IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/02193/B3, 2021/02195/B2
NCN: [2022] EWCA Crim 750

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 28th April 2022

B e f o r e:

LORD JUSTICE HOLROYDE

MRS JUSTICE McGOWAN DBE

MR JUSTICE CHOUDHURY

R E G I N A

- v -

GARY ARTHUR ALLEN

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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)

Miss K L Goddard QC appeared on behalf of the Appellant

Mr A MacDonald QC, Mr J Gelsthorpe and Miss A Metcalfe appeared on behalf of the Crown

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J U D G M E N T

Thursday 28th April 2022

LORD JUSTICE HOLROYDE:

1. This appellant was convicted of the murders of Samantha Cass (count 1) and Alena Grlakova (count 2) and was sentenced to life imprisonment with a minimum term of 37 years. He now appeals, by leave of the single judge, against his conviction and sentence.

2. Ms Cass was killed in October 1997, by strangulation by ligature. Ms Grlakova was killed in December 2018, by strangulation and/or compression of the neck. Each had been a sex worker at the time of her death. Each of their bodies was placed into a river or stream in an attempt to conceal the crime. At the trial, before Goose J and a jury in the Crown Court at Sheffield, there was no real issue but that each of the deceased was a victim of murder. The central issue for the jury was whether they were sure that it was the appellant who committed each murder.

3. Examination of the body of Ms Cass revealed the presence of the semen of two men in her vagina. One was a man referred to at trial as "Mr A". The other was the appellant. He was arrested in July 1998 for an unrelated offence, and a DNA match was made. He admitted that he had paid to have sexual intercourse with Ms Cass, but denied that he had killed her.

4. The appellant was charged with the murder of Ms Cass. At his trial in February 2000 he was acquitted.

5. Within a few weeks of his acquittal, the appellant assaulted two female sex workers in Plymouth, for which he was sentenced in December 2000 to a lengthy term of imprisonment. In each case, the victim suffered compression of her neck, but was saved from more severe injury by the intervention of other persons. When discussing those offences with a probation officer in 2001 and 2003, the appellant was reported as making remarks to the effect that he hated women, in particular female sex workers, that he had planned and targeted sex workers, and that he enjoyed using violence.

6. In 2010 and 2011 the appellant made admissions to undercover police officers that he had killed Ms Cass. He said that his condom had split when he was having sexual intercourse with a prostitute, who threatened to allege rape if he did not give her money. He had lost his temper, strangled his victim with a length of string, and dumped her body in the river.

7. The body of Ms Grlakova was found in January 2019. Investigation revealed that she had been in phone contact with the appellant until 24th December 2018 The appellant admitted that he knew her, had seen her a number of times, and had had sexual intercourse with her on one of those occasions. He denied knowing that she was a sex worker and denied any involvement in her death.

8. The appellant was charged with the murder of Ms Grlakova. In December 2020, the prosecution successfully applied to this court, differently constituted, for an order that the February 2000 acquittal be quashed and the appellant retried for the murder of Ms Cass. Thus it came about that the two murders, although separated in time by more than 21 years, were charged in the same indictment.

9. The case against the appellant on each charge was circumstantial. In relation to both charges, the prosecution relied on the Plymouth offences as showing a propensity to commit violent assaults on sex workers, and on other evidence as to what was alleged to be the appellant's mindset of hatred and contempt for sex workers. This included his comments to the probation officer in 2001; his later comments to another probation officer, to the effect

that he fantasised about beating and threatening to kill a prostitute; his writing of notes found in his cell in 2008 relating to the condition of a dead body in water and mobile phone cell-siting evidence; and relevant images found on his phone.

10. In relation to the murder of Ms Cass, the prosecution relied on the finding of the appellant's semen; scientific evidence said to disprove the explanation he gave to the police for the presence of his semen; evidence as to his actions shortly after the killing, when he disposed of the car he had been using at the time and washed his clothing in a departure from his usual laundry routine; and his confessions to the undercover officers.

11. In relation to the murder of Ms Grlakova, the prosecution relied on evidence given by persons who had known the deceased as to her contacts with the appellant; a CCTV recording showing Ms Grlakova at the appellant's home early on the evening of 26th December 2018, when he had threatened her with severe violence if she knocked on his door again; evidence of the appellant's movements in the early hours of the following morning; evidence said to show that he had bought work gloves and hand trowels later that day, which the prosecution linked to scientific evidence that Ms Grlakova's body had been covered with gravel; and cell siting evidence showing that on the evening of 27th December 2018 his phone was near the stream where the body was found some weeks later. It was the prosecution case that Ms Grlakova was murdered on the night of 26th December 2018 or in the early hours of the 27th.

12. The appellant gave evidence in his own defence, denying any involvement in the killings and putting forward his explanations for, and denials of, the matters on which the prosecution relied. He accused the probation officers of lying, and accused police officers of conspiring to secure his wrongful conviction of the Plymouth offences. It was suggested that Mr A may have killed Ms Cass, and that there were reasons why particular persons may have wished to harm Ms Grlakova.

13. Three witnesses were called for the defence. They were all persons who had made statements to the police, disclosed to the defence as unused material, in which they said that they had seen Ms Grlakova on dates in January 2019, after the prosecution said that she had been murdered. They gave oral evidence of those sightings. One of them, Ms Grikainyte, had said in her statement that she was "certain" that the person she saw was Ms Grlakova. With that statement in mind, Miss Goddard QC – who represented the appellant at trial, as she does in this court – asked the witness this question at the conclusion of her evidence in chief:

> "Q. How sure are you that the person you saw that day in January was Alena?"

The judge intervened, saying:

> "I do not think that how sure is someone is a question that is appropriate."

Miss Goddard did not pursue the point any further.

14. In the course of giving his directions of law in relation to circumstantial evidence, the judge noted that although there had been no sighting of Ms Grlakova by her family or friends

or on CCTV after 26th December 2018, there were three or four witnesses who said that they had seen her in January 2019. The reference to a fourth witness was a reference to a prosecution witness who had given oral evidence that he believed he had seem Ms Grlakova in that month. The judge reminded the jury of the evidence of the defence witnesses towards the end of his summing up. Having done so, he then said this:

> "Well, ladies and gentlemen, when you consider the evidence of these three witnesses, who say they saw Alena during January 2019 after the time when the prosecution say she had been killed, you will need to be cautious. This is not because they are not trying to tell you the truth but, as a matter of common experience, it is not unusual for a witness to make a mistake about identification. We have all done it, been sure that we recognise someone we all know, only to find that we are wrong when we approach them. Alternatively, being sure we have seen someone, but later it has proved that it could not be the person because they were somewhere else. All this means is that you should take care when you consider this evidence. You will want to weigh it against all the other evidence in the case about when Alena was last seen, including the CCTV evidence, but it is still evidence in the case for you to consider."

15. The grounds of appeal against conviction relate to what is said to have been an incorrect approach by the judge to the evidence of those three witnesses. Miss Goddard accepts that it was permissible for the judge to make some reference to the need for caution when considering evidence of identification, but submits that the judge fell into error in a number of ways. First, he wrongly gave what amounted to a modified *Turnbull* direction, warning the jury of the possibility of mistaken identification. In this respect, she particularly points to the phrase early in the passage quoted "You will need to be cautious", which she submits amounted to a direction. Secondly, the judge gave that direction without warning, having in earlier discussions with counsel agreed that any such direction would be inappropriate. Thirdly, he did not go on, as would be necessary in a *Turnbull* direction, to identify for the jury the strengths and weaknesses of the evidence. The overall effect, Miss Goddard submits, was to encourage the jury to dismiss the evidence of the three witnesses as incredible or unreliable. Lastly, she submits that the judge had wrongly prohibited her from adducing evidence from Ms Grikainyte, that she was "certain" of her identification of Ms Grlakova. In view of the reliance placed by the prosecution on the various features said to link the two murders, it is submitted that these errors render both convictions unsafe.

16. For the respondent Mr MacDonald QC, who also appeared at trial, submits that there was no error of approach. The judge gave no direction of law about the three witnesses, but fairly summarised their evidence, including referring to features which were relevant to the strengths and weaknesses of their identifications, and then rightly advised the jury of the particular dangers posed by identification evidence. It is further submitted that the judge was correct to prohibit counsel from eliciting what would have been an improper statement of opinion from the witness Ms Grikainyte. Alternatively, any error in that respect was of no real significance in the trial as a whole. Mr MacDonald submits that there is therefore nothing to cast doubt on the safety of the conviction on count 2. The conviction on count 1, which depends on separate evidence, is in any event safe.

17. We are grateful to both counsel for their submissions, which were helpfully clear and focused.

18. As is well known, the court in *R v Turnbull* [1977] QB 224 stated that:

> "Whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken."

19. This is not such a case. The prosecution were not relying on evidence of identification. It would have been inappropriate for the judge to give a *Turnbull* direction about evidence adduced by the defence in support of an aspect of the defence case. It is however clear, in our view, that in the passage which we have quoted from the summing up the judge did no such thing. Nor did he give a modified *Turnbull* direction. All he did, and in our view rightly did, was to give a faithful summary of the evidence of the witnesses and mention briefly the need to be cautious about identification evidence because of the common experience that honest mistakes can be made. That observation was neither inappropriate nor unfair. As was said by Leggatt LJ (as he then was) giving the judgment of the court in *R v Jordan Ray Smith & Others* [2019] EWCA Crim 1151 at [39]:

> "The potential dangers of identification evidence and consequent need for care are matters which may not be known to jurors in the way that they are well known to those with experience of criminal justice. Nor do they depend on which party at the trial is relying on such evidence."

That observation was made in the context of a trial in which some of the prosecution witnesses had given evidence of identification which was favourable to the defence, but the point is in our view equally valid here.

20. It follows that the premise of the grounds of appeal, namely that the judge misdirected the jury, falls away. We see no force in the related criticism that the judge failed to alert counsel to what he proposed to say to the jury: in the circumstances we have indicated, he was under no obligation to do so, and no unfair prejudice was suffered by the defence. Nor can we accept that the judge's words unfairly encouraged the jury to reject important defence evidence. On the contrary, the judge ended the passage quoted by specifically reminding the jury that it was evidence for them to consider.

21. As to the complaint relating to the examination in chief of Ms Grikainyte, we do not think it necessary to explore the boundary, in relation to evidence of identification, between a permissible assertion of fact as to a witness' own state of mind and an impermissible statement of opinion or belief. The reason for the judge's intervention, in our view, was

straightforward. It would not have assisted the jury for the witness to be asked about the extent to which she was sure. Such a line of inquiry, whether during examination in chief or in cross-examination, would be likely to complicate the jury's task by clouding the issue of the standard of proof. We therefore do not accept the criticism of the judge's intervention. Even if we had been persuaded that he fell into error, we would not in any event have regarded it as an error capable of casting doubt on the safety of the conviction. Ms Grikainyte gave her evidence that she had seen Ms Grlakova alive at a time when the prosecution case was that she was dead. The jury's assessment of that evidence would not realistically have differed if she had been permitted to add "and I'm certain of that".

22. In the light of what we have said, it is unnecessary for us to give separate consideration to whether the convictions, or either of them, would have been safe, even if we had been persuaded that the judge had misdirected the jury. We only observe that the circumstantial evidence amounted to a very strong case against the appellant on both counts.

23. For those reasons, the appeal against conviction fails and is dismissed. We turn to the appeal against sentence.

24. In addition to the Plymouth offences, to which we have referred, the appellant had previous convictions for offences of battery, possessing an offensive weapon and breach of a Sexual Offences Prevention Order. No pre-sentence report was thought to be necessary at the sentencing hearing and none is necessary now.

25. The judge was provided with Victim Personal Statements by one of Ms Cass' three children, who was aged just 12 at the time of her mother's murder, and the husband of Ms Grlakova, the father of her four children. Each member of this court has also read those statements, which convey with great clarity and force the extent to which these crimes have blighted the lives of those who loved the deceased. The judge in his sentencing remarks rightly referred to the profound and lifelong grief of the bereaved.

26. The offence charged in count 1 predated the Criminal Justice Act 2003, and the judge approached the sentencing process with that in mind. He imposed concurrent minimum terms reflecting the totality of the offending in fixing the minimum term on count 2, taking a starting point of 30 years in accordance with Schedule 21 to the Sentencing Act 2020. He identified six aggravating features of the murders, beginning as follows:

> "First, that in both murders there was a significant degree of pre-meditation. Your mindset towards sex workers demonstrates that you had targeted your victims."

27. The other five features were: the substantial suffering caused to Ms Cass before she died, borne out by her extensive injuries; the appellant's treatment of her body after her death, when he drove his car over her; the concealing of both bodies in water; the disposal of evidence, namely his car after the first murder and the trowels and gloves used to conceal the body of his second victim; and, in relation to count 2, the previous convictions for the Plymouth offences. There was little mitigation available to the appellant.

28. In those circumstances the judge imposed concurrent sentences of life imprisonment, with concurrent minimum terms of 30 years on count 1, 37 years on count 2, less the 624 days when the appellant had been remanded in custody.

29. The ground of appeal against sentence is that the length of the minimum term on count 2 was manifestly excessive because there was no evidential basis on which the judge could properly find that either offence was premeditated. Miss Goddard submits that the evidence went no further than showing that the appellant may have fantasised about killing or seriously injuring sex workers. She submits that the circumstances of both murders could reasonably be regarded as showing that the appellant had killed after he had lost his temper. Miss Goddard notes that there had been no allegation of premeditation as part of the prosecution case.

30. For the respondent, Mr MacDonald points out that it was not necessary to prove premeditation in order to establish guilt, and that the prosecution had never said that the murders were not premeditated. He submits that, having heard all of the evidence in what was a long trial, the judge was entitled to make the findings he did and to impose a total minimum term which was in the range properly open to him.

31. Again, we are grateful to counsel for their helpful submissions.

32. In the passage which we have quoted, identifying the first of the aggravating features, the judge in our view was not purporting to find that the specific murders had been carefully planned. Rather, he was referring to the appellant's general premeditation of serious violence towards sex workers – a deep-seated and warped view which caused him to target that group of women. In the light of all we have read, and have very briefly summarised in this judgment, the judge was plainly entitled to make that finding, and to treat it as a significant aggravating feature. It is not suggested that he was not entitled to find the other five aggravating features which he identified, of which we would mention the Plymouth offences as being particularly serious, coming as they did so soon after the appellant had been acquitted at his first trial for murder. Nor is it suggested that there was any significant mitigation. The judge, having conducted a long trial and been able to observe the appellant, including when giving evidence, was in the best position to assess the extent to which it was necessary to move upwards from the statutory starting point of a minimum 30 year term. The term of 37 years was certainly a stiff sentence, but we are not persuaded that it was outside the range properly open to the judge. It was not, therefore, manifestly excessive in length.

33. For those reasons, the appeal against sentence fails and is dismissed.
