Regina
v
Adil Mahmood

Court of Appeal Criminal Division

[2019] EWCA Crim 1267

Before: Lord Justice Davis Mr Justice Jay Sir John Saunders

Friday, 28 June 2019

Representation

Mr M Bromley-Martin QC appeared on behalf of the Appellant.
Mr T Cray appeared on behalf of the Crown.

Judgment

Lord Justice Davis:

1. This is an appeal, brought by leave of the Full Court, against sentence. The applicant had pleaded guilty in the Crown Court to counts of manslaughter and arson. He was in due course sentenced by His Honour Judge Leonard, sitting in the Central Criminal Court, to a term of eight-and-a-half years' imprisonment, with hospital and limitation directions given under section 45A of the Mental Health Act 1983 (as amended).

2. On the written grounds, in respect of which leave had been granted, it had been argued that such a sentence, by reference to section 45A , had not been appropriate or justified and that the appropriate sentence would have been a hospital order under section 37 of the 1983 Act, coupled as appropriate with a restriction order under section 41 .

3. Further and alternatively, it had also been argued and leave had been granted on this point too, that the custodial sentence of eight-and-a-half years' imprisonment, and connoting a starting point of 13 years after trial, the appellant having pleaded guilty, was simply much too long.

4. This matter had been before the Full Court on a previous occasion, when indeed leave was granted. At that stage there was no indication that the appeal would proceed on all points formulated. Indeed, that remained the position so far as this court was concerned until this morning. However, this morning the members of this court were presented with a supplemental argument, submitted to the court office yesterday evening as we gather, prepared by Mr Bromley-Martin QC on behalf of the appellant, raising concerns. It appears that in fact the appellant had been released from the hospital environment back into prison in August 2018, although this had not previously been mentioned to the court. The concern is that, in such circumstances, this court, it was suggested, might not now be in a position to substitute a sentence under section 37 , with or without a restriction order under section 41 . It was further said that the appellant was concerned that if this court were to impose a section 41 restriction, if it were satisfied that the sentence of Judge Leonard was wrong, then the appellant might end up by being in effect detained for an indeterminate period and may end up being detained for longer than would be the case under the determinate term of his sentence. This last point, we add, is always

going to be the potential position where a restriction under section 41 may be imposed.

5. At all events, this morning Mr Bromley-Martin sought an adjournment to get up to date medical evidence so that the matter could be further explored. At the same time, he in effect sought a form of guarantee from this court that in no circumstances would a restriction order under section 41 be imposed by this court if it were otherwise satisfied that the sentence of Judge Leonard could not stand.

6. This court indicated that it was not prepared to grant an adjournment and furthermore it was not prepared to give a guarantee of the kind sought. Mr Bromley-Martin had taken instructions from his client in advance of the hearing today as to the position and he has been firmly instructed that in those circumstances, which have now eventuated, he is not to pursue the grounds of appeal seeking to challenge the section 45A order made by the sentencing judge and would confine this appeal to the challenge to the custodial sentence.

7. In those circumstances, and Mr Bromley-Martin having clear instructions on the matter, this court permitted those counts relating to that aspect of the sentence to be withdrawn and this appeal, in point of substance, has now proceeded solely with regard to the custodial term. It is a great pity to put it mildly, that this court's attention was not drawn to this potential difficulty, if not at the previous hearing then at all events in good time before the hearing today.

8. We will set out the background facts relatively shortly. The appellant, now aged 38, had initially been charged with murder and with arson. In the result, he having pleaded guilty to manslaughter on the count of murder, a plea which was acceptable, and having pleaded guilty also to the count of arson, he was sentenced in the Central Criminal Court to eight-and-a-half years' imprisonment on the count of murder and 18 months' imprisonment concurrent on the arson count. Hospital and limitation directions, as we have said, were given under section 45A of the 1983 Act.

9. The background had been that in the early hours of 29 May 2017 the almost naked body of a man called Hassaman Ettakkal, aged 54 and who was a Moroccan national, had been found beside the burnt out remains of a BMW car. That vehicle had been stolen several months beforehand. It seems that Mr Ettakkal had been sleeping rough in it. It had been abandoned near a shopping area adjacent to Green Lane in Ilford. It further appears that Mr Ettakkal had sought to make some kind of living through begging and small scale drug dealing in the area.

10. There was evidence from two witness that the deceased, Mr Ettakkal, had been a small time drug supplier and that the appellant had been using him as a source of obtaining drugs. Those two particular witnesses had been asleep in their car which was parked nearby and they were awakened by the two men arguing over drugs and with the appellant also making seemingly paranoid accusations to the deceased.

11. The deceased then apparently headbutted the appellant, who retaliated by punching him in the body four times. The appellant was much more powerfully built than Mr Ettakkal; Mr Ettakkal was also in a very poor state of health because not least of his various addictions. At all events Mr Ettakkal fell to the ground and was not able to get up. The appellant returned to the car park and clearly realised that Mr Ettakkal was dead. He then left the scene and then went to buy some petrol. He then returned to the scene and set fire to the BMW car. One of the witnesses had seen the appellant holding a petrol can. He again left the scene and went to the home of a woman who described him as being "off his nut".

12. The cause of death was identified as haemorrhage and a ruptured spleen. The life-style of the deceased had been such that he suffered sclerosis of the liver, which would have exacerbated the effect of such a traumatic injury. Further, he suffered from chronic lung disease and broncopneumonia. Further, his nutritional status and life-style led to an increased risk of falls and rib injuries contributed to by increased fragility. It was the impact to the chest which cause the rupture to the spleen.

13. The appellant had been traced through an examination of CCTV evidence and phone evidence which showed him visiting the scene twice. The appellant had lived with his partner close to where the body was found.

14. A pathologist gave detailed evidence as to the state of the deceased. Apart from the other medical and physical considerations which we have described, it may be noted that he was a very slightly build man, some 5 feet 5 inches in height, and weighed only some 8 stones in weight.

15. The pathologist accepted that the physical condition of the deceased would have exacerbated the effect of the injury inflicted. It was accepted that there was no pattern to be suggestive of any kicking or stamping. There was evidence furthermore that before the arrest of the appellant he had been suffering from paranoid delusions and rambling behaviour and so on.

16. Inevitability given the circumstances, psychiatric evidence was obtained. The first one obtained was from a Dr Kavuma. That was dated 19 September 2017. That fully reviewed the position; it was found that the appellant suffered from paranoid schizophrenia. He was assessed however as fit to plead, but it was indicated that he was psychotic in the period around the events in question. Dr Kavuma said:

> ”It is arguable that his illness has a substantial bearing on his capacity to form the specific offence intent for these alleged offences.”

17. The view expressed by Dr Kavuma with regard to the availability of a defence of diminished responsibility was somewhat equivocal. Altogether less equivocal was a further psychiatric report from a Dr Wilkin, dated 2 November 2017. He accepted that the appellant suffered from a recognised medical condition in the form of paranoid schizophrenia. However, he stated the clear view that this did not contribute significantly to the appellant’s behaviour at the material time and stated the clear view that a medical defence to murder was not open to the appellant. It is right to say that the account of events given by the appellant to Dr Wilkin was rather different from the account which had previously been given by the appellant to Dr Kavuma. At all events Dr Wilkin, amongst other things, recorded this:

> ”Mr Mahmood was quite clear with me that his altercation with the victim was not related to his symptom of mental illness. He indicated to me that this was an argument over a drug deal; the victim had not been part of his delusional belief system; he had not been involved in any of the psychotic symptoms that he had experienced…Therefore, in my opinion, Mr Mahmood, understood the nature and quality of his acts and although he had

been surprised at the outcome, he would have been aware that what he did was wrong."

A little later Dr Wilkin said:

> "In my opinion, this is a case where, although Mr Mahmood was unwell at the time of the offence, his symptoms of mental illness would not have made a significant contribution to his behaviour at the material time and therefore would not have substantially impaired his responsibility for his acts or omissions. However, I would emphasise that this is a matter for the jury."

At all events the conclusion of Dr Wilkin was that no psychiatric defence to a count of murder was available.

18. It may further be noted that the appellant has, unfortunately, a very bad antecedent history. This includes a significant number of convictions, including convictions for serious violence and indeed, on one occasion, he had been sentenced to 9 years' imprisonment for very serious violence. There had been relatively few lengthy periods in his life (as an adult) when he has not been in prison.

19. There is no doubt, as the medical evidence says, that he has long suffered from psychotic symptoms. He has in the past received medication for that. All the indications are that when he takes his medication, his condition can be managed. Unfortunately, he does not always take his medication, and on this particular occasion he had not been taking his medication as he should have been. Instead, the indications are that he had reverted to trying to obtain Class A drugs as a substitute for the prescribed medication which he should have been taking.

20. A further addendum report was prepared by Dr Kavuma for the purposes of sentence hearing. By this time it had understandably been accepted that a defence of diminished responsibility could not be maintained. The plea was accepted on the basis of lack of intent to kill or to cause really serious injury. The addendum report of Dr Kavuma, to a considerable extent, focused on the potential differences between an order made under section 37 and section 41 , on the one hand, and an order made by reference to section 45A on the other hand. At the hearing, there was really not much exploration of whether an indeterminate sentence in the form of a life sentence or whether an extended sentence should be imposed. Instead, the debate really focused upon whether or not a section 37 / 41 disposal was appropriate or whether or not a section 45A disposal was appropriate.

21. In the course of his sentencing remarks the judge, at one stage, said, referring to the psychiatrist accepting a diagnosis of paranoid schizophrenia:

> "They are not of the opinion, save to the limited extent on loss of control, that your condition contributed significantly to your behaviour."

That is certainly so with regard to Dr Wilkin, it is less obviously so with regard to Dr Kavuma. But at all events the judge then went on and said this:

> ”At the heart of your problems over the year is a failure to take your medication, but also that you have been taking controlled drugs, including cocaine. I agree with the medical opinion that your current and past offending is a result of your paranoid schizophrenia, together with your failure to take the prescribed medication and, as importantly, your reliant on drugs of abuse, such as cocaine …”

22. The judge referred to the decision of the Court of Appeal in *R v Vowles [2015] EWCA Crim 45* , and then said this:

> ”I do judge that you require treatment for a mental disorder and I judge, at least to some extent, that the offending is attributable to your mental disorder. It also due, in my judgment, as I have said more than once now, to your addiction to drugs. I consider that bearing in mind your criminal behaviour over an extended period, that your offending requires punishment and I also take into account the part that your mental position plays in your past criminal behaviour. I have very much in mind the need to protect the public on your eventual release……in my judgment, the appropriate course to take is to make a hospital order and I judge, for the reasons I have set out, and because of the serious nature of the offending and past offending, that I ought to pass in your case a custodial sentence. Taking into account your plea of guilty as to an unlawful act manslaughter, on the basis of lack of intent to do grievous bodily harm and, to some extent, the loss of control, but where there is a high risk of causing really serious body harm, and your history of committing the offences of violence, and giving full allowance for your plea of guilty at the earliest opportunity, the sentence I pass is one of eight-and-a-half years' imprisonment for manslaughter and 18 months concurrent for arson …”

23. In view of the withdrawal of the grounds, relating to the judge's decision to impose a custodial term, by reference to section 45A of the 1983 Act, we can in effect pass over that point. However, we have of course reminded ourselves of the principals set out in the case of *Vowles* and also reminded ourselves of the helpful supplementary observations contained in a further decision of a constitution of this court in *R v Edwards [2018] 2 Cr App R(S) 77* . All we would say is that having regard to the circumstances of this case as outlined by the judge in his sentencing remarks and having regard to the proper application of the principles set out in *Vowles* and in *Edwards* , this court would have had the greatest difficulty acceding to the arguments in writing that the order made by the judge was wrong. We express no concluded view on the matter because necessarily we have not today heard full argument on the point. But our present view is that not pursuing those particular grounds has been sensible.

24. We turn however to the ground which is pursued, which is as to the length of the custodial term. Mr Bromley-Martin submitted that the sentence of eight-and-a-half years' imprisonment, in total (connoting, as we have said, a starting point of some 13 years) is far, far too long. Indeed he went so far as to suggest that a sentence of no more than 4 years' imprisonment would have been appropriate. In this regard he sought to place

some reliance on the Definitive Guideline issued by the Sentencing Council with regard to manslaughter. It may be noted however that that guideline is stated to come into effect to offenders who are sentenced on or after 1 November 2018. Here the sentence took place on 16 January 2018 and consequently this guideline has no application at all.

25. However, if only with a view to accommodating Mr Bromley-Martin's wishes, this court did look *de bene esse* at the guideline, albeit we make clear that courts are not required to have regard to guidelines which only prospectively are due to come into effect and indeed, in the ordinary way, should decline to do so if counsel seek to place reliance on them.

26. Mr Bromley-Martin stressed the circumstances of this offending. He said that, on any view, the schizophrenia of the appellant had had a significant part to play in what occurred here. Further, no weapon had been involved, there had been no kicking and there had been no stamping. There had been four punches administered to the body. He submitted that given all the circumstances it would be wrong to say that death had been caused in the course of an unlawful act which carried a high risk of grievous bodily harm which was or ought to have been obvious to the offender. He submitted that, in all the circumstances, this did not call for a sentence of the length imposed by the judge, and his submission was that, if one could properly rely on the new guideline, this matter in terms of culpability should have been placed into culpability C.

27. We simply are not able to agree with Mr Bromley-Martin's arguments. Whilst the paranoid schizophrenia of the appellant is indeed an important matter to take into account, it may be noted that, as the judge judge expressly found, this was only one factor. Also highly operative in causal terms was the appellant's failure to take his prescribed medication which he knew he should have taken. Indeed he had all the warnings in this regard which would have been available to him from his antecedent experiences. Moreover, this offending occurred in the context of him seeking to obtain illegal Class A drugs and the dispute, at least to a considerable extent, arose because of a disagreement with his drug dealer. A further important matter is the very serious antecedent history of the appellant which includes convictions for serious offences of violence. Moreover, the judge found, as he had, in our judgment, been entitled to find, that there was indeed a high risk of causing grievous bodily harm which surely must have been obvious to this appellant even in his then condition.

28. Overall, it is clear that the appellant retained a very significant degree of culpability for this offending. Given his antecedent history, given the whole context in which this offending occurred and bearing also in mind that the sentence had to reflect the further serious matter of the arson, which involved in effect trying to burn potential incriminating evidence, we can see no fault in the sentence imposed by the judge. We think a starting point of in the region of 13 years was an entirely proper one for totality of this offending. We doubt if we would even describe it as a severe starting point to adopt. It certainly was not excessive. Accordingly, this appeal is dismissed.