

Neutral Citation Number: [2020] EWCA Crim 271

No: 201903060/A3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday 18 February 2020

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE SPENCER

HIS HONOUR JUDGE WALL QC

(Sitting as a Judge of the CACD)

R E G I N A

v

LUC BARKER

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Mr J Hill QC (via video link) appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE HOLROYDE: On 7 January 2019 Gavin Moon, then aged 31, was stabbed to death in the flat which he shared with the applicant. The applicant and Brian Goldsmith were convicted of his murder. On 22 July 2019 in the Crown Court at Newcastle-upon-Tyne, they were both sentenced by Mr Justice Morris to life imprisonment. The minimum terms specified by the judge, before taking account of days spent on remand in custody, were 16 years in the applicant's case and 18 years in Goldsmith's case.
2. The applicant sought leave to appeal against his sentence. His application was refused by the single judge. It is now renewed to the full court. We are very grateful to Mr Hill QC, who represented the applicant at trial and has been good enough to act for him pro bono on this renewed application. His clear and focused submissions have been of great assistance to the court.
3. The applicant is now 29 years old. He suffered two strokes when he was aged about 20 and he subsequently sustained head injury when he was assaulted. As a result, he suffers physical disability and cognitive impairment. He is to an extent paralysed down one side of his body, and often uses a walking frame to assist with his mobility.
4. The applicant has a long history of drug abuse. So too does Goldsmith. Moon was at the time of his death both using drugs and selling them from the flat which he shared with the applicant. There had been occasions when the applicant had stolen drugs from Moon. Although Moon was leading a troubled life, he was the father of two children and close to his family.
5. The evidence at trial showed that Moon had been subjected to a sustained attack by both offenders, which started in the living room and ended with Moon bleeding to death in the kitchen. A neighbour heard Moon repeatedly shouting, "You thieving scumbag". The judge concluded that the attack had begun when Moon returned to the flat, found that some of his drugs had been stolen and tried to remove Goldsmith from the premises.
6. In the course of the attack upon Moon, the applicant used a hunting knife with a 19-centimetre blade, one side of which was serrated and notched. Goldsmith used an even larger knife which has never been recovered. At an early stage of the attack in the living room, Goldsmith inflicted fatal injury by stabbing Moon in the right side. The wound penetrated to a depth of 20 centimetres and cut the aorta. Moon remained capable of some activity for a short time and at some point, he was slashed a number of times by the applicant, sustaining incised wounds, including defensive injuries to his hand. In the course of the attack, Goldsmith was heard to say "You think someone is going to call the police? No one is coming."
7. After killing Moon, or at any rate having left him fatally wounded in the kitchen, the

offenders left the flat. By the time the applicant left he had stolen cash and drugs from Moon's pockets as Moon lay on the kitchen floor. The applicant returned to the flat the following day. He pretended that he had just discovered Moon's body on his return. When interviewed under caution, he put forward a lying account to the effect that he had not been present at the time of the attack. At trial, he admitted presence but denied participation and sought to cast the blame on Goldsmith.

8. Victim personal statements by Moon's sister and daughter were available to the judge. As he rightly said, they spoke "eloquently, courageously and movingly both of the terrible ordeal they had to endure over the days immediately following Gavin Moon's death and of the enduring pain of their loss."
9. Also available to the judge were two psychological reports about the applicant. Dr Griffiths, a consultant neuro-psychologist to whom the applicant had been referred by the clinical lead at the prison where he was held on remand, carried out tests which at face value indicated a significant deterioration in general intellectual function. She noted however the possibility that the applicant may not have been performing to the best of his ability during testing. Dr Gordon, a consultant clinical psychologist who examined the applicant at the request of the CPS, accepted that the applicant experienced both physical and cognitive difficulties as a result of his acquired brain injury and that he experienced difficulties in planning and organising, but assessed his general functioning as being relatively good and noted that he had been able to provide cogent and intelligent, albeit untruthful, answers in his police interview.
10. The judge in his very clear sentencing remarks indicated that he was not satisfied either that Moon had been murdered for gain, or that the knives had been brought to the scene. He therefore took a starting point for the minimum terms of 15 years pursuant to paragraph 6 of schedule 21 to the Criminal Justice Act 2003. At page 6A of the transcript, he identified six aggravating factors:

"(1) The use of not one but two knives in what was effectively a joint attack.

(2) The persistence of the attack, starting in the living room, and ending up in the kitchen, as evidenced in particular by Gavin Moon's defensive cut injuries, and by the murder weapon being thrust into the kitchen door.

(3) Connected with that, the suffering endured by Gavin Moon in the course of that attack, evidenced by the bloodstaining found in the hall and the kitchen.

(4) Both of you were under the influence of drugs when the offence was committed.

(5) There was the ridiculing of Gavin Moon, telling him that the police were not coming.

(6) The fact that as he lay there dead or dying, money, drugs and scratch cards were taken from his pockets."

11. In the applicant's case, the murder was also aggravated by the fact that he had left the body lying in the flat for over 14 hours, thereby causing considerable additional distress to the bereaved family of Moon. The judge noted that neither man had at any stage shown any remorse either for what they had done or for the enduring misery which they had caused to others. Although both offenders had previous convictions, in the applicant's case mainly for offences of dishonesty, the judge did not regard these as requiring him to increase the minimum term.
12. As to mitigating factors, the judge found that the attack had not been planned and that neither man had intended to kill. He noted that the applicant had been a friend of Moon for many years. At page 7B of the transcript, he said this:

"As regards mitigation, I take account of the fact that you were the accessory to the murder and did not yourself inflict the fatal wound. You thus played a somewhat lesser role in the attack upon Gavin Moon. Secondly, in considering your culpability, I have had the opportunity to see you give evidence in the course of the trial. Whilst the expert evidence is not entirely unequivocal, I do take account of your brain injury, and the fact that you suffer from some significant cognitive impairment."
13. The grounds of appeal are that the minimum term of 16 years was manifestly excessive in length, in particular because it failed to allow a sufficient reduction either for the applicant's secondary participation in the murder or for his reduced culpability consequent on his cognitive deficit and low intelligence. In his written advice, Mr Hill referred to a report by a consultant forensic psychiatrist which had been commissioned by the defence because of concerns as to whether the applicant was fit for trial or needed the assistance of an intermediary. In the event, no application was made for an intermediary to be instructed and the psychiatric report was not disclosed. Thus the medical evidence available to the judge was, as we have noted, that of Dr Griffiths and Dr Gordon.
14. In his oral submissions this morning, Mr Hill has expanded upon his two principal grounds of appeal. The essence of his argument is that if a minimum term of 18 years was found by the judge to be appropriate in Goldsmith's case, then the minimum term in the applicant's case should have been shorter than 16 years. A difference between the two of two years gives insufficient weight, argues Mr Hill, to the much lesser role played by the applicant and to the effect upon his culpability of his cognitive impairment. As to

the latter, Mr Hill submits that because of his cognitive difficulties the applicant was unable to remove himself from the developing situation of violence in which he became caught up.

15. We have reflected on those submissions and we have taken into account the written response to them in the Respondent's Notice.
16. As to the first of the two grounds, it is in our view clear beyond argument that the judge gave appropriate weight to the role played by the applicant and drew a sufficient distinction in this regard between the two offenders. He found and took into account that the fatal stab wound was inflicted by Goldsmith in the living room. But the reality of the case was that Moon was attacked by both offenders, each of whom was armed with a large knife and each of whom was found by the jury to have intended to cause really serious injury to their victim. The applicant used his knife to slash Moon, inflicting the defensive injuries and cuts to the area of the left neck and the left ear. It follows that the applicant was active in making an attack, two onto one, against an unarmed man who was trying to defend himself as best he could. It seems to us that the applicant's long friendship with Moon makes his position, if anything, worse. His participation was further aggravated by his conduct in stealing from the dying man and then leaving the body in the flat for a lengthy period, thus compounding the distress of the bereaved.
17. We turn to the second ground of appeal. In the recent case of PS, Dahir and CF [2019] EWCA Crim 2286, this court made observations about the ways in which an offender's mental health, condition or disorder may be relevant to his culpability in committing the crime and/or may be relevant in a limited way to the length of the custodial term in that it may make it more difficult for the offender to cope with custody. The court made clear that when a mental health condition or disorder is relied on in mitigation, a careful assessment will be necessary in the light of all the circumstances of the individual case. The condition or disorder may in some cases have little or no effect on the sentencing outcome and in other cases may have a substantial impact.
18. In the present case, the judge considered the expert evidence which was placed before him and expressly took into account the fact that the applicant suffers from some significant cognitive impairment. We find nothing in the reports of Dr Griffiths and Dr Gordon which points to any significant lessening of the applicant's culpability for this crime as a result of his intellectual and cognitive limitations. Although he functions at a low level, there is no evidence of significant impairment of his ability to exercise judgment or self-control or to make rational choices or to understand the consequences of his actions. It is, we think, important to bear in mind that the judge was able to observe the applicant during the trial and to hear him give evidence. He was therefore in a good position to assess the extent to which his cognitive impairment was relevant to sentence. We can see no basis on which it could be argued that the judge failed to give sufficient weight to that aspect of the mitigation.

19. For those reasons, grateful though we are to Mr Hill, we see no arguable ground of appeal. This renewed application is accordingly refused.

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Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk