR JUSTICE JEREMY BAKER:

1. On 1 May 2018 at the Central Criminal Court, Emdadul Islam having earlier pleaded guilty to having an offensive weapon and been convicted of manslaughter, was sentenced to 14 years' imprisonment in respect of the manslaughter and two years concurrent imprisonment for having an offensive weapon.
2. His co-accused Yasin Patel, who had pleaded guilty to wounding with intent and having an offensive weapon, was sentenced to a total of 12 years' imprisonment.
3. Emdadul Islam now appeals against sentence with permission of the full court.

Circumstances of the offences

4. On the afternoon of 12 October 2018 two serious acts of violence took place on Plashet Road in Forest Gate in London. In the first incident, Yasin Patel, assisted by his step-father, Titu Miah, stabbed a 16-year-old boy called Moinul Islam several times to the body. A few minutes later and in retaliation for that incident the appellant struck Titu Miah with a baseball bat on the back of his head causing his death five days later at hospital on 17 October.

5. The events that afternoon commenced when a group of youths visited the Clear Cuts barber shop on Plashet Road where Yasin Patel was already present. Some form of altercation took place and Yasin Patel left the shop and drove off in his Mercedes motorcar. The group of youths then visited another barber shop called Malik's where the appellant was having his hair cut. Whilst there, Yasin Patel arrived in his Mercedes motorcar with his step-father Titu Miah and they pursued the group of youths which included Moinul Islam. When Yasin Patel and his step-father caught up with Moinul Islam, Yasin Patel repeatedly stabbed him whilst Titu Miah grabbed him by the hair as he was lying on the ground.

6. This incident having come to the attention of the appellant, who knew but was no relation to Moinul Islam, left Malik's barber shop, retrieved a baseball bat from the boot of his motor vehicle, approached Yasin Patel and his step-father from behind and struck Titu Miah on the back of the head causing him to fall to the ground. Despite the fact that the force of the blow had fractured his skull, Titu Miah was able to get up from the ground and lay on the bonnet of the Mercedes motorcar. Before it was driven off, the appellant struck the rear window of the Mercedes motorcar with sufficient force to break the baseball bat.

7. Following Titu Miah's death at hospital on 17 October, the appellant handed himself into the police and provided a prepared statement in which he claimed to have struck Titu Miah once to the shoulder area because he was afraid Titu Miah was going to assault someone. He denied any intent to kill or cause really serious bodily harm.

8. At trial, the appellant was acquitted of murder but convicted of manslaughter. It is apparent from the jury's verdict that whereas the jury rejected the appellant's defence that in striking Titu Miah he was acting in lawful defence of another, they accepted that when he unlawfully struck Titu Miah he neither intended to kill nor cause Titu Miah really serious bodily harm.

9. There was a victim impact statement from the deceased's wife which spoke eloquently of the profound distress that her husband's death had caused to both herself and their three young children.

10. The appellant, who is 24 years of age, is not a man of good character. He has a number of previous convictions for drug-related offences. However, his only previous conviction for violence was a common assault in 2012.

Sentencing exercise

11. In his sentencing remarks, the judge determined that the appellant did not meet the criteria for being regarded as a dangerous offender and that appropriate punishment would be afforded by the imposition of a determinate period of imprisonment. In determining the appropriate length of the custodial term the judge observed that the degree of harm was at the highest level as the appellant had caused the deceased's death. As to the appellant's degree of culpability the judge stated that: "The harm that was caused could have been readily foreseen." In this regard the appellant had deliberately retrieved a baseball bat in order to use it as a weapon with which to inflict the fatal injuries to the deceased.

12. The judge noted that the pathologist, Dr Chapman had indicated that severe force would have been required to inflict the 5 x 6 centimetre comminuted fracture which had led to the deceased's death.

13. The judge found that there were factors which aggravated the offence, including the fact that the offence took place in public and the severity of the impact of the deceased's death upon his family.

14. So far as mitigation was concerned, the judge noted the appellant's relative youth and the fact that he had only one previous conviction for relatively low-level violence. The judge also took into account a letter written by the appellant in which he expressed remorse for his offending. The judge stated that the circumstances in which these offences had taken place had many of the hallmarks of gang-related activity. He stated that there was some degree of premeditation involved in the offence but it was clear that the appellant's actions were carried out in retaliation for what had happened to Moinul Islam.

Grounds of appeal

15. On behalf of the appellant, Mr Brian O'Neill QC submits that the period of imprisonment was manifestly excessive. He acknowledges that in *Appleby [2009] EWCA Crim. 2693* the court underlined that in manslaughter cases sentences are required to reflect the fact that an individual's life has been lost. He accepts that in the light of *Appleby* the previous sentencing range of between 10 and 12 years' custody for manslaughter cases where death is caused that result in a fatal stabbing and where a knife is taken to the scene has increased and that sentences of around 14-15 years have more recently been imposed. However, it is submitted that where, as in the present case, a less potentially dangerous weapon is taken to the scene, namely a baseball bat, then the appropriate period of imprisonments should be below this range.

16. He points out that in *Branagan [2012] EWCA Crim. 1695* which involved a situation which it is submitted is similar to the present one, where death is caused by a single blow to the head with a wooden object which the offender had to hand, the court described a post-trial figure of seven-and-a-half years' custody as being on the severe side. He pointed out that in the present case the appellant only acted as he did because of what the deceased had done to Moinul Islam, that the appellant struck a single blow which it was accepted may not have been aimed at his head but across his shoulders, and that there was medical evidence that had appropriate treatment been provided to the deceased at hospital he may not have died from the injuries caused by the appellant. Furthermore, the appellant was relatively young and had no previous convictions for serious violence.

17. Mr O'Neill also seeks to criticise the judge for his reference to gang-related activity and he submits that there was no evidence of this at the trial. Moreover, he submits that the judge's reference to the anger being exhibited by the appellant when he smashed his baseball bat into the rear window of the Mercedes motorcar detracted from the jury's finding that there was no intention to cause really serious bodily harm and that on the contrary, the appellant's actions exhibited restraint as he could instead have caused further injury to the deceased. It is also submitted that the judge erred in giving excessive weight to the factors such as the presence of children at the scene when there were few of these present and the trauma caused to the deceased's family.

Analysis

18. By reason of the fact that the sentence in this case was imposed prior to 1 November 2018, the Sentencing Council's Definitive Guideline for manslaughter do not apply to this case. Those guidelines provide for various categories of offence based upon the relative culpability of the offender as disclosed by the facts of the particular case which is being dealt with by the court and set out respective starting points and category ranges. As these guidelines will form the basis of sentencing exercises for future manslaughter cases and do not apply in the instant case, we do not consider that it is either necessary or appropriate to make any observations as to how they might apply to the facts of this case. Observing only this, that the type of category ranges set out in the guidelines are no doubt reflective of the approach of this court in *Appleby* for sentences for manslaughter. Instead we intend to follow the approach adopted by this court in *Huggins [2017] 1 Cr.App.R (S) 21* of concentrating on the twin factors of the culpability of the appellant and the harm caused or risked being caused by the appellant in this case.

19. In approaching the matter in this way we have not found it particularly useful to have regard to sentences which have been imposed in other cases, which are invariably fact-specific to those cases. In fairness, Mr O'Neill did not pursue such an exercise with any vigour and we only observe that so far as *Branagan* is concerned, not only was the offender (who had no previous convictions for violence) and the deceased good friends, but the deceased was armed with a knife when the offender struck a blow with a piece of wood in what was described as being only "more than trivial force" and where the deceased suffered from an unusually thin skull. These circumstances are clearly far removed from the case with which we are dealing today.

20. We of course acknowledge that the appellant is relatively young. Although not of good character he has only one previous conviction for relatively low-level violence some years ago. On the other hand, this is a case in which the appellant kept a baseball bat in his motor vehicle, available to be used by him, as he did in the present case to inflict fatal injury to the deceased. Moreover, as a result of the jury's verdict there was here no question of the appellant acting in any defensive capacity; rather his actions were motivated by retaliation for what the deceased had done to Moinul Islam. It may be that the appellant could have inflicted more blows upon the appellant than he did. However, the blow which struck the deceased to the back of the head was done with what was considered to be severe force by the forensic pathologist and resulted in an extensive comminuted fracture to his skull from which he subsequently died.

21. In these circumstances, we are satisfied that whatever the appellant's intention, which of course

was neither to kill nor to cause really serious bodily harm, the appellant's unlawful act carried a high risk of death which ought to have been obvious to the appellant. Moreover, that it was a significant aggravating factor the appellant had specifically armed himself with a baseball bat prior to the offence, intending to use it as a weapon with which to cause injury to the deceased.

22. It may be that a weapon such as a baseball bat is not one which is so obviously dangerous as a knife. However, the weight to be given to this factor will depend upon the circumstances of the individual case and in the present case, as we have already observed, the appellant not only had the baseball bat ready for immediate use but used it with severe force to inflict fatal injuries to his victim.

23. In so far as there is criticism of the judge's reference to gang-related activity, having read the sentencing remarks for ourselves, this appears to be a reference to the activities of the group of individuals which travelled from one barber shop to the other, rather than a specific reference to the appellant's conduct and we do not discern that it had the effect of wrongfully inflating the judge's approach to the sentencing exercise. Likewise, given the severity and the extent of the injury which the appellant caused to the deceased's skull, we do not consider any significant mitigation arose from the evidence that had appropriate medical treatment been provided to the deceased at hospital he may not have died. Moreover, we do not consider that there can be any justifiable criticism of the judge's observation that what the appellant did to the motor vehicle was indicative of his level of anger. Undoubtedly the appellant could instead have inflicted further injury to the deceased. However, by then the appellant had already inflicted a fatal blow to the deceased's head and the appellant was clearly still acting in anger when he proceeded to smash the window of the motor vehicle with sufficient force to break the baseball bat. Likewise, we do not detect any undue weight being given to the fact that there were children present when the incident occurred, nor to the extent of the harm caused to the deceased family.

Conclusion

24. We have not found this an easy matter upon which to reach a determination. We acknowledge straightaway that the judge who had conducted the trial would have been well able to assess the degree of culpability involved in this particular case. However, although the baseball bat was a potentially dangerous weapon when used in the way in which it was by the appellant on this occasion, this was not a case in which a knife had been taken to the scene and used to inflict the fatal injury. Moreover, we take into account the fact that this was a single blow by a young man with no previous convictions for serious violence.

25. Bearing these matters in mind, we are just persuaded that on the particular facts of this case the sentence of 14 years was too long to reflect the extent of the appellant's culpability and instead we consider that the appropriate sentence is one of 12 years. Therefore, we will quash the sentence imposed in the lower court and substitute for it a sentence of 12 years' imprisonment. To that extent the appeal is allowed.

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