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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 23 July 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

HIS HONOUR JUDGE MICHAEL CHAMBERS QC

(Sitting as a Judge of the CACD)
R E G I N A
v

GAILLE BOLA

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(Official Shorthand Writers to the Court)

Mr P Hynes & Ms Pinkus appeared on behalf of the **Appellant**

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

MR JUSTICE PICKEN:

1. The appellant, Gaille Bola, appeals with leave of the single judge against a 24-year extended sentence comprising a 21-year custodial term and 3-year extension which he received at Blackfriars Crown Court on 31 January 2019, having previously been convicted of manslaughter after a trial which ended on 21 November 2018.

2. That trial was, in fact, a retrial since the appellant originally stood trial for murder at the Central Criminal Court, before the same judge, between 2 and 16 July 2018. At the conclusion of that trial there was an application to add a further count of manslaughter. Having acquitted the appellant of murder, the jury were, in the event, however, unable to agree on the manslaughter count - hence the retrial.

3. The facts can be outlined briefly. On 31 December 2017 the appellant and two others attended a flat in Larmans Road, Enfield in search of Meschak Dos Santos, an 18-year-old cocaine and heroin dealer, who used the flat as a safe house to package his drugs for onward street supply. The appellant was a drug dealer on a larger scale and had gone in search of Mr Dos Santos with the intention of acquiring a mobile telephone drugs line from him. Also in the flat at the material time was an associate of Mr Dos Santos and the residents, Kevin Hockley and Denise Wilson.

4. The appellant and his associates were let into the flat by Mr Dos Santos. When Mr Dos Santos laughed at the appellant's demands for the mobile telephone, he was struck on the head. At that point somebody said: "pass me the knife" and Mr Dos Santos was stabbed once in the chest. He then handed over the mobile telephone, and the appellant and his companions left with that mobile telephone together with drugs and cash taken from the table. The whole incident lasted but a few minutes.

5. Mr Dos Santos was airlifted to hospital and underwent an emergency operation at the Royal London Hospital. He was, however, pronounced dead that evening. The cause of death was an incised chest wound which we understand to have penetrated to a depth of some 130 mm. He had also suffered a traumatic head injury.

6. The appellant was identified by Mr Hockley and Ms Wilson during an identification procedure which took place on 3 January 2018. He subsequently attended Wood Green Police Station on 8 January 2018, giving "no comment" responses to all questions in interview, before the next day making a prepared statement in which he denied being involved in the stabbing of Mr Dos Santos.

7. At trial, both his first trial and his retrial, the appellant admitted that he and his two unidentified associates wanted to obtain from Mr Dos Santos a mobile telephone that operated as a drugs line. It was a valuable piece of criminal equipment and, as such, the judge observed when sentencing the appellant, the appellant was prepared to go to any lengths to possess it.

8. When sentencing, the judge concluded also that it was most likely that it was the appellant who stabbed Mr Dos Santos but he made the point that "who inflicted the wound matters not" since this had been a joint enterprise. The judge then went on to consider the Manslaughter Definitive Guideline dealing with unlawful act manslaughter. He explained that the appellant had been convicted of manslaughter committed during "the course of an unlawful act, a very serious assault, which involved an intention to cause harm falling just short of grievous bodily harm and which carried a high risk of death or grievous bodily harm which was, or ought to have been, obvious to you". The judge plainly had in mind in that respect the first two features identified in the Definitive Guideline under Category B dealing with factors indicating 'high culpability'.

9. The judge added that the offence was committed "in the context of ongoing, geographically widespread, and profitable Class A drug dealing". He explained, as to this, that it had been submitted on the appellant's behalf that death was not caused in the course of committing a serious offence in which the appellant played more than a minor role since "the substantive offence" for which the appellant could have been indicted "was one of the theft of a telephone". The judge rejected that submission since in his view "it was an attempt to obtain a telephone, a drugs line, for use to supply Class A drugs" and, therefore, the appellant must have "been arguably involved in a conspiracy to supply Class A drugs". As a result, the judge considered that, in terms of criminality for the purposes of the Definitive Guideline, this was a Category A or 'very high culpability' case since it entailed a combination of Category B factors indicating 'high culpability' and that placed this case into Category A rather than Category B.

10. For that reason, having gone on to decide that the appellant should be regarded as "dangerous" for the purposes of the Criminal Justice Act 2003, and so that an extended sentence was appropriate in his case, the judge explained that he took as his starting point the 18-year starting point stipulated in the Definitive Guideline for a Category A offence. However, after taking account of the aggravating factors in this case and explaining that those factors had to be balanced by the appellant's age (22 at the time of sentence and 21½ at the time of the offence), the judge then increased the sentence by 3 years. The judge referred in this context to a number of factors which were identified in the Definitive Guideline as aggravating factors, specifically the appellant's previous convictions (13 convictions for 20 offences) which included offences of possession of a bladed article in a public place and using threatening, abusive words or behaviour with intent to cause fear or provocation of violence as well as possession with intent to supply

Class B drugs, the fact that the killing entailed the use of a knife, the appellant's leading role in the group of attackers, the fact that the death occurred in the context of an offence which was planned and the fact that the appellant was on licence at the time that the offence was committed.

11. Mr Paul Hynes QC, who appears before us together with Ms Molly Pinkus on the appellant's behalf, makes no complaint as to the judge's dangerousness assessment, and so as to his decision to impose an extended sentence, but submits that the length of the sentence was manifestly excessive. Specifically, he submits that the judge erred in treating the offence as a 'very high culpability' or Category A case.

12. He submits also that, having adopted a starting point that was too high, the judge failed adequately to reflect the aggravating and mitigating features and to adjust the sentence within the appropriate range so as properly to reflect the circumstances of the offence and the appellant, and in particular so as to avoid double counting aggravating features which had already been taken into account when categorising the offence. As to this latter point, the suggestion is made that, in identifying the aggravating factors applicable in the appellant's case, the judge essentially double counted by referring to the drugs context in which the offence was committed, not only as the reason why he regarded this as a Category A case, but also, "recast and rehearsed in slightly different terms", as aggravating factors which, in his view, warranted an uplift from the Category A starting point of 18 years' custody.

13. Mr Jacob Hallam QC, for the prosecution, submits that the judge was right to categorise the offence as a Category A offence given that this was a planned attack against a background of Class A drug supply and given also that the appellant had taken a knife to the scene and had a long history of knife crime. He observes in this context that, had the appellant been convicted of murder, the starting point for determining the minimum term, pursuant to paragraph 6 of schedule 1 to the 203 Act, would have been 30 years' imprisonment because the killing was for gain, namely the obtaining of a mobile telephone.

14. Whilst we note this last submission made by Mr Hallam QC, we do not, in the present case, find it especially helpful to draw an analogy with the position had the appellant been convicted not of manslaughter but of murder given that there is now the Definitive Guideline which deals specifically with manslaughter offences. That Definitive Guideline applies to all appellants aged 18 and older who are sentenced after 1 November 2018 regardless of when the offence was committed. It gives comprehensive guidance. As such, those sentencing ought, at least primarily, to be looking to the Definitive Guideline rather than looking at what the sentence would have been if there had been a conviction for murder.

15. We focus, therefore, on the question of whether the judge was justified in approaching

the sentence in this case on the footing that the offence committed by the appellant entailed 'very high culpability' (Category A) as opposed to 'high culpability' (Category B). There is no issue in this case that this is at least a Category B/'high culpability' case. This is either because, in the wording of the Definitive Guideline, "death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling just short of GBH" or "death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender". It appears, indeed, that the judge considered that both these features applied in this case, and we consider that he was right to do so. Importantly, it was not on this basis, however, that the judge went on to conclude that this is a Category A case through "a combination of culpability B factors". Nothing, therefore, turns on this point. The issue is, rather, whether the judge was justified in treating this as a case in which the third of the Category B features is also applicable, namely that: "death was caused in the course of committing or escaping from a serious offence in which the offender played more than a minor role". As previously observed, the judge considered that the appellant must have "been arguably involved in a conspiracy to supply Class A drugs". It was for this reason that he considered that there was the necessary "combination of culpability B factors" which warranted treating this as a Category A case.

16.

17. We do not agree with the judge about this. We consider that the judge was wrong to approach the case as entailing a killing in the course of a conspiracy to supply drugs. That seems to us to represent too broad an application of the third Category B features since it is difficult to see how what the appellant was actually doing, when he went to the flat where Mr Dos Santos was at the time, can really amount to the appellant "committing ... a serious offence" in the way in which it was categorised by the judge. Indeed, we note that the judge himself merely described it as being "arguable" that, in doing what he did, at the flat the appellant was "involved in a conspiracy to supply Class A drugs". Arguability is not, for these purposes, sufficient since any finding that the third of the Category B features is applicable should be to the criminal standard – see, by way of analogy if not direct application, Archibold at paragraph 5A-528.

18. We have considered whether this is a case which can properly be said to have involved death being caused in the course of committing a serious offence, bearing in mind Mr Hynes' submission that theft of a mobile telephone in the context of drug dealing activities cannot amount to commission of a serious offence. We have borne in mind in this context that this was a case in which the appellant played at least a leading role in a joint enterprise using whatever force was necessary and in order to obtain the mobile telephone which Mr Dos Santos had in his possession and which contained information which would be useful to the appellant in his drug dealing. It is clear that the appellant and those with whom he went to the flat armed with a knife were willing to use that knife because, of course, they did so by stabbing Mr Dos Santos in the chest with fatal results. That said, it is clear that the case was never presented, whether at trial or before the judge at the sentencing stage, as a case which involved a robbery having been committed by the appellant and his associates. This is because, as Mr Hynes points out, there was an issue whether, in fact, the mobile telephone concerned belonged to Mr Dos

Santos as opposed to the appellant or one of the people he went to the flat with. In such circumstances, we do not regard it as being open either to the judge or to us on this appeal to approach this case on the basis that the third of the Category B features is also applicable in this case, and so to treat this case as a category A case.

19. We observe, furthermore, that, even if the third feature set out in Category B were applicable, it would not necessarily follow that that, taken alongside the first and/or second features also set out in Category B, would make it inevitably appropriate to categorise the present case as a Category A case. This is because the Definitive Guideline expressly states that a sentencing judge should avoid "an overly mechanistic application" of the various factors and that "the court should balance them" to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence. Indeed, it is worth noting also that, in describing Category A itself, the Definitive Guideline emphasises, through the use of the word "**may",** that it is not necessarily the case that there would be 'very high culpability' even if there is a combination of Category B factors or, indeed, "the extreme character of one or more culpability B factors".

20. In this case, given that we are approaching the matter on the basis that there is not a combination of Category B factors demonstrating 'high culpability', we are clear that it would be inappropriate to treat the case as a Category A case. We proceed, therefore, on the basis that this is a Category B case rather than a Category A case. There were, nonetheless, a number of features of the offence which justified treating these offences being at the very top end of the Category B sentencing range, and so as attracting a 16-year starting point. The context in which the offence came to be committed is highly material in this respect. This was a very serious, indeed brutal, attack which resulted in Mr Dos Santos's death. The blow to the head, we note, was so significant that it resulted in brain damage. The stab wound was itself a deep stab wound. In short, this was an attack which, in our assessment, amply merited a 16-year sentence by way of starting point. That 16-year starting point must inevitably, in our view, however, be increased in recognition of the facts that, as the judge pointed out, the appellant has a bad record of highly relevant previous convictions and he was also on licence at the time that the offence was committed. Set against this, we acknowledge that the appellant was aged only 21 at the time of the killing and that his longest previous sentence was 12 months' detention in a young offender institution. Weighing these factors in the balance, we consider that a one-year increase in the 16-year starting point would be justified in this case, so resulting in a custodial term of 17 years. We arrive at this conclusion without at this stage taking into account the other factors which were taken into account by the judge, namely the appellant's use of the knife, the appellant's leading role in a group attack and death occurring in the context of an offence which was planned. Although these are all factors listed as aggravating factors in the Definitive Guideline, we agree with Mr Hynes when he submits that they are matters that ought not be taken into account a second time having already been considered when categorising the appellant's culpability in the manner which we have done to arrive at our 16-year starting point. To do so would entail double-counting in circumstances where the

Definitive Guideline introduces the aggravating factors with the warning that "care should be taken to avoid double counting factors already taken into account in assessing culpability".

21. It follows, for all these reasons, that we consider that the 24-year extended sentence which the appellant received in this case was manifestly excessive and must be quashed. We substitute for that sentence an extended sentence which totals 20 years, comprising a custodial term of 17 years and a 3-year extended licence.

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