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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1557



CASE NOS 202203269/B3 & 202203459/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Thursday, 5 October 2023

Before:

LORD JUSTICE EDIS
MRS JUSTICE STACEY DBE
HIS HONOUR JUDGE LEONARD KC
(Sitting as a Judge of the CACD)

REX
V
KEITH MCCARTHY

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MR G MOHABIR appeared on behalf of the Applicant

J U D G M E N T

1. LORD JUSTICE EDIS: The applicant in this case, Keith McCarthy, now renews his application for leave to appeal against conviction and sentence following refusal by the single judge.
2. The applicant was convicted of murder (count 1) and causing grievous bodily harm with intent (count 3) by the jury on 20 October 2022. In relation to murder he was sentenced to life imprisonment with a minimum term of 22 years, less 309 days spent awaiting extradition from the Republic of Ireland. Ten years' imprisonment concurrently was imposed in relation to count 3.
3. On an earlier occasion he had entered guilty pleas to causing serious injury by dangerous driving (count 4) and causing death by dangerous driving (count 5). No separate penalty was imposed in relation to those two offences which may have been an error of law in that mandatory disqualification from driving was required.
4. At all events, the hearing today has revealed a degree of uncertainty about the way in which these allegations were dealt with. We consider that it is necessary that that uncertainty should be resolved before final decisions are taken in relation to the suggested unsafety of the two convictions following verdicts returned by the jury.
5. We therefore propose to give leave to appeal against conviction in terms which we shall explain in a moment and to adjourn the application for leave to appeal against sentence to the full court which will deal with the conviction appeal.
6. The allegation arises from the death of Kerrin Repman on 15 April 2020. Mr Repman died when the appellant's BMW motorcar collided with the rear of a scooter on which he was riding on a road in Marine Parade, Harwich in Essex. The prosecution case was that that collision occurred because the appellant chased Mr Repman in his BMW car at high speed intending to cause him at least really serious harm. Count 3 arose because in the

collision which caused Mr Repman's death, his scooter was caused to travel onto the pavement, striking and seriously injuring a bystander, Peggy Lawrence, who is the victim of that allegation.

7. The grounds of appeal as settled make two complaints. First, it is alleged that the judge erred in admitting two previous convictions for offences related to the use of weapons. One of these, from 2011, was an allegation of wounding with intent to do grievous bodily harm using a knife. The second was an allegation of threatening a person with a bladed article. That was more recent.
8. We consider that the full court should consider the basis on which these previous convictions were admitted and also whether the direction which the judge gave about them adequately described any potential significance they may have had for the benefit of the jury. The conviction from 2011 may arguably have been admissible on the question of whether the appellant's admittedly dangerous driving was being perpetrated with an intention to cause really serious harm or not, which was the issue before the jury on counts 1 and 3. Arguments against its admissibility may have included its age and an assessment of the strength of the case without it, whether it had the effect of bolstering a case which on the issue of intent was weak. We do not of course adjudicate on the merits of any of those arguments or indeed seek to limit the grant of leave which we give on this ground to those arguments alone. Different considerations may well apply to the second and more recent conviction in which no violence of any kind was actually used.
9. We therefore give leave in relation to the ground complaining about the admissibility and use of bad character evidence in this case. One difficulty which we have encountered in dealing with this ground this morning is that the facts of the 2011 case were apparently reduced to admissions which were placed before the jury. We have not been able to lay

our hands on a copy of that document and neither has counsel, so we do not know what the jury actually knew about the 2011 conviction and we are unable therefore to consider the submission that the facts were particularly prejudicial and should not have been before the jury. We do not know whether they were or not.

10. The submission of no case to answer was dealt with by the judge in a written ruling which we have read. He did not deal with the evidence on which the prosecution relied in any detail at all. He did summarise the prosecution case for the jury in his written directions dated 18 October 2022 at paragraph 21. We are working on the basis that the evidence there summarised, which we note does not include the bad character evidence, was the evidence which he held when dealing with the submission of no case to amount to a case to answer on murder.
11. We are persuaded by Mr Mohabir of counsel, who has appeared before us *pro bono* on behalf of the appellant and for whose assistance we are grateful, that this ground is also arguable and we give leave.
12. In addition to the two pleaded grounds of appeal which we have dealt with, a further complexity has become increasingly apparent during the course of the hearing this morning. As we have explained, the allegations of which the appellant was convicted, whether by the jury or on his own plea, were counts 1, 3, 4 and 5 on the indictment. Count 2 was a count of manslaughter. Manslaughter was not, it would seem, left to the jury. We have read the summing-up which makes that plain. The count 2 referred to in the summing-up is what we have hitherto referred to in this judgment as count 3, namely the allegation of causing grievous bodily harm to Peggy Lawrence with intent.
13. We do not really know what has happened to the count of manslaughter before the trial. It may be that there is an arguable ground of appeal based on the failure to leave

manslaughter to the jury on the facts of this case. We cannot consider the merits of any such ground in advance of its being properly formulated and placed before the court with reference to all relevant transcripts and other documents to explain what has happened.

This process will require the participation of the prosecution and the defence.

14. What we would therefore propose to do is to give directions so that any further ground of appeal on which the appellant wishes to rely must be lodged with the court together with an appropriate and accurate account of how manslaughter was treated in this trial and before the trial, with all relevant documents, by 2 November. The prosecution must respond by 7 December and we will direct that the question of whether leave to argue that additional ground of appeal should be determined by the full court at the hearing of the grounds of appeal for which we have given leave. Both parties should prepare for the case on the basis that if leave is granted the ground of appeal will be determined at that same hearing by the same court.
15. In relation to the two grounds for which leave has been granted, we will direct that a skeleton argument should be lodged by the appellant by 2 November. That skeleton argument can therefore also deal with any proposed new third ground of appeal and the prosecution must respond by 7 December to those two grounds as well as to any new third ground. The case can then be listed for hearing in the first term of 2024. The appellant will be aware that he faces a very substantial sentence of imprisonment whatever the outcome of this appeal and in those circumstances it is unnecessary to direct that the listing of the appeal requires expedition. It is more important in our judgment that the case comes before the court fully prepared and in proper order, than that it comes before the court as a matter of urgency.

16. Is there anything else you think we need to deal with, Mr Mohabir?

17. MR MOHABIR: In relation to directions my Lord, no. As an ancillary matter, my Lord, leave having been granted, there has already been a substantial amount of work between counsel, the Criminal Appeals Office and the like. My application in the circumstances is that it would be preferential for all four counsel to work together to try and have a brief document before the court, particularly in relation to the chronology. I know I have been working with Mr Malik and Mr Espree (?) on behalf of the Crown, as respondent. My application in short is for legal aid to be extended for the services of myself and also Miss Bickerstaff KC.

18. LORD JUSTICE EDIS: We will consider that. Obviously you are entitled to a representation order for today because you have succeeded in getting leave. The question is whether your representation order for the future should be for you, or for Miss Bickerstaff KC or for both of you. Obviously it is a matter for the prosecution who and how many they instruct. That is not our concern. Is there anything you would like to say about whether the representation order for the future should be for leading counsel or junior counsel or both?

19. MR MOHABIR: My Lord, I would respectfully say in such a serious case where legal aid was extended for both counsel at the lower court, although the issues are far more refined and a lot of work has been done already by me and the input by Miss Bickerstaff KC in this case would be limited so far as public purse is concerned but more importantly if the Crown are to respond in this case with Mr Malik KC, in my respectful submission in such a serious case Miss Bickerstaff - certainly Mr McCarthy should be availed of her services certainly for the hearing to argue the points. I anticipate I will be doing most of the work with her oversight.

20. LORD JUSTICE EDIS: Thank you. We will just retire.

21. (Short adjournment)

22. LORD JUSTICE EDIS: Yes, Mr Mohabir we will grant a representation order in this case for leading and junior counsel. Obviously your representation order is backdated for the work you have done to date, but Miss Bickerstaff's will not be; her representation order starts today.

23. MR MOHABIR: Thank you, my Lords and my Lady.

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