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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2024] EWCA Crim 59
CASE NO 20230220/A3

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 17 January 2024

Before:

LORD JUSTICE COULSON

MRS JUSTICE FOSTER

MR JUSTICE HILLIARD

REX

V
ERIK FELD

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MR A MORRIS appeared on behalf of the Applicant.

J U D G M E N T

LORD JUSTICE COULSON:

Introduction

1. The applicant is now 38. On 23 March 2023, he was convicted of murder at the Central Criminal Court. On 14 June 2023, he was sentenced by Bryan J ("the sentencing judge") to life imprisonment, with a minimum term of 28 years, less the period of 506 days spent on remand. He renews his application for permission to appeal against that sentence following refusal by the single judge.

The Relevant Facts

2. In the early hours of 16 August 2021, the applicant went to Tower Hamlets Cemetery Park. He went there armed with a claw hammer and the clear intention of killing any man he encountered. He knew that it was a large park, which was unlit at night, with extensive areas of trees and dense undergrowth. He also knew that there would be lone men in the park even in the middle of the night.

3. The planning involved the applicant collecting hammers with a view to using them to assault and kill. Although, following his arrest, he refused to provide the PIN number for his mobile phone, that phone was accessed by the police. The phone showed Google searches for amongst other things "murder footage" and "murder videos". The applicant had visited web pages with the associated thumbnails and videos containing real-life footage of people being murdered. The majority showed them being hammered to death. There were also photographs of the applicant himself brandishing a claw hammer on his phone.

4. The applicant came across Ranjith Kankanamalage in the park. He attacked him with the hammer in a sustained and unprovoked attack. He struck Mr Kankanamalage at least 12 times; at least three of those blows required severe force. The victim's skull was shattered, and the brain penetrated. Sadly, the victim had defensive injuries to his hands and arm, so it was clear that he had not been killed by the first or second blow. His suffering and terror must have been extensive. It was, on any view, a savage and pitiless murder.

5. The applicant was arrested on 20 August 2021, for unrelated offences of affray and possession of a (different) claw hammer which he had brandished at a store security guard. His flat was searched, and two sledgehammers and two mallets were discovered and confiscated. Subsequently his DNA was recovered from Mr Kankanamalage's fingernails. The applicant was re-arrested on 21 January 2022 on suspicion of murder, and a further hammer and a cut-throat razer was found by his bed.

6. The applicant denied murder. He said that he had taken a hammer to the park to strike trees to alleviate his tension. He also maintained that he had acted in lawful self-defence. At no point in the preparation for, or during the trial did the applicant accept that he had killed Mr Kankanamalage but that, due to a pre-existing mental condition, he was only guilty of manslaughter due to diminished responsibility. He was duly convicted of murder. The sentencing judge described his purported defence as "a cock-and-bull story".

The Sentencing Exercise

7. The sentencing judge provided detailed sentencing remarks which, in their written form,

ran to 52 paragraphs. They are careful and considered. Since a life sentence was mandatory, the sentencing remarks explain the assessment of the appropriate minimum term which, as we have said, the sentencing judge fixed at 28 years, less time spent on remand.

8. It was agreed that having taken the hammer to the park with an intent to kill or cause serious injury, the starting point for the minimum term, in the applicant's case, was one of 25 years (see paragraph 41 of the sentencing remarks). The judge then found a series of aggravating features beginning at paragraph 42. These included:

   (a) the very significant degree of planning and premeditation;

   (b) the extreme violence used in the killing, (including evidence that at least some of the wounds were consistent with being caused by the round head of the hammer whilst others were consistent with being caused by the claw end);

   (c) the fact that this was an attack on a stranger, in a public park at night and that in consequence Mr Kankanamalage was a vulnerable victim;

   (d) the applicant's previous convictions for a range of offences, including one incident in June 2011 involving sexual assault, battery, possession of an offensive weapon and criminal damage. On that occasion, amongst other things, the applicant brandished an axe at passengers on the District Line, pushing it in their faces and threatening them. We also note that, in another incident to which the sentencing judge referred (which happened the day after the murder, outside a shop in East London), the applicant produced a claw hammer and lifted it, threateningly, above his head whilst shouting at the security guard inside. Importantly, on that occasion, the applicant exercised sufficient self-control to walk away. That is something to which we will return later in this

judgment.

9. The judge found that the only mitigation was the personality disorder from which the applicant suffered, as explained in detail in a psychiatric report, produced by Dr Stephen Attard and dated 24 May 2024. The judge's sentencing remarks dealt with that report at paragraphs 27 to 38. In that context, the judge also had regard to the Sentencing Guideline in respect of Sentencing Offenders with Mental Disorders, which we shall call "the relevant Guideline". The crux of the judge's conclusions was as follows:

> "34. In this regard the Guideline helpfully identifies a useful starting point to be to ask the questions identified in the Guideline. I have had regard to all such questions, however I consider the following to be of particular relevance:-
> 'At the time of the offence did the offender's impairment or disorder impair their ability:
> - to exercise appropriate judgement
> - to make rational choices
> - to understand the nature and consequences of their actions?".
>
> 35. I am greatly helped in this regard by the conclusions of Dr Attard at paragraph 243 of his report where he concludes:
> '243. In considering the above, it is likely that Mr Feld was experiencing a period of instability at the time of the index offence as a result of increased psychosocial stressors. The manifestations of his personality disorder were likely significant in regard his behaviour at the material time including his ability to exercise appropriate judgement, make choices and consider the nature and consequence of his actions, albeit not to a degree that substantially impaired his ability to understand the nature of his conduct, form a rational judgement or exercise self control.' (**emphasis added)**."
>
> 36. In such circumstances, and having heard all the evidence in the trial, and bearing in mind all that I know about you, whilst there was a reduction in culpability such reduction was only limited and certainly not significant not least given that the matters identified were not to a degree that substantially impaired your ability to understand the nature of your conduct or to form a rationale judgment or to exercise self-control.
>
> 37. I reject the submission that your disorder significantly reduced your

> culpability, and reject the submission that although your condition did not give rise to a defence of diminished responsibility the circumstances fell not far short of that.
>
> 38. In this regard I am satisfied that you understood perfectly well the nature of your conduct and that it was wrong to equip yourself with a hammer and to go out with the intention of killing a random stranger, that you retained the ability to form a rationale judgment as to just how wrong such conduct was, and I am satisfied that your ability to exercise self control was not substantially impaired. Rather, in such circumstances, you formed a deliberate intent to go out and carry into effect your long held fantasy to kill a random stranger for your own gratification."

10. We should also refer to two other paragraphs in the sentencing remarks because they go directly to some of the submissions made this morning by Mr Morris. They are paragraphs 45 and 46:

> "45. The only real mitigation, such as it is, is your personality disorder. In this regard Schedule 21 paragraph 10(c) of the Sentencing Act 2020 identifies, as possible mitigation, 'the fact that the offender suffered from any mental disorder or mental disability' which '(although
> not falling within section 2(1) of the Homicide Act 1957) lowered the offender's degree of culpability'. I have already addressed your personality disorder in detail above. As there identified I consider that whilst there was a reduction in culpability such reduction was only limited and certainly not significant not least given that the matters identified were not to a degree that substantially impaired your ability to understand the nature of your conduct or to form a rationale judgment or to exercise self-control."

Paragraph 46 then repeated paragraph 38, noted above.

11. For these reasons the sentencing judge concluded that the aggravating factors outweighed the one mitigating factor represented by the applicant's personality disorder. As he put it at paragraph 48 of the sentencing remarks:

> "…I have made an appropriate downwards adjustment from the

> substantially raised starting point to take account of your mitigation such as it is."

That resulted in an overall uplift from the original starting point of 25 years to one of 28 years, with an appropriate reduction for time spent on remand.

The Grounds of Appeal

12. There are three grounds of appeal. First, it is said that the judge failed properly to apply the statutory mitigating feature set out in paragraph 10(c) of Schedule 21 of the Sentencing Act 2020 (an offender suffering from a mental disorder). It is said that the judge confused that test with the potential defence of diminished responsibility and therefore underplayed the significance of the applicant's personality disorder in the sentencing exercise.

13. Secondly, it is alleged the judge failed to follow the conclusions of Dr Attard to the effect that the mental disorder was a significant contributing factor to his culpability. Thirdly, it is said that the judge's treatment of the aggravating factors not only failed to reflect the applicant's mental disorder, but gave rise to an inflated starting point before any reduction for that disorder, which meant that the sentence was manifestly excessive.

The Single Judge

14. The single judge rejected those points when refusing permission to appeal. As to the first, he considered that the complaint was "essentially semantic": whilst the judge did, on occasion, use the language applicable for a defence of diminished responsibility, hence the reference to "substantially impaired", that reflected the language of the relevant Guideline that he was applying. He found that the sentencing judge had regard to the

right test at paragraph 10(c) of Schedule 21 because, amongst other things, he found that there was “a reduction in culpability”.

15. As to the wider question of Dr Attard’s report, the single judge rejected the suggestion that the sentencing judge had somehow ignored Dr Attard’s evidence. On the contrary, he said that the sentencing judge, although not bound by it, had in fact relied on the report in a number of important respects. He also said that the sentencing judge, having presided over the trial, had the benefit of considering all the evidence, not just the report of Dr Attard. The evidence as a whole was reflected in the sentencing remarks.

16. As to the final point, concerned with the aggravating factors, the single judge noted that the applicant had other convictions for violence with weapons and that there were other significant aggravating factors. For these reasons, he concluded that the minimum term of 28 years was not excessive.

The Renewed Application Hearing

17. In the course of his clear submissions this morning, Mr Morris sought to renew the application for permission to appeal. Although he essentially restated the three points that we have already noted, we are happy to acknowledge both the clarity and thoughtfulness with which those submissions were advanced. We acknowledge that it is not easy for counsel in Mr Morris’s position to seek to persuade a court that a minimum term imposed as a result of an horrific murder should somehow be reduced. Mr Morris’s submissions properly recognised those difficulties but remained focused on the particular points he wanted to raise. We have given those three points considerable thought, and we

shall explain our views on them in a moment. But we have concluded that the single judge was right to refuse permission to appeal. Our reasons are as follows.

Ground 1: The Alleged Misapplication of Paragraph 10(C)

18. Paragraph 10(c) of Schedule 21 of the Sentencing Act 2020 provides that mitigating factors that may be relevant to the offence of murder include the fact that the offender suffered from any mental disorder or mental disability which, although not falling within section 2(1) of the Homicide Act 1957, lowered the offender's degree of culpability. The reference to section 2(1) is of course a reference to the defence of diminished responsibility.

19. Whilst the relevant Guideline is too long to summarise properly in this judgment, we note that:

(a) Paragraph 4 warns that mental disorders can fluctuate;

(b) Paragraph 9 states that culpability may be reduced if an offender was, at the time of the offence, suffering from an impairment or disorder;

(c) Paragraph 11 states that culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour;

(d) Paragraph 12 makes the obvious point that, in some cases, the impairment or disorder may mean that culpability is significantly reduced whilst in other cases the impairment or disorder may have no relevance to culpability at all;

(e) Amongst the suggested questions in paragraph 15, the relevant Guideline asks whether, at the time of the offence, the disorder impaired the offender's ability to exercise appropriate judgment; to make rational choices; and to understand the nature and

consequences of their actions.

That last question was, of course, the question which the sentencing judge expressly asked himself in the passage from his sentencing remarks which we have already set out.

20. Mr Morris's complaint under Ground 1 is that the judge confused the general test set out in paragraph 10(c) of Schedule 21, with the test for the sort of reduction in culpability required to make good a defence of diminished responsibility. In short, it was said that the bar was set too high. Putting it another way, as Mr Morris does at paragraph 30 of his grounds, he said that, whilst the evidence was that the applicant's ability to understand the nature of his conduct, form a rational judgment or exercise self-control were not *substantially* impaired, his personality disorder was a *significant* contributing factor to his conduct and amounted to a significant mitigating factor.

21. We understand why the single judge described this as a "semantic" argument. However, we acknowledge that there are passages in the judgment which might have given the impression that the judge was running the two tests together. But the position in principle, which we consider the judge properly followed, is straightforward. If an offender suffers from a mental disorder then, in accordance with paragraph 10(c), that may lower his or her degree of culpability, and in that way, it may amount to a mitigating factor. That is so even in circumstances where the disorder could not justify a submission, let alone a finding, of diminished responsibility. But the reason why it is a mitigating factor is because, as the relevant Guideline explains, it may reduce, even significantly reduce, the offender's culpability: the extent to which the offender is to blame for the crime.

22. In this case, in accordance with paragraph 10(c) and the relevant Guideline, the sentencing judge found that the applicant did suffer from a personality disorder and that that did reduce his degree of culpability. So the only remaining issue was the question of degree or extent of the reduction. That was quintessentially a matter for the sentencing judge who, in this case, had also presided over the trial.

23. So despite the language of some parts of the sentencing remarks, we are bound to reject the suggestion that the judge somehow became confused between the test identified in paragraph 10(c) and the test for diminished responsibility. In our judgment, he was always focused on the right test, namely whether there was a reduction in culpability at the time of the offence because of the personality disorder. That inevitably had an overlap with the test for diminished responsibility; indeed we note that that overlap was prayed in aid on behalf of the applicant, because in the sentencing note prepared by Mr Morris, he argued to the judge that although the "applicant's condition did not give rise to a defence of diminished responsibility, it is open to the court to conclude that it did not fall too far short of that". That submission was carefully considered by the judge and, in the passage that we have already identified, was rejected.

24. Accordingly, in our view, the judge had in mind the right test under paragraph 10(c) and so, for the reasons that we have given, we reject Ground 1 of the appeal.

Ground 2 - Dr Attard's Report

25. Accordingly, this was a case where there was an accepted personality disorder, and the

only question was the degree to which that reduced the applicant's culpability. Although, as we have said, that was quintessentially a matter for the sentencing judge (as the relevant Guideline explains at paragraph 13), Dr Attard's report was of assistance in arriving at an answer to that question.

26. As we have said, Dr Attard was clear at paragraph 243 of his report that, at the time of the murder, the applicant's personality disorder did *not* substantially impair his ability to understand the nature of his conduct, form a rational judgment or exercise self-control. In other words, his personality disorder did not/could not significantly reduce the applicant's culpability and therefore could not be a significant mitigating factor. On a proper analysis therefore, we consider that the judge was correct to approach the matter in the way that he did.

27. We do not accept the suggestion that the judge did not have proper regard to Dr Attard's report. We consider that he had careful regard to what Dr Attard had said. We have already referred to paragraph 243, but there are other passages to which we would refer. We note, for example, that Dr Attard said that there was "no evidence" to suggest that the applicant was acutely psychotic at the time of the alleged offence (see paragraph 240 of the report). We note that, on the contrary, Dr Attard noted that the contemporaneous medical records showed that he was "relatively stable" in the months prior to the murder (see paragraph 237). We are also bound to note that at paragraphs 129 and 131 of the report, Dr Attard noted that various contemporaneous medical records, compiled following interviews and examinations shortly after the murder, recorded that there was "no psychotic symptoms" and that the applicant "seemed calm... lucid and clear... He

seemed to be himself."

28. We should also refer to the fact that, both in Dr Attard's report and in the evidence, there were a number of examples of incidents where the applicant had become consumed with ideas of rage and potential murder, but in which he had exercised self-control to walk away from those situations. The judge referred to that material in passing. He did not set it out in his sentencing remarks. It seems to us that that was a potentially important element of the background evidence and another reason why the judge was right to conclude, as Dr Attard had concluded, that the ability to exercise self-control was not substantially impaired and therefore was not a significant mitigating factor.

29. It is also important to note, as we have recorded the single judge as saying, that Dr Attard's report was only one part of the material which the judge had to take into account when sentencing the applicant. The sentencing judge had presided over the trial and was therefore perfectly placed to reach a fully considered conclusion as to the degree of culpability of the applicant and the appropriate sentence. That is what paragraph 13 of the relevant Guideline stresses that the judge should do. Dr Attard's report was one, albeit very important, element of the material that was relevant to the sentencing exercise. For all those reasons therefore, we do not consider that Ground 2 is arguable.

Ground 3 - The Aggravating Factors

30. Finally, there is Mr Morris's submission about the aggravating factors which the sentencing judge took into account. It is said that the aggravating factors were symptoms of the applicant's mental disorder, so that the judge's treatment of them as aggravating

factors was both erroneous and confusing. It is also separately said that the judge placed too much weight on them anyway, particularly the significant planning and premeditation.

31. In our view, those criticisms are misplaced. As to the planning, the judge found that the applicant had carefully planned the murder and that included viewing the videos, before going out at night, to a location where he knew that potential victims would be present, having equipped himself with a hammer and concealed it in a bag. All of that was to give effect to the applicant's intention to murder a random stranger. That was a degree of planning which amounted to a significant aggravating factor. This was not the sort of murder that happened off the cuff, or randomly, or as a result of a spur of the moment incident.

32. On this particular point, moreover, the sentencing judge expressly addressed the issue of whether the applicant's personality disorder negated or reduced the impact of the aggravating factor, and he explained why it did not: see paragraphs 38 and 46 of the sentencing remarks.

33. Therefore, we are bound to agree with the sentencing judge, that the planning and premeditation were not explained by the personality disorder. The applicant, according to Dr Attard, was able to understand the nature of what he was preparing to do and yet failed to exercise any self-control.

34. All of that goes to the first of the aggravating factors, namely the planning and

premeditation, but the other aggravating factors, in our view, were not explained by the personality disorder in any event. Those included the extreme violence used in the killing, the vulnerability of the victim and the previous convictions. Accordingly, we conclude that the sentencing judge was entitled to find that the aggravating factors outweighed the single mitigating factor.

35. Therefore, although the learned judge did not set out the detail of the calculation, having concluded that the aggravating factors outweighed the single mitigating factor, he uplifted the starting point from 25 years to a minimum term of 28 years. We do not consider that that uplift was wrong in principle or erroneous in law. Accordingly, we reject the submission that the 28-year minimum term was manifestly excessive. We repeat our gratitude to Mr Morris for his careful submissions this morning, but this renewed application for permission to appeal must be refused.

36. MR MORRIS: Could I ask for a representation order in this case?

(The Bench Conferred)

37. LORD JUSTICE COULSON: Mr Morris, I think the position is that, although we would, personally, grant you that order, we do not think we can because we have not granted you leave.

38. MR MORRIS: I know in other renewed cases I have tried to get the Registrar to grant it in advance of the hearing, so I think I know the Registrar has powers.

39. LORD JUSTICE COULSON: Let us leave it like this. If you communicate with the Registrar, now, you can say that, in the unusual circumstances of this case, the Court would grant you a representation order, if it had the power. The Court freely accepts it

does not know if it has the power; the Registrar will know. If we do have the power, you can have a representation order; if we do not, you cannot. Can we be any clearer?

40. MR MORRIS: No, you cannot.

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