

Neutral Citation Number: [2019] EWCA Crim 1443

No: 201901204 A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 24 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE MORRIS

HIS HONOUR JUDGE MICHAEL CHAMBERS QC

R E G I N A

v
S

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22
Furnival Street, London EC4A 1JS, 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.

Ms A Darlow QC appeared on behalf of the **Appellant**

Mr D Connolly appeared on behalf of the **Crown**

J U D G M E N T
(As approved)

1. MR JUSTICE MORRIS: This is an appeal against sentence brought with the leave of the single judge. The appellant was aged 16 at the time of the offence. The provisions of section 45 of the Youth Justice and Criminal Evidence Act 1999 are therefore engaged.
2. An order was made in the lower court and we have made a further order under section 45.
3. On 16 January 2019 at St Albans Crown Court, the appellant was found guilty of the manslaughter due to loss of control of RU. He was sentenced to 7 years' detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000.

The facts of the case

4. By the summer of 2017, RU had been in a relationship with the appellant's older sister, PS, for about four months. At the time PS was 18. On Tuesday, 10 July 2017, RU was stabbed by the appellant at the appellant's family home in Watford. He died shortly afterwards. The appellant has a younger brother, VS, who is aged 10. At the time of the killing, the appellant's parents were away in Canada. The three children stayed at home whilst being checked on by other members of the family. PS's bedroom was in a "granny annex" on the ground floor at the back of the house.
5. Whilst PS had previously introduced RU to her brother and mother, the fact that he was her boyfriend was kept secret from the family. On Friday, 6 July, whilst the parents were away, RU stayed overnight with PS. The next morning, the appellant came to her room and met RU for the first time.
6. On Tuesday, 10 July, whilst the appellant was out of the house, PS invited RU round. VS, the younger brother, was there too. There came a time when PS and RU were alone in her bedroom at the back of the house. VS was in the living room at the front of the house. PS had locked him in. PS then returned to the annex, locked the connecting door. PS and RU then had sex.
7. About 30 minutes later, the appellant returned home. He found the annex door locked and his younger brother locked in the lounge. He went looking for his sister. He went out into the back garden, where he looked through a crack in the curtains of his sister's bedroom window. There he saw a naked man whom he did not recognise on top of his sister having sex. The appellant knocked loudly on the door to the study, which was next to the kitchen. PS told RU to hide in the garage. She took a few minutes to get her clothes on before opening the door to the appellant.
8. The appellant was very angry, and pushed PS aside, demanding to know, "Where is he? Where is he?" He searched the house and eventually found RU in the garage. RU was sitting down on the garage floor as the appellant attacked him. He did not stand up or say anything. RU was sitting shielding his face with his hands. The appellant struck RU three or four times with a knife.
9. A neighbour, alerted by screaming and shouting, dialled 999. The appellant told the neighbour at the scene that he had stabbed someone. The neighbour and PS tried to apply first aid, but RU was unresponsive. He died at the scene. The emergency services arrived and the appellant told the police straight away that he had stabbed RU.
10. RU died as a result of the stab wound to the chest. It was a deep wound which chipped the lower edge of a rib and pierced the pulmonary artery. There were two further stab wounds to the back and to the left hand, the latter wound being typical of a defensive injury. The force of the fatal wound was described as moderate to severe.
11. In interview, PS revealed that there had been a previous incident three or four years ago, where a man had turned up outside the family home, saying that he wanted to take her

away. At that point, the appellant had intervened and had told him to leave. However, PS said that the appellant had got into trouble with their parents because they thought that he had not done enough to look after his sister. As a result, she described the appellant as being very protective of her.

12. There was a victim personal statement from RU's father, which we have considered. In that statement, he said:

"As a family we cannot put into words how completely devastated we are and how RU's untimely and cruel death has impacted our lives."

13. At the end of his statement, he concluded that their lives would never be the same again.

14. Before turning to the learned judge's sentencing remarks, we refer to the two Sentencing Guidelines relevant to this case and to which the judge himself referred.

The manslaughter guideline

15. The guideline for manslaughter by reason of loss of control is contained at pages 15 to 19 of the Sentencing Council's Definitive Guideline on Manslaughter.

16. Step one is to determine the offence category. In relation to culpability, the guideline provides first:

"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.

The court should avoid an overly mechanistic application of these factors."

17. The guideline then sets out three categories of culpability: Category A, high culpability, the relevant feature of which for present purposes is:

"Loss of self-control in circumstances which only just met the criteria for a qualifying trigger."

18. Category B, medium culpability, which is described as follows:

"Cases falling between high and lower because:

- factors are present in high and lower which balance each other out **and/or**
- the offender's culpability falls between the factors as described in high and lower."

19. Category C, lower culpability, which is described as follows:

"Qualifying trigger represented a very high degree of provocation."

20. Step two in the guideline provides for the starting point and category range: category B with a starting point of 8 years' custody and a range of 5 to 12 years' custody; and category C with a starting point of 5 years' custody and a range of 3 to 6 years' custody.

21. On the following page, the guideline sets out a list of factors increasing seriousness and factors reducing seriousness or reflecting personal mitigation. Falling within the former

category is "the offence involved use of a weapon." In the latter category, amongst factors reducing seriousness, there is included no previous convictions, remorse, age and lack of maturity, and, significantly, "intention to cause serious bodily harm rather than to kill".

The guideline on sentencing children and young people

22. Under the Guideline for Children and Young People, the court must have regard to the principal aim of the youth justice system, namely to prevent offending by children and young people, and the welfare of the young person. The guideline continues at paragraph 1.2:

"While the seriousness of the offence will be the starting point, the approach to sentencing should be individualistic and focused on the child or young person, as opposed to offence focused. For a child or young person the sentence should focus on rehabilitation where possible."

23. In relation to custodial sentences, the guideline states at paragraph 6.46 that:
"When considering the relevant adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of a half to two thirds of the adult sentence for those aged 15-17 ... This is only a rough guide and must not be applied mechanistically. In most cases when considering the appropriate reduction from the adult sentence the emotional and developmental age and maturity of the child or young person is of at least equal importance as their chronological age."

The judge's sentencing remarks

24. In his sentencing remarks, the learned judge recorded the fact that the appellant had raised three defences; lack of intention to commit serious harm, self-defence and loss of self-control. The jury had not accepted the first two of those defences. The judge went on to describe the events of 10 July as astonishing and truly senseless. He made reference to the earlier incident three to four years ago where the appellant had intervened and come to his sister's aid. He then described the facts of the offence. In particular he summarised the facts as follows (at page 3B to D):

"You were able to see sexual activity between your sister and the victim. That was entirely consensual activity. You jumped very much to the wrong conclusion and thought you had to act in some way.

You rushed back into the property. You knocked on the door to the annex. For obvious reasons, it took a little time before your sister opened the door. You thought she was being evasive. You had only one thought in your head, it seemed to me, which was to find this individual and deal with him. In fact, your sister had put RU into the garage -- not for the first time, I heard -- so that he would not be found. You went in and searched around. You did not ask questions as to who the young man was and what was the nature of his relationship with your sister. Having not found him in the bedroom or any other area, you went into the garage and there, confronted him. You wanted him out. He, on the evidence I heard, was to some extent cowering in the corner -- no doubt worried, frightened and ashamed."

25. The judge went on to refer to the nature of the stab wounds, concluding that it was “a strong, forceful stabbing”. He noted that the appellant had very quickly at the scene told the police that he had stabbed RU. The judge referred to the victim personal payment of RU's father and the devastating effect of their loss.
26. He turned to address the appellant. The appellant had no previous convictions and seemed in all respects to be an ordinary schoolboy. He had references from a teacher and from friends and seemed to be a bright young man, perhaps with occasional outbursts of anger which he had struggled to control. The judge suggested that that might be because of his age and lack of maturity. The judge referred to the appellant's personal letter to him and did not doubt that the appellant felt a great deal of remorse. He observed that it would have been a greater sign of remorse to have offered a guilty plea to manslaughter at an early stage. The judge also noted the effect on the appellant's own family and the appellant's own good behaviour in the Young Offender Institution. The appellant was intelligent enough to have a good future. The judge concluded that the criteria of dangerousness was not met.
27. The judge continued:

"It is not easy in a case like this to decide upon what the sentence should be. I am very conscious of the victim and the effect on his family, as well as your position as a 16 year-old and now 17 year-old."
28. The judge then referred to the two relevant sets of sentencing guidelines. First, he referred to the guideline in relation to children and young people in terms which reflected practically verbatim the terms of paragraphs 1.1, 1.2 and 6.46 of that guideline, referred to above.
29. Secondly, he turned to consider the Guideline for Manslaughter by reason of loss of control, referring to the fact that there are three categories of culpability. The prosecution was suggesting high culpability and the defence was suggesting lower culpability. After making observations about the defence of loss of control having replaced the former defence of provocation, the judge observed that the former covers a much broader area than provocation. He then identified the ingredients of the defence of loss of control, pointing out that the relevant qualifying trigger was either fear of serious violence from RU or a thing or things done or said or both which constituted circumstances of an extremely grave character causing him to have a justifiable sense of being wronged. In doing so the judge was reflecting the terms of the statutory defence in the Coroners and Justice 2009 Act. The judge continued as follows:

"The thrust of your defence of loss of control, it seemed to me, was that you thought -- quite wrongly -- that there was non-consensual sexual activity taking place between your sister and RU, and you didn't ask any questions about it to find out what exactly was going on and what the nature of the relationship was and, I should also say, that the evidence was clear that you had met RU two or three days before, in the company of your sister. The jury must have accepted that you mistakenly thought that there was either a rape or a very serious sexual offence taking place in that bedroom, to raise that qualifying trigger, because there was little or no evidence that you would have a fear of serious violence from RU. Certainly, there was nothing he did

in the garage to indicate that he was a significant threat to you. He was, in fact, cowering in the garage, on the evidence I heard."

30. After explaining that the jury must have decided that the third element of the defence was also satisfied, the judge then turned to consider the Sentencing Guideline for Manslaughter and the category of culpability into which the appellant's case fell. He concluded that the case fell within category B, medium culpability. In reaching that conclusion, the judge pointed out that whilst for high culpability the guideline states "loss of self-control in circumstances which only just meet the criteria for a qualifying trigger", there is no reference in that category to the concept of provocation. On the other hand, for lower culpability category C, the judge pointed out that "it says qualifying trigger represented by a very high degree of provocation". The judge stated that plainly, in the circumstances of the present case:

"There was no provocation in the ordinary sense of that word ... RU did nothing to provoke you whatsoever."
31. The case did not fall within the low culpability because:

"I cannot see, on the plain language of that guideline, that there is here a very high degree of provocation."
32. The qualifying trigger in the present case was the appellant's misguided view that there was a rape going on in the bedroom. The judge could not say that that only just met the criteria for the qualifying trigger (and this could not fall within category A, high culpability).
33. The judge then went on to consider aggravating and mitigating features, and the sentence he would have imposed on an adult, in the following terms:

"In terms of aggravating or mitigating features, there was a clear aggravation in the use of a weapon. I take the view that you intended to kill. You used that weapon more than once and you very forcefully stabbed RU in the chest. In terms of mitigation, you have no previous convictions, as I've said. There is some element of remorse. And of course, there is your age. If I was dealing with this case on the basis that you were an adult, it seems to me that I would be looking at category B, which has a starting point of eight years' custody, with a range up to 12 years. This case seems to me to be a serious case in category B, for the reasons I hope I have explained: the use of the knife and intention, it seems to me, to kill and the other circumstances I've already described. I would be looking, at an adult sentence, in the high regions of category B which, as I say, goes up to 12 years."
34. The judge then concluded by considering the appellant's age and the sentencing guidelines for young people in the following terms:

"I take into account your age and the sentencing guidelines about young people and the reductions that need to be made, and I arrive at the sentence of seven years' detention under section 91."

The grounds of the appeal

35. The appellant contends that the sentence of 7 years' detention was manifestly excessive. In the grounds of appeal and in oral argument by Ms Darlow QC today, the appellant puts forward four grounds as follows:
- (1) the judge erred in his approach to the relevant guidelines and in particular in his assessment of “culpability”;
 - (2) the judge erred in treating an intention to kill as an aggravating feature;
 - (3) the judge failed properly to weigh the aggravating and mitigating features;
 - (4) the judge failed sufficiently to reflect the appellant's age in the final sentence.
- We deal with each of those grounds in turn.

Ground (1): the manslaughter guideline

36. The appellant submits that the judge should have identified the level of culpability as within category C. Essentially, the appellant makes three points:
- (1) The judge was wrong to approach the sentencing guidelines as if, by the use of the word "provocation" in those guidelines, the guidelines retained concepts from the former defence of provocation under the Homicide Act 1957, or that the word should be understood “within the ordinary sense of the word”, rather than within the meaning in the Coroners and Justice Act 2009.
 - (2) The judge was wrong to conclude that on the facts there was little or no evidence that the appellant would have had fear of serious violence from RU.
 - (3) Because of his erroneous approach to the concept of “provocation” as used in the guidelines, the finding of the judge that the defendant was not “provoked” was in error. The jury's finding necessarily implied a finding that the defendant had or might have lost self-control because of things said or done which constituted circumstances of an extremely grave character; the thing done being the mistaken belief that his sister had been raped. That amounted to an exceptionally high degree of provocation.
37. In oral argument today, Ms Darlow expanded upon that submission by saying that given the circumstances relied upon here as the qualifying trigger, and as necessarily accepted by the jury, the judge was bound to place the case within category C, and there was no scope to go beyond that.
38. The respondent submits that on the facts of the present case, the successful defence rested entirely on the appellant's own interpretation of what he saw was going on between his sister and RU as being rape. It did not arise from any actions of RU himself. When referring to provocation as being absent, the judge had in mind those instances in which there is some form of confrontation between a defendant and victim involving some form of overt behaviour on the part of the victim directed towards the defendant. That was what the judge meant by provocation in the normal sense. It was for the judge to evaluate the gravity of the events which precipitated the loss of control, and he was uniquely well placed to draw factual conclusions from the evidence.
39. In oral submission today, Mr Connolly added to his submissions by referring to that introductory passage to step one to the guideline, and emphasised the fact that the qualifying trigger here was based on the defendant's belief rather than the existence of a sexual assault having actually taken place.

Analysis

40. The starting point is that the defence of loss of control was established in this case. The learned judge's direction to the jury in summing-up in relation to this defence was as

follows:

"If you conclude that the Defendant did or might have lost control and that loss of control was or might have been caused or triggered by either or both of (a) his fear of serious violence from [RU] against him or his siblings and (b) his belief (albeit mistaken) that a thing or things had been done or said (or both) by [RU] which constituted circumstances of an extremely grave character, and which caused him to have a justifiable sense of being seriously wronged and a person of his age and sex, with a normal degree of tolerance and self-restraint and in the circumstances he experienced would or might have reacted in the same or in a similar way to him, then this defence does apply."

41. On the basis of that direction, the jury found that the defence did apply.
42. We agree with the learned judge that, on the evidence in the case, there seems to have been no real basis for a fear of serious violence from RU. To that extent we do not accept the appellant's submission to the contrary. It follows that the judge was correct to sentence on the basis that the jury must have accepted the possibility that the appellant *genuinely believed* that his sister had been raped or sexually assaulted by RU in the bedroom, and thus to sentence on the basis of "a thing done constituting circumstances of an extremely grave character".
43. In any case where the defence of loss of control is established other than by reason of fear of serious violence, the thing done or said necessarily amounts to circumstances of an extremely grave character. Step one of the guideline makes it clear that the judge has to assess the overall culpability of the offender in all the circumstances. The three categories in the guidelines show a range of culpability within "circumstances of an extremely grave character". In our judgment, the learned judge was correct to reject the prosecution's submission that this was a case falling within category A.
44. As regards the question of whether the case fell within culpability category C, the relevant question is whether the "qualifying trigger represented a very high degree of provocation"; and not, as the learned judge stated, whether there is "qualifying trigger represented by a very high degree of provocation". We do not consider it helpful to refer to the notion of provocation under the former partial defence under the Homicide Act. In category C, the word "provocation" is used in a non-technical sense to indicate the extent to which the offender was caused to act ("provoked") as he did.
45. In the present case, we conclude that the judge was entitled to conclude that the degree of causal link was not at the most extreme end of the scale. The assessment of where on the scale the appellant's loss of control due to his mistaken belief of rape fell, was a matter for the evaluation of the sentencing judge. We consider that he was entitled to find that category C did not apply in the present case, for the reasons he gave at page 3B to E of the sentencing remarks which we have already quoted. By the time the appellant gained entry into the bedroom, some minutes had passed. His sister was no longer being subjected to the perceived sexual assault and it is not suggested that she appeared to be in distress. The appellant asked no questions and had only one thought, which was, "to find the individual and deal with him". It may have been otherwise if the appellant had used the knife in an attempt to get RU off his sister in the bedroom. Additionally, RU himself did not contribute in any way to the appellant's mistaken belief and thus did not contribute to the

loss of control. On the basis of the facts as found, and the fact that the stabbing took place a little later in the garage, we conclude that the learned judge was entitled to reject the suggestion of category C and to find that the case fell within category B.

Ground(2): intention to kill

46. Before turning to the remaining grounds, we consider that one fair interpretation of the judge's analysis of the sentence is as follows. For an adult the starting point was 8 years; after taking account of aggravating and mitigating factors, he considered the sentence would be in the high regions of category B, and that indicated a sentence of 10½ to 11 years. The judge then applied a reduction of one third pursuant to the Young People Guideline, and that resulted in a sentence of 7 years.
47. The appellant submits in relation to ground (2) that the judge erred in treating his conclusion that the appellant had an intention to kill as an aggravating factor. Intention to kill is not listed in the Guideline as such. Rather, the Guideline expressly refers to intent to cause serious bodily harm, rather than intention to kill, as being a mitigating factor. In oral argument before us, Ms Darlow added that there was in any event insufficient evidence such that the judge could be sure that the appellant did intend to kill. There was only one life threatening injury.
48. The respondent submits that the judge made it clear that it was the use of the knife which was the primary aggravating feature, and that there is nothing to suggest that he gave any additional or unwarranted emphasis on the accompanying intention to kill. In any event, there was nothing to prevent the judge from taking the two elements together, the use of the weapon with an intention to kill. The use of the weapon and the intention to kill were necessarily and unavoidably linked in his appraisal.

Analysis

49. As to this ground, we consider that on the facts the judge was entitled to conclude that there was an intention to kill, taking account of the number of wounds and the degree of force used. However, as regards the main point made by the appellant, there is merit in this ground. It is clear under the guidelines that intention to kill is not an aggravating factor. Rather, absence of such an intention is to be taken into account as a mitigating factor. However, on a fair reading of his sentencing remarks, the judge did consider "intention to kill" to be an aggravating factor. The first reference is in the context of his discussion of aggravating factors, and the second reference in that passage is in the context of his reference to the other aggravating factor, the use of the knife, and is given as one of the reasons for considering that this was a serious case within category B. To that extent, the judge erred, and it appears that one of the two reasons for having increased the notional adult sentence from the 8 year starting point was not warranted. We consider below the effect of this finding on the overall sentence.

Grounds (3) and (4): balance of aggravating mitigating factors and youth

50. These two grounds overlap. The appellant submits as regards ground (3) that, effectively, leaving out of account the intent to kill, the judge increased the notional adult sentence excessively for the single aggravating factor of the use of the knife, and moreover failed to reduce the sentence sufficiently, or at all, to take account of the clear mitigation. That mitigation, it is submitted, consisted of absence of previous convictions, good character and remorse, all supported by positive reports from the pre-sentence reports.
51. The appellant further submits that the judge specifically failed to give adequate weight to the appellant's age. The judge makes no reference to the aim of preventing reoffending,

nor to rehabilitation, and did not sufficiently reduce the total sentence to take that into account.

52. Further, the appellant submits that the judge failed to separate out the reductions for mitigation and for youth. The total reduction, covering both, from a notional 11 or 12 years to a final sentence of 7 years (amounting to in the region of 60 per cent) means that the judge gave either little or no weight to mitigating factors, or alternatively only a minimal reduction for the appellant's age at the final stage.
53. In oral argument, Ms Darlow fairly accepted that the use of the knife was a very serious factor, but nevertheless submitted that it was not possible to see that the judge had adequately taken into account the mitigating factors. On the youth guideline, she submitted that the appropriate reduction in this case was 50 per cent. The appellant was less mature than his peers, partly as a result of the effect of the incident when he was 12 years old. He had a longstanding fear that what he had done in the past was inadequate.
54. The respondent submits, in relation to ground (3), that the learned judge did take account of mitigating factors as well as aggravating factors when concluding that the adult sentence would be in the high regions of category B. Secondly, the learned judge plainly afforded a significant and generous deduction in accordance with the guidelines for young people. The respondent points out that the reduction for age given was well within the range and that the appellant is towards the higher end of the age bracket of 15-17, thus tending towards a reduction at the lower end of the range.
55. In oral argument, Mr Connolly emphasised that here the attack went beyond the mere use of a weapon and the judge overall was entitled to place the offence at the upper end of the category range.

Analysis

56. First, as regards ground (4) and youth, we welcome what we have heard today about the appellant's very positive progress in custody, and we very much hope that this progress towards rehabilitation will continue. Nevertheless, we consider that the learned judge's approach to the reduction to take account of the appellant's age was clearly expressed and correct, and his decision cannot be criticised on that ground.
57. Secondly, as regards mitigation, the judge did take account of relevant mitigation, namely the absence of previous convictions and the appellant's remorse. That was part of his consideration leading to his notional adult sentence of the high regions of category B. However, we consider that reaching a figure of around 10½ to 11 years after taking into account mitigation represented a tough sentence. There is some force in the submission that the judge did not reduce that notional sentence sufficiently to take account of the mitigation.

Our overall conclusion

58. We consider that the judge's analysis of the facts in this unusual case was careful, detailed and well reasoned. He presided over the trial and had heard all the evidence. He was entitled to consider that the use of the knife in the particular circumstances here was a substantial aggravating factor. In two respects, as we have indicated, his sentence is open to criticism: he should not have treated intention to kill as an aggravating factor, and he might well have applied a greater reduction for mitigating factors. The result is a sentence which, in our view, is at the high end of the range of appropriate sentences. However, taking everything into account, we conclude that in all the circumstances the

sentence of 7 years was not manifestly excessive.

59. For these reasons, the sentence imposed by the sentencing judge upon the appellant was not manifestly excessive, and this appeal is dismissed.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk