



Neutral Citation Number: 2023 EWCA Crim 336

Case No: 202202613A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT

Her Honour Judge Munro KC

T20217027

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th March 2023

Before :

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE McGOWAN
HIS HONOUR JUDGE RUPERT MAYO

Between :

BEN OLIVER
- and -
REX

Appellant

Respondent

Miss J Dempster KC (instructed by **Banks & Partners**) for the **Appellant**
Mr L Mably KC (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 14th December 2022

Approved Judgment

This judgment was handed down remotely at 10.00am on 30th March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice McGowan :

Introduction

1. On 14 January 2022, at the Central Criminal Court, the Appellant pleaded guilty to the manslaughter of his grandfather. He was tried for murder and acquitted by reason of his diminished responsibility. He was 23 at the time of the killing and 25 at the date of sentence. On 2 August 2022 he was sentenced by Her Honour Judge Munro KC to imprisonment for life with a specified minimum term of 9 years and 124 days. The sentence was passed under s. 285 of the Sentencing Act 2020, following the judge's determination that he was dangerous. He appeals against that sentence by leave of the Single Judge. On 14 December 2022 we heard the appeal. At the conclusion of the hearing we announced our decision, namely that the appeal was dismissed. We said that we would give our full reasons in writing at a later date. These are our reasons for dismissing the appeal.

History

2. On 19 January 2022 the Appellant killed his 74 year old grandfather. He was 24 years old. The background history was complex and showed a pattern of seriously abusive behaviour within the family. The Appellant's mother had been adopted by the deceased and his wife. She had suffered mental and physical health problems throughout the Appellant's life. He had often been looked after by his grandparents and had been taken into the care of the local authority. The Appellant's mother had formed a relationship with a man who had regularly used physical violence against both the Appellant and his mother. The Appellant had also been exposed to highly sexualised behaviour and pornography throughout his childhood.
3. The Appellant suffered from deafness and had an autistic spectrum disorder. This had resulted in his being badly bullied at school. At 14 he was moved from mainstream education to a special school for children who have an autistic disorder. He was unable to settle at that school.
4. The relationship between the Appellant and his grandmother was described as positive and loving.
5. The Appellant has two younger half-sisters. In 2016 he was sentenced to six years' imprisonment for the rape of one of the girls, committed when he was aged between 13 and 16. In her sentencing remarks the learned judge observed as follows; *"I pause there to record my firm view, as supported by the psychiatric evidence that the offending in which you were involved was learned from your own childhood experiences and your lack of empathy or understanding was exacerbated by and rooted in your autism"*.
6. In 2016 the deceased had suffered a stroke which left him bed bound and needing full-time care. Some little time after that both the Appellant's half-sisters made allegations of serious sexual abuse against the deceased. Unsurprisingly this caused a great deal of anger and hurt within the family. Both the deceased's children had made threats to kill him. These threats were said to be serious. The Appellant learned of

the allegations on his release from prison in September 2019. He was also told that his grandfather had sexually assaulted his mother. The Appellant told his grandmother that his knowledge of the allegations meant that he could no longer love his grandfather, although he continued to behave well towards him.

7. The Appellant's mental health was badly affected by the pandemic. He became unduly troubled by the idea that he might cause his grandparents to contract Covid with fatal consequences. This fear and a lack of physical contact with his grandmother caused a very serious deterioration in the Appellant's mental health. He began, seriously, to contemplate and discuss suicide.
8. The Appellant's condition continued to worsen. There were many conversations about suicide and in mid-January 2021 he was admitted to hospital following a serious attempt to kill himself. On release he went to stay with his grandmother, under the supervision of the Home Treatment Team. His grandmother described him as "absolutely tormented". On 15 January the Appellant and his grandmother attended a crisis meeting with his Mental Health Team. His medication was increased.
9. Over the following few days the Appellant was told by his mother that she would "not have peace" until her father was dead. The Appellant told his grandmother that there were demons who wanted to harm him. Together they had watched a film about an orphan who had been abused and he told his grandmother that, a long time ago, he had seen his grandfather watching pornography with "his willy out".
10. He was described by his grandmother as jittery and unable to rest on the morning of the killing. He sent texts to his mother during the late morning, telling her that he thought he had seen what happened to his mother in the victim's experience in the film and was finding it difficult to remain grounded.
11. Shortly before 12 noon he took a kitchen knife upstairs and cut his grandfather's throat. He continued to stab him to the mouth and eyes. He was later to tell the psychiatrists that this was in order to stop him talking and seeing. There were 21 separate stab wounds. He texted his mother to tell her that he had killed grandfather. He also told his grandmother that, "he can't hurt you anymore, Nan".
12. His grandmother called the emergency services and while she was making the call the Appellant went upstairs and climbed onto the ledge of a bedroom window. His grandmother persuaded him not to jump and when the police arrived he was fully cooperative.
13. There was a wealth of psychiatric assessments and the learned judge made it clear that she would sentence based on the two reports commissioned by the defence from Dr. Ian Cumming and Dr. Ba Min Ko. They had diagnosed an autistic spectrum disorder, depression and an adjustment disorder arising from recently being told that the deceased had committed sexual assaults against other family members.

Sentence

14. All the experts agreed that no form of hospital order would be appropriate.

15. The judge began the sentencing exercise by considering all the psychiatric evidence available and found; *“Their (Cumming and Ba Min Ko) view was that your diagnosed medical conditions substantially impaired your ability to form a rational judgment. You did not think that there was an alternative to killing your granddad. You did not think about the consequences and did not have the skills to manage conflict or to see the bigger picture due to your obsessional and tunnel vision. On the other hand, you did understand that you were killing your granddad and had decided to do so”*.
16. The judge began her determination of the appropriate sentence by applying the relevant Sentencing Guideline. She was required to consider to what extent his ability to understand the nature of his conduct, form a rational judgment and/or exercise self-control was impaired by his diminished responsibility. She set the level of responsibility retained as in the medium category, but at the very top of that category. The starting point in that category is 15 years in a range that goes from 10 to 25 years’ imprisonment. Within that range she set the term at 24 years’ imprisonment before further consideration of aggravating or mitigating factors and before allowing credit for the guilty plea. She determined that level of retained responsibility because the Appellant was not psychotic; his autism was significant, rather than severe; the decision to kill was determined and conscious because he knew he was killing his grandfather and why.
17. The learned judge found that there were four factors which aggravated the seriousness; the vulnerability of the victim; the physical suffering caused to him; the Appellant’s previous offending; the fact that he was on licence from the earlier sentence at the time. In identifying mitigating factors, the judge found that the experiences that the Appellant had undergone as a child; that other family members had wanted to kill the victim because of the allegations about his sexual assaults and most recently the discovery that he had hurt the Appellant’s beloved grandmother were all of significance. He had shown genuine remorse and had sought help for his mental health problems.
18. In the view of the judge those factors balanced one another, and she did not alter the position from 24 years.
19. The next stage in the sentencing exercise was the requirement that she consider whether the Appellant was dangerous and whether, if so, it was appropriate to impose a life sentence under s.285 of the Sentencing Act 2020. She found that there was a significant risk of serious harm to members of the public by the commission of further specified offences based on: the previous history of offending; his continuing interest in illegal pornography; the suddenness of the deterioration in his mental health and the ferocity of the attack.
20. Having made that finding she went on to determine that the seriousness of the offence meant that only a life sentence was appropriate. The notional determinate term was 24 years. That term was reduced to 16 years to afford full credit for the timely guilty plea. The point at which the Parole Board could consider release was two thirds of the way through that term and therefore the judge set the minimum term at 10 years and 8 months. That minimum term was adjusted under the slip rule to correct the calculation of the number of days served to count against the term.

Accordingly the final minimum term imposed was 9 years' and 124 days' imprisonment.

Argument

21. We are grateful to Miss Dempster KC and Mr Mably KC for their great assistance by way of their written and oral submissions.
22. In her three written grounds Miss Dempster submitted that the sentence was manifestly excessive first because the judge had taken insufficient account of the Appellant's personal mitigation. Secondly she had taken insufficient account of his mental health at the time. Lastly, she was in error in finding that he was dangerous. In her concise and focussed oral submissions she argued that the judge should have found that the level of responsibility retained put this offence at the top of the low category or, at worst, at the bottom of the medium category. In argument she combined grounds 1 and 2 and submitted that the judge had given insufficient credit for all the personal mitigation available to the appellant, including his mental health. Miss Dempster identified the following features; there was no evidence of ill feeling by the Appellant towards the deceased before the offence; the fact that others in his family had previously felt threatened by the deceased; his own vulnerability; his youth and immaturity and his genuine remorse.
23. In her third ground Miss Dempster challenged the finding of dangerousness. She describes the "perfect storm" of a combination of circumstances which she argues are 'very unlikely' to be repeated. The killing occurred during a period when the Appellant's mental health was adversely affected by the fears and restrictions caused by the pandemic and when he learned what the deceased had done to his mother. She submits that he will, inevitably, be in custody for a long time which will mitigate any risk and relies upon Dr. Cumming's view that there is a "potential to resolve some of the dynamics" in his circumstances. If, she argued, her submission about the error in the finding of dangerousness is made out, then the requirements of s.285 are not met and a life sentence is not appropriate.
24. In his response Mr. Mably submitted that grounds 1 and 2 relate to judgements reached by the judge in her discretion, having heard the evidence. It cannot be said, he argued, that she was either wrong in her application of the law nor in the approach she took to reaching her findings. She heard the evidence and reached findings which were properly open to her. He submitted that she took a correct approach to the assessment of the level of retained responsibility, taking proper notice of the relevant, and only the relevant, factors. She was entitled to find that the factors which aggravated the seriousness were balanced by those that reduced it and accordingly not to increase or decrease the position within the available range. He had contended for a position at the lower end of the top range at the original hearing.
25. On the finding of dangerousness Mr. Mably identified those factors which he says, obliged the judge to reach the conclusion she did. The judge was correct to find a significant risk of serious harm based on the nature of the offence; the suddenness of its commission; the fact and the nature of the previous offending and his continuing interest in illegal pornography. He submitted that it is highly speculative to say that future serious offending is 'very unlikely' when one considers the fact and nature of the previous conviction. Again, he submitted that the judge considered all the

relevant material and reached a decision which was properly open to her. Having reached the finding that the Appellant was dangerous the judge was bound to go on to consider the second question, was a life sentence necessary. The finding of dangerousness does not make the imposition of a life sentence inevitable but it was open to her to make such a finding on the material available.

Analysis

26. The assessment of the level of responsibility retained in a case of manslaughter by virtue of diminished responsibility is not a mathematical exercise. It does, however, require a careful analysis of all the relevant factors and a precise calibration of the case within the guideline. The sentencing court has to assess where in the categories, high, medium or low, an offence should be placed and further where within the appropriate range it sits. The extremely broad range of such offending is demonstrated by the range of sentence, from 3 to 40 years and the spread within each category. The category range for medium culpability is 10 to 25 years.
27. A conviction for manslaughter by reason of diminished responsibility, as the guidelines states, necessarily means that the individual's responsibility is substantially impaired. That impairment arises because his ability to understand the nature of his conduct, to form a rational judgment and/or exercise self-control is substantially impaired.
28. The judge was required to identify the relevant features of the offending which assisted her to establish the level of impairment and therefore the level of responsibility retained. The accepted evidence that the Appellant was not psychotic is a fundamental part of that assessment. His acts were deliberate and carried out in response to specific pieces of information about the deceased's appalling behaviour. The crux of the Appellant's impairment was manifest in his inability to form a rational judgment. He did not believe there was an alternative to killing his grandfather.
29. His terrible upbringing in combination with his underlying condition of an autistic spectrum disorder, and the effects of recent disclosures restricted his ability to form a rational judgment. They caused or contributed to the diminution of his responsibility for his acts. They obviously do not absolve him of all responsibility and on the facts of this case it was entirely open to the judge to find that his responsibility was reduced only to the level she assessed, as she observed, "*you did understand that you were killing your granddad and had decided to do so*". In our view the judge was entitled to reach the finding she did on the level of responsibility retained.
30. Having made that finding and set the level at 24 years, the judge went on to consider what, if any, impact the combination of the aggravating and mitigating factors had in any adjustment of that notional determinate term. The factors she identified are agreed as relevant. The issue is whether her assessment that they balanced one another out caused the sentence imposed to be manifestly excessive. How much weight is to be attributed to a factor in aggravation or mitigation is a decision to be made by the sentencing judge. It is a matter of judgment based on a proper consideration of evidence and argument. The judge had heard the trial and considered all the evidence, particularly the expert psychiatric evidence and was well placed to make that assessment.

31. The judge was required to follow the provisions of s.308 of the Sentencing Act 2020,

(2) In making that assessment, the court—

(a) must take into account all the information that is available to it about the nature and circumstances of the offence,

(b) may take into account all the information that is available to it about the nature and circumstances of any other offences of which the offender has been convicted by a court anywhere in the world,

(c) may take into account any information which is before it about any pattern of behaviour of which any of the offences mentioned in paragraph (a) or (b) forms part, and

(d) may take into account any information about the offender which is before it.

32. The facts of this offence, its ferocity and suddenness might well have justified a finding of dangerousness alone but the combination with the Appellant's inability to form a rational decision in response to what he had learned and his previous offending mean that the judge's conclusion is unimpeachable.

33. Having reached that conclusion the judge then had to consider whether the offence was serious enough to justify a life sentence. This Court considered the matters which should be taken into account in *Attorney General's Reference No 27 of 2013, (R v Burinskas) [2014] EWCA Crim 334* at [22],

22. In our judgment,the questionas to whether the seriousness of the offence (or of the offence and one or more offences associated with it) is such as to justify a life sentence requires consideration of:-

i) The seriousness of the offence itself, on its own or with other offences associated with it This is always a matter for the judgment of the court.

ii) The defendant's previous convictions.....

iii) The level of danger to the public posed by the defendant and whether there is a reliable estimate of the length of time he will remain a danger.

iv) The available alternative sentences.

34. The judge followed that guidance, she considered the relevant evidence and all the available material before her. It was a carefully reasoned judgement and cannot be criticised.

Decision

35. There was nothing wrong in the approach which the judge took to the material and there was no error in the reasoning process which led her to reach the conclusions she did.

36. Accordingly the sentence was not manifestly excessive. It is for all of these reasons that we dismissed the appeal.