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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT

CANTERBURY

HHJ JAMES CP No: 46ZY1198824

CASE NO 202404406/A1

Neutral Citation: [2025] EWCA Crim 149

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday, 7 February 2025

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MURRAY
THE RECORDER OF PRESTON
HIS HONOUR JUDGE ALTHAM
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX
V
RASHKO KURTEV

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MR P McGHEE appeared on behalf of the Attorney General
MR D BENTLEY KC appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: On 9 March 2024 Rashko Kurtev ("the offender"), a man aged 32 with no previous convictions, was involved in a violent altercation outside a fish and chip shop in Birchington in Kent. With two metal chairs, which he used in quick succession, he caused serious head injuries to Mr McLeod, a 46-year-old man. The offender was arrested on the same day. He was charged on 11 March 2024 with causing grievous bodily harm with intent. The Magistrates' Court sent him for trial in the Crown Court at Canterbury. The indictment preferred against the offender contained two counts. There was an alternative count of inflicting grievous bodily harm. At the plea and trial preparation hearing on 8 April 2024 the offender pleaded not guilty to both counts. The judge at that hearing, His Honour Judge James, the Recorder of Canterbury, made a note that the issue was "self-defence/defence of another". A trial date of 5 November 2024 was fixed.
2. Mr McLeod died from his injuries on 15 April 2024. Once a post mortem report confirming causation had been obtained, the offender was charged with murder. At a hearing on 18 June 2024 he indicated that he would plead not guilty to murder. He was remanded in custody. The plea and trial preparation hearing in respect of the indictment charging murder took place on 12 July 2024. The offender pleaded not guilty.
3. There were further hearings in September of 2024. At the first of those hearings it was indicated that the issues were unchanged. At the second hearing on 26 September, Judge James (who managed this case throughout) invited the prosecution to consider adding a count of manslaughter to the indictment. This would mirror the scheme of the indictment which had been preferred prior to Mr McLeod's death. The prosecution accepted the judge's invitation. An amended indictment charging both murder and manslaughter was preferred.

4. On 22 October 2024 the case was listed for a pretrial review. The prosecution stated that a plea of guilty to manslaughter would not be acceptable. The offender was arraigned on the count of manslaughter. He pleaded not guilty. The trial was brought forward by a day to 4 November 2024.
5. On 28 October a psychological report was served by the offender's solicitors. It was served principally in order to support submissions in relation to adjustments to the trial process. The conclusion of the report was that, whilst the offender did not suffer from any defined mental disorder, his reasoning and mental processing skills were very poor. Compared to the average person he would find assessing the likely consequences of his behaviour difficult.
6. When the case was listed for trial on 4 November, the prosecution stated that, following advice from King's Counsel, a plea to manslaughter would be an acceptable disposal of the proceedings. The offender was re-arraigned on that count. He pleaded guilty. Sentence was adjourned until 15 November 2024. On that date the judge proceeded on the basis that the prosecution case was fully accepted. No pre-sentence report was requested or obtained. The judge imposed a total sentence of three years and nine months' imprisonment.
7. His Majesty's Solicitor General now applies to the court under section 36 of the Criminal Justice Act 1988 on the basis that the sentence was unduly lenient.
8. What happened on 9 March 2024 was captured on CCTV and other video footage. We have been able to view the footage in its entirety several times. Mr McLeod arrived at the fish and chip shop or café at about 2.00 pm. He was with a friend named Thomas Mason. Mr McLeod had clothes which he had been given by a local charity chop. They were supposedly for him to wear at an interview he was due to have.

9. The two men went into the café briefly before going back outside. A young woman named Gavin, who worked at the café, went out with a cup of coffee which the offender had ordered. He then began to change into the clothes from the charity shop. This was on the pavement in a public street. He used the glass door into the café as a mirror. After a short time, Miss Gavin went to the door to ask Mr McLeod to move away. At first he appeared to comply with this request. He then went into the café and remonstrated with her. His language and his attitude was aggressive. Miss Gavin told him that if he left the café he would be refunded the cost of his cup of coffee. Mr McLeod did leave.
10. Miss Gavin came out of the café again and spoke to Mr McLeod who was still close to the door of the café. He became agitated. Miss Gavin's description was that he went "ballistic". Thomas Mason tried to calm him. Mr McLeod reacted by pushing Mason and shouting at him.
11. Within the café were two men named Boyer, one of whom was the owner of the café, together with the offender who worked there. On seeing and hearing the disturbance they went outside. One of them told Mr McLeod to leave because he had upset Miss Gavin. Mr McLeod's reaction was to go towards the men who had come out of the café. Mason tried to push him back but was unsuccessful. Mr McLeod went towards the offender. The offender pushed him away. Mr McLeod then moved to an area to one side of the front of the café.
12. What followed happened within 10 to 15 seconds. The offender picked up something apparently belonging to Mr McLeod which he had left on a table outside the café. He threw it in the direction of Mr McLeod. Mr McLeod's reaction was to lunge forward and strike at the offender. He grabbed at the offender's t-shirt. He was in an angry mood. His friend Mason tried to restrain him. The evidence of the owner of the café was that at

this point the offender "got mad". Outside the café around the table to which we have already referred were some metal chairs. The offender picked up a chair using both hands. The chair weighed around 15 kilos. He lifted it over his head and brought it down towards Mr McLeod. Mr McLeod did not suffer any obvious wound at this stage. The chair probably struck his arm. Mr McLeod briefly broke free from Mason's grip. At that the offender took hold of a second chair. By the time he had hold of the chair, Mason had once again taken hold of Mr McLeod. The offender raised this chair above his head. Miss Gavin shouted at him to stop. The footage we have seen does not have sound but she can be seen very close to the offender. She is clearly saying "don't" or "stop" or words to that effect. The offender brought the second chair down forcefully onto the head of Mr McLeod. It was this blow which caused the serious head injuries from which he later died. Miss Gavin was obviously distressed at what the offender had done. She took hold of him. The owner of the café stood between the offender and Mr McLeod. The offender then went back into the café.

13. Mr McLeod suffered a fractured skull and a traumatic brain injury which led to bleeding in the brain. He was in due course taken to King's College Hospital in London. Despite the best endeavours of staff there he later died from complications of his brain injury.
14. When interviewed the offender admitted that he had struck Mr McLeod with a chair. He said that Mr McLeod had been asked to move on but had been swearing and threatening him and other members of staff from the café. Mr McLeod had pushed and punched him. He thought that Mr McLeod was going to throw a planter which was outside the next door shop. He threw one chair which struck Mr McLeod's arm, apparently without effect. In fear he threw the second chair. He did that in order to scare off Mr McLeod and to make him leave.

15. By the date of sentence Mr McLeod's brother had made a lengthy victim personal statement setting out the devastating effect that Mr McLeod's death had had on his family. He had a 12-year-old daughter from whose mother he was estranged but whom he saw on a regular basis. She was unable to understand why her father no longer visited. Mr McLeod's mother was 82. She was traumatised by what had happened to her son. The statement was read in full at the sentence hearing.
16. The judge was required to apply the Sentencing Council definitive guideline in relation to unlawful act manslaughter unless the interests of justice indicated otherwise. It is not suggested now and never was that anything other than a conventional application of the guideline was appropriate.
17. The prosecution position was that the case properly fell into Category C in respect of culpability. Their submission was that there was a Category B factor which might apply, namely "death was caused in the course of an unlawful act which carried a high risk of death or really serious harm which was or ought to have been obvious to the offender." However, their submission was that the case better fell into Category C because, "death was caused in the course of an unlawful act which involved an intention by the offender to cause harm or recklessness as to whether harm would be caused, that falls between high and lower culpability."
18. The prosecution said that by reference to the guideline there was a single aggravating factor, namely the use of a chair as a weapon. The mitigating factors were the offender's lack of previous convictions, the absence of premeditation and the offender having the prospect of work. As to the reduction for plea, the prosecution relied on F3 in the Council guideline on reduction of sentence for plea: "In the Crown Court where the offered plea is a permissible alternative on the indictment as charged, the offender will

not be treated as having made an unequivocal indication unless the offender has entered that plea."

19. On behalf of the offender, it was argued that culpability fell between Category C and Category D. It was said that there were two factors in Category D which were relevant, namely: "... death caused by an unlawful act which was in defence of self or others (where not amounting to a defence)" and "responsibility was substantially reduced by mental disorder, learning disability or lack of maturity." As to mitigation, in addition to the features referred to by the prosecution, there was remorse, poor thinking skills, difficult personal background and impact on the offender's family.

20. The judge began his sentencing remarks by referring at some length to the victim personal statement made by Mr McLeod's brother. He noted the sadness and betrayal that had been engendered by the offender's violence. However, the judge observed that he had to step back from the raw emotion of the case and sentence by reference to the definitive guideline.

21. The judge accepted that Mr McLeod had behaved aggressively and in a confrontational manner. However, the use of a metal chair as a weapon went far beyond anything that could be justified as self-defence. Moreover, said the judge, when the "deliberate and forceful second blow directed to his head" was struck, Mr McLeod was being restrained and posed no direct threat to anyone. The judge said that the offender at that stage had acted in anger and retaliation, albeit under a degree of provocation. He observed that the potential for serious injury should have been obvious, even to someone of limited intellectual functioning. He said that this element of the offence made "placing the case within the sentencing guidelines a difficult task". On the one hand the death resulted from an act which carried a high risk of death or very serious injury. On the other hand,

Mr McLeod's demeanour meant that initially the offender was motivated by a desire to defend himself and others. By that route the judge concluded that culpability fell into the medium category which gave a starting point of six years' imprisonment.

22. There were aggravating factors identified by the judge, namely use of a weapon in so far as it was not already covered by the element of high culpability and an attack carried out in public with witnesses present who were clearly distressed by what they saw.

23. The judge identified the personal mitigation as no previous convictions, lack of premeditation, limited thinking skills, caring responsibility for a young family and remorse. However, the judge noted that, where deliberate criminality had resulted in such grave consequences, personal mitigation could only have limited effect on the sentence.

24. Nonetheless, the judge determined that the appropriate sentence after a trial would have been five years' imprisonment, namely a reduction of 12 months from the starting point for a Category C offence. In relation to reduction for plea, the judge set out the charging history and the view taken by the prosecution up to the day of trial. He described the circumstances in which the prosecution indicated that a plea of guilty to manslaughter would be acceptable as "rather unusual". He concluded that a reduction of 25 per cent was appropriate.

25. The Solicitor General argues that, as the judge noted, the act of the offender carried a high risk of really serious harm to Mr McLeod which must have been obvious even to someone of the offender's mental capacity. On the other hand, no low culpability factor was present. The evidence could not support a finding that there was no risk of anything beyond minor harm. The psychological evidence did not suggest that culpability was significantly reduced by such mental deficit as affected the offender. On the judge's

finding, this was not a case of self-defence falling short of a full defence. The Solicitor submits that the reality of the position taken by the prosecution at sentence was that there were elements of high and medium culpability but nothing to suggest low culpability. Nothing said by the prosecution in the court below would have led the judge to conclude that there were elements of low culpability. In those circumstances, the judge should have taken a sentence greater than the starting point for a medium culpability case before considering aggravating and mitigating factors. The category range for medium culpability is three to nine years' custody. It is argued that the sentence before allowance for aggravating and mitigating factors ought to have been somewhere towards the upper end of that range. The Solicitor accepts that the judge was justified in reducing whatever the initial sentence was by 12 months to allow for mitigating factors.

26. The argument of the Solicitor General is that the overall consequence of those matters is that the reduction for the plea of guilty should have been applied to a sentence significantly longer than five years' imprisonment. As for the reduction for plea, the offender was in a position to indicate a plea to the offence of manslaughter from 18 June onwards. Although the separate count was not on the indictment at that stage, a plea to manslaughter is always available on a charge of murder. In fact, the offender did not tender a plea even when the count was added to the indictment. It is argued that the reduction for the plea of guilty should have been at or near 10 per cent, namely the reduction appropriate where the plea is indicated on the day of trial.

27. We have been assisted on behalf of the offender by David Bentley KC who appeared for him in the Crown Court. He argues that the sentence was imposed by a very experienced judge who had had conduct of the case throughout. Although the judge had not conducted a trial, he was in a very good position to judge the level of culpability involved

so far as the offender was concerned. His judgment as to the extent of the provocation and its effect on culpability should be respected by this court.

28. In relation to the issue of reduction for plea, Mr Bentley in writing relied on *Bertram* [2003] EWCA Crim 2023 to support the argument that a significant reduction for the plea of guilty was appropriate. He further relied on an email sent by the judge to the Criminal Appeal Office following sentence in which the judge set out the history of the proceedings and then said:

> "In these highly unusual circumstances and taking account of what I knew of the defendant's lack of intellectual capacity, lack of command of English and the apparent vacillation in the position of the prosecution, I took the view that Mr Kurtev was entitled to significantly greater credit than would usually be available for someone who pleaded guilty on the day of trial."

29. In oral submissions, Mr Bentley on the issue of reduction for plea invited consideration of the proposition that this case fell within exception F1 within the guideline, namely it was unreasonable for him (the offender) to have indicated his plea earlier than he did. If that was right, then it was entirely open to the judge to afford the reduction that he did.

30. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the then Lord Chief Justice in *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."

31. In this case we have two issues to consider: was it reasonable to identify a sentence of six years' custody as appropriate before matters of aggravation and mitigation came to be

considered? Was it reasonable to reduce the final sentence by 25 per cent by reason of the plea of guilty?

32. In determining those issues we must take full account of the benefit the judge had in managing the proceedings from the outset. He had been able to observe the offender at the various court hearings where the offender was present, whether in person or via a prison video link. The judge's exposure to the case as a whole inevitably was greater than ours has been. On the other hand, the judge did not conduct a trial. In terms of the evidence, we have been able to view several times the same footage that was available to the judge. It is that footage which gives the clearest picture of what happened on that afternoon last March.

33. It is apparent from the footage that the offender deliberately picked up a heavy chair, lifted it over his head and projected it at Mr McLeod. Even when he did that for the first time Mr McLeod posed a limited threat. When the offender used a heavy chair to attack Mr McLeod for a second time, there was, as the judge found, no threat. Mr McLeod was being held. Miss Gavin shouted at him to stop. As the judge found, the offender then was acting in anger and by way of retaliation. The judge concluded that the unlawful act involved a risk of really serious harm to Mr McLeod which would have been obvious to the offender. That conclusion was inevitable. The judge went on to say that the offender was initially motivated by a desire to defend himself and others. It could be said that that was a generous view to take given what is apparent on the CCTV and other footage. Even if it was a reasonable view, it was of insignificant weight when assessing the blow administered by the offender with the second metal chair.

34. As the judge found, there was a clear and obvious high culpability factor. The feature serving to reduce culpability in relation to the fatal blow was of very limited significance.

In our judgment, the offence was at the upper end of the category range for medium culpability. The judge acknowledged, correctly, that personal mitigation can only have a limited effect when the consequences of offending are so devastating, as was the case here. He reduced the notional sentence by 12 months to allow for the mitigation. We do not say that that reduction was unreasonable but we are satisfied that it should have been applied to a sentence significantly longer than six years' custody for all the reasons we have given. We accept, as Mr Bentley has urged upon us, that this was not an incident which took time to develop. It is possible to time it precisely by reference to the CCTV footage. It was not an incident that was instigated by the offender in the sense that he did not start to behave in an aggressive and confrontational way. However, as the judge observed, by the time the second chair was used in a violent manner on the head of a man who was at that stage posing no threat, the offender was acting out of anger and in a retaliatory fashion. In our judgment, the sentence before mitigating factors were taken into account should have been in the region of eight years' custody. Thus, the proper sentence prior to reduction for plea was seven years' custody.

35. Had 25 per cent been applied to that figure and the resulting sentence been a matter of consideration for this court, it may or may not be the case that we would have concluded that that sentence was unduly lenient. But the matter does not end there. We turn to the question of reduction for the plea of guilty. The way in which the proceedings unfolded was unusual. First, it was only some three months after the attack on Mr McLeod that the offender was charged with causing his death. That was inevitable given the time that it took for Mr McLeod to die from his injuries and the investigation as to causation that followed the death. Second, the prosecution had a change of heart very much at the eleventh hour as to the acceptability of a plea to manslaughter.

36. However, the offender's approach to a plea of guilty was apparent from an early stage. He initially was charged with offences relating to really serious harm. In April 2024, when Mr McLeod was still alive, the offender pleaded not guilty to any form of unlawful assault. His defence was noted as being self-defence or defence of another. At no time prior to Mr McLeod's death did the offender indicate any form of plea. After he had been charged with murder the offender at no point indicated a plea of guilty to manslaughter until the day of trial. The plea only was tendered when the prosecution said in terms that would resolve the case. The offender's lack of a command of English and his lack of intellectual capacity, as referenced by the judge in the e-mail to the Criminal Appeal Office, might have been of some consequence had the issue been whether he had understood the nature of the case at a single hearing. In fact, he had been represented throughout the course of the proceedings at various hearings. The issue was relatively straightforward: was there any reasonable basis on which self-defence or defence of another might have arisen on the facts? The judge in his sentencing remarks made it clear how unrealistic such a defence would have been. That is something that this offender would have been quite capable of understanding. In the course of oral submissions it was argued by Mr Bentley that a plea to manslaughter at some earlier point would have removed the defence of self-defence on the count of murder. That of course is correct. But as the judge found, the defence of self-defence simply did not arise on the facts. The offender, in our judgment, can hardly take advantage of an effort by him to try and run a defence which simply was not there.

37. What of the vacillation by the prosecution? As we have noted, the offender had an opportunity at a very early stage before Mr McLeod's death to accept he had acted unlawfully. He did not do so. He did not plead guilty to manslaughter when he was first

charged with murder, as he could have done. He did not do so when the count was added to the indictment. None of that was affected by the approach taken by the prosecution.

38. Mr Bentley's reliance in his written submissions on *Bertram* is, with respect, unhelpful. That was a decision at a time when there was no guideline in relation to reduction for plea. More particularly it pre-dated the Sentencing Council guideline by approximately 14 years. The approach in that guideline is very different to that which might have been appropriate in 2003, always assuming that the factual situation in *Bertram* could be regarded as analogous to this case.

39. We consider that the submission made by the prosecution before the judge was correct. Paragraph F3 in the reduction for plea guideline provided the answer to the problem faced by the judge. There was no indication of a plea of guilty to the offence of manslaughter until the day of trial. It had been a permissible alternative from the point at which the offender had been arraigned on the count of murder. The judge ought to have been fortified in that conclusion by what had happened when the offender had faced charges contrary to sections 18 and 20 of the Offences Against the Person Act 1861. There was no indication of any admission of any unlawful act at that point.

40. In our judgment the reduction for the plea of guilty should have been at or around 10 per cent. On the basis that the sentence before such reduction should have been seven years' imprisonment, a sentence of six years' imprisonment would have been an appropriate outcome. That is a little more than 10 per cent reduction. It gives some modest effect to the effect of vacillation which concerned the judge. As has been pointed out by Mr Bentley, a judge can depart from the strict terms of a guideline if it is in the interests of justice to do so. In order to effect appropriate justice to the offender in this case that slightly greater level of reduction was sufficient.

41. The sentence imposed was only a little more than half of the sentence which we conclude was the reasonable sentence in all of the circumstances. We conclude that the sentence was unduly lenient. We are not obliged to increase a sentence in those circumstances. We retain a discretion. In a case where a man has died due to the use by the offender of a weapon which carried a high risk of death or serious injury we conclude that we are compelled to exercise our power pursuant to section 36 of the 1988 Act. We give leave to refer the sentence imposed in the Crown Court at Canterbury. We quash the sentence of three years nine months' imprisonment. We substitute a sentence of six years' imprisonment.

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