IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202003135/B2-202003136/B2

NCN: [2021] EWCA Crim 1764

Royal Courts of Justice

Strand

London

WC2A 2LL

Thursday 4 November 2021

LORD JUSTICE HOLROYDE

MR JUSTICE JULIAN KNOWLES

MR JUSTICE HENSHAW

REGINA

V

KIERON BROWN

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MR J BARTFELD QC appeared on behalf of the Applicant.

J U D G M E N T

1. LORD JUSTICE HOLROYDE: This applicant, Kieron Brown, was charged on an indictment with the murder of Exauce Ngimbi (count 1) and having an article with a blade or point (count 2). At the conclusion of his trial in the Crown Court at Harrow the jury returned a verdict on count 1 of not guilty of murder but guilty of manslaughter. They also found the applicant guilty on count 2.
2. The trial judge (HHJ Dean) subsequently sentenced the applicant on count 1, to an extended determinate sentence of 18 years, comprising a custodial term of 15 years and an extension period of 3 years. She imposed a concurrent standard determinate sentence of 2 years 6 months' imprisonment on count 2.
3. Applications for leave to appeal against conviction and sentence were refused by the single judge. They are now renewed to the Full Court.
4. The offences were committed on 5 December 2019. The applicant (then aged 26) had been dealing drugs on the Pembury Estate from the home of a vulnerable man, Mr Knight. The deceased (then aged 22) was or had been a member of the Pembury Boys gang and also engaged in drug dealing. For some days before the fatal incident the applicant had been involved in a dispute with the Pembury Boys. There was evidence that the deceased had been overheard agreeing with another man that the applicant "needed to be taken care of".
5. On 26 November 2019 the applicant, armed with a pole, chased one of the Pembury Boys from Mr Knight's flat. The applicant was then attacked and injured by men armed with bats. A resident who witnessed that incident called the police but the applicant refused to assist with their investigation.
6. On 4 December 2019 the applicant encountered the deceased in the street. They fought. No significant injury was caused. This incident was not reported to the police.
7. On the following day (5 December) the applicant, armed with a large kitchen knife, went to a street where the deceased and others were dealing drugs. When they saw him, the deceased was provided by one of his companions with a short sword. There was a verbal altercation between the two men. The applicant then walked away and went into a mews. He had his hand on his knife and was looking behind him as he walked along the mews. The deceased and another man (Delor) followed him on bicycles. Their two companions waited near the entrance to the mews.
8. The applicant, knife in hand, turned to face the deceased and Delor. The deceased swung at him with the sword. All three began to walk away in opposite directions but the deceased and Delor then remounted their bicycles and followed the applicant. The applicant and the deceased again swung at one another with their weapons. The deceased fell to the ground, and was stabbed by the applicant. The applicant was then tripped or knocked to the ground, where he grappled with the deceased, inflicting further stab wounds. The applicant then left the scene and swiftly disposed of his knife and his clothing.
9. The deceased sustained in all eight wounds, including two the heart and one to the neck. He died at the scene a short time after the stabbing. Two of the wounds were said by the pathologist to have required the use of force approaching severe.
10. When interviewed under caution the applicant put forward a prepared statement, in which he said that he had been acting in self-defence. He thereafter replied "no comment" to all questions.
11. At trial, the jury were shown CCTV footage which covered most but not quite all of the

events in the mews. We should note that each member of this Court has also seen that footage. Evidence was adduced before the jury about the previous convictions and the past or present gang membership of the applicant, the deceased and those who were with the deceased in and around the mews.

12. The applicant gave evidence in his own defence. He asserted that he was in fear for his life and acting in self-defence when he inflicted the fatal wounds. He said he had only had the knife in his possession for a short time, having disarmed one of the Pembury Boys who had tried to attack him minutes earlier. He gave evidence to the effect that he had no intention of stabbing anyone and was trying to persuade the deceased and Delor to leave him alone, but had had to defend himself when the deceased attacked him with the sword. He said that he did not know where his blows landed because he was "just flashing about, not aiming anywhere specific". When he was on the ground he was not aware that he was striking blows, he was just swinging his arms about trying to get his attackers off him. In answer to a direct question at the start of his cross-examination, he said in terms that he had no intention of causing any serious injury.
13. The judge, in summing-up and in a written Route to Verdict, directed the jury about the issues of self-defence and intention to kill or to cause really serious injury. The jury returned the verdicts to which we have referred.
14. In her sentencing remarks the judge said that she was sure that the applicant, by his drug dealing, had put himself on a collision course with the deceased and others. After the minor incident on 4 December, the applicant had returned the following day, armed with a large knife, and had stood at the entrance to the mews in what the judge was sure was an act of defiance and provocation. He was, she said, looking for trouble and willing to fight with the deceased even though he was outnumbered. It had been the applicant who was the first to draw his weapon.
15. With reference to the Sentencing Council's Definitive Guideline on Sentencing for Unlawful Act Manslaughter the judge found that two of the category B factors indicating high culpability were present: the applicant had caused the death of the deceased by an unlawful act which involved an intention on his part to cause harm falling just short of really serious injury, and it was an unlawful act which carried a high risk of death or really serious injury which was or ought to have been obvious to him. There being two high culpability factors present, she found the offence to fall into category A of the guideline, with a starting point of 18 years' custody and a category range from 11 to 24 years. She rejected a defence submission that the case fell within category D. She found a number of aggravating features: the applicant's previous convictions for 27 offences, including drug offences, carrying weapons and violence; his discarding of his knife and clothing; and the fact that an eyewitness had been traumatised by what she saw. The judge found only limited personal mitigation. She noted that the applicant's counsel had specifically invited her to sentence without obtaining a pre-sentence report relating to dangerousness and she was able to do so having presided over a two-week trial. She found the applicant dangerous and was satisfied that a standard determinate sentence would not provide sufficient protection for the public. In those circumstances, she passed the sentences to which we have referred.
16. The appeal against conviction is limited to the conviction of manslaughter. It is submitted that that conviction is unsafe, in particular because in the circumstances of this case there was no factually or legally sound route to manslaughter.

17. The ground of appeal against sentence is that the sentence on count 1 was manifestly excessive, in particular because the judge adopted a factual basis for sentence which was inconsistent with the jury's verdict.
18. In his written and oral submissions on behalf of the applicant Mr Bartfeld QC, who also appeared at trial, submits that the only issue was self-defence and that the evidence left no room for a verdict of manslaughter. Having regard to the number and nature of the stab wounds, it was not possible for anyone who had formed an intent to injure not to have intended to cause at least really serious injury. It was therefore not open to the jury to conclude that the applicant had an active intention which fell short of an intention to cause grievous bodily harm. The only proper interpretation of the evidence given by the applicant, submits Mr Bartfeld, was that he was thinking of nothing beyond defending himself. On that basis, it is submitted that the judge was wrong to leave manslaughter to the jury and the conviction on count 1 is unsafe.
19. If, contrary to that submission, this Court upholds the conviction, then Mr Bartfeld submits that it was not open to the judge to sentence on the basis of an intention to cause harm falling just short of really serious injury. He repeats his argument that if the applicant had voluntarily engaged in a knife fight, he could only have intended to cause really serious injury. There was therefore, he reiterates, no coherent route to a manslaughter conviction. If there was, he submits there can only have been a very narrow margin between that verdict and outright acquittal on the basis of self-defence. The judge, he submits, should therefore have placed count 1 in to category D of the guideline, on the basis that death was caused "in the course of an unlawful act which was in defence of self... (where not amounting to a defence)".
20. As to count 2, Mr Bartfeld accepts that the jury were entitled to find that the applicant had armed himself in case of attack and therefore did not have a good reason for having the knife. He submits that the verdict cannot be interpreted as a finding that the applicant intended to engage in a knife fight, because that - for the reasons already advanced - could only be consistent with an intention to cause really serious injury, and so would have resulted in a conviction of murder.
21. It is further submitted that, in all the circumstances of the case, the judge was not entitled to make the finding of dangerousness. In the alternative, if that finding was open to her, an extended determinate sentence was unnecessary and inappropriate in all the circumstances of this case.
22. We are grateful to Mr Bartfeld for his submissions, the more so because he has been good enough to appear today acting pro bono.
23. We have not heard oral submissions on behalf of the respondent but we have read and considered a detailed Respondent's Notice.
24. We consider first the submission that manslaughter should not have been left to the jury. As a preliminary point, we have read written submissions and heard oral submissions this morning from Mr Bartfeld on the question of what was or was not agreed between counsel in the course of the trial. We do not think it necessary or indeed productive to endeavour to resolve the issue which appears to have arisen between counsel in this regard. It suffices to say that the directions which the judge eventually gave were contained in a draft provided to counsel in advance and were given to the jury before closing speeches, so that counsel on both sides had the opportunity, if they wished, to address the jury about this particular point.

25. The principles applicable to the question of whether a judge should leave a lesser alternative offence to the jury have been considered in a number of cases: see in particular the decision of the House of Lords in R v Coutts [2006] UKHL 39 and the decisions of this Court in R v Foster [2007] EWCA Crim 2869 and R v Barre [2016] EWCA Crim 216. For present purpose, it suffices to distil from those principles that, regardless of the tactical wishes of the parties, a judge should leave to the jury any lesser alternative offence which has been obviously raised by the evidence. An alternative verdict is "obviously raised" for this purpose if, on the evidence, it is one to which the jury could reasonably come.
26. On a charge of murder one of the elements of the offence, which the prosecution must prove for sure, is that the accused intended to kill or to cause really serious injury. There are, of course, cases in which the inference that the accused had that intention appears overwhelming and, where appropriate, a judge in his or her discretion can make clear to the jury when summing-up that, for example, the accused has admitted having the necessary intention, or that no argument has been advanced against the jury finding the necessary intention proved. But intention is a matter for the jury and, save perhaps in very exceptional circumstances, must be left to them for their decision.
27. In the present case, whatever may or may not have been agreed between counsel and whatever may have been the evidential position before the applicant entered the witness box he, in his evidence, expressly denied that he had any intention to cause really serious injury. It was for the jury to decide what they made of his evidence. There was certainly a strong basis for inferring the requisite intention. But it was open to the jury reasonably to conclude that they were sure that the applicant caused the death of the deceased by an unlawful act but not sure that he intended to kill or cause really serious injury. If the judge had withdrawn the issue of intent from the jury, she would have usurped the jury's function and would thereby have exposed the applicant to a greatly increased risk of conviction for murder. That risk, in our view, substantially outweighed, in the circumstances of this case, the risk suggested today by Mr Bartfeld that a jury might have approached their verdict with a view to ensuring there was a conviction of something rather than an outright acquittal.
28. For those reasons we have no doubt that the judge was correct to leave manslaughter to the jury. There is accordingly no arguable ground of appeal against conviction.
29. The correct approach to determining the factual basis for sentencing is well established. In R v King [2017] EWCA Crim 128, this Court held:

> "If there is only one possible interpretation of a jury's verdict(s) then the judge must sentence on that basis. When there is more than one possible interpretation, then the judge must make up his own mind, to the criminal standard, as to the factual basis upon which to pass sentence. If there is more than one possible interpretation, and he is not sure of any of them, then (in accordance with basic fairness) he is obliged to pass sentence on the basis of the interpretation (whether in whole or in relevant part) most favourable to the defendant."

30. In the present case, the judge was able to be sure of the correct factual basis. The applicant had, at different stages of the proceedings, given a number of differing accounts

of how he came to be in possession of the knife with which he inflicted the fatal injuries. Each of those accounts involved his having disarmed an attacker and having retained a knife for defence against an anticipated further attack. The jury, by their verdict on count 2, were sure that the applicant did not have a good reason to be carrying the knife when he confronted the deceased. It follows that the judge was right to sentence on the basis that the applicant had unlawfully armed himself prior to that confrontation. She was entitled, on the evidence, to find that he had deliberately provoked the Pembury Boys and was looking for trouble.

31. The guideline at step 1, determining the offence category, begins with the following instruction in relation to the determining of culpability:

> "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."

32. Applying that instruction to the circumstances of this case it is, in our view, unrealistic to seek to place the offence into category D of the guideline. The judge was entitled, and in our view correct, to find that two features of category B (higher culpability) were present, and on that basis to conclude that the case fell into category A because there was "a combination of culpability B factors". The custodial term which she imposed was below the guideline starting point for category A and within the category range for a category B offence. In those circumstances, we can see no arguable ground on which the length of the custodial term could be challenged.
33. As to dangerousness, no pre-sentence report was necessary and none is necessary at this stage. The judge noted that some of the applicant's previous convictions related to his involvement with the Pembury Boys and was entitled to find that, whether or not he was still a gang member himself, he was entrenched in a criminal life-style. His willingness to carry and use a knife, against the background of his drug dealing activities, plainly showed him to be dangerous for sentencing purposes. There can be no realistic challenge to the judge's finding that he was.
34. Finally, as to the imposition of an extended sentence the judge rightly considered whether, having found the applicant to be a dangerous offender, a standard determinate sentence would be sufficient to protect the public. She gave what we regard as impeccable reasons for concluding that it would not, saying in particular:

> "... given your record, your determination to earn your living by dealing drugs, your willingness to do so on rival territory enforced by violence or the threat of violence I have come to the view that the public do need the additional level of protection [afforded] by an extended sentence for public protection, because unless you are willing to change and address your offending behaviour and understand the causes and consequences of your offending then there must be a significant risk of serious harm in the future."

35. Again, we can see no arguable ground on which that application could be challenged.
36. For those reasons, grateful though we are to Mr Bartfeld for his submissions, these renewed applications fail and are refused.

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

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