Neutral Citation Number: [2021] EWCA Crim 842

Case No: 2019 02845 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
THE COMMON SERJEANT OF LONDON (HH JUDGE MARKS QC)
T2018 07065

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2021

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE HENSHAW
and
HH JUDGE ZEIDMAN QC, RECORDER OF REDBRIDGE
Sitting as a Judge of the Court of Appeal Criminal Division

- -

Between:

ISAIAH POPOOLA	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Mr C Henley QC (assigned by **the Registrar of Criminal Appeals**) for the **Appellant**
Mr P Jarvis (instructed by **Crown Prosecution Service, Appeals and Review Unit**) for the **Respondent**

Hearing date: 27 May 2021

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JUDGMENT

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed not before 10:30 am Friday 11 June 2021.

Lord Justice Holroyde:

1. The principal issue in this appeal against sentence is whether the judge, in determining the appropriate minimum term to be served under a life sentence imposed for murder, gave sufficient weight to the fact that the appellant was aged only 18 years 9 months at the time of the offence.

2. After a trial at the Central Criminal Court before the Common Serjeant and a jury, the appellant was convicted of four offences: inflicting grievous bodily harm on Hamza Syed, contrary to section 20 of the Offences against the Person Act 1861 (count 1); manslaughter of Abdikarim Hassan (count 3): violent disorder, contrary to section 2(1) of the Public Order Act 1986 (count 4); and murder of Sadiq Mohammed (count 5). On 9 July 2019 he was sentenced on count 5 to custody for life, with a minimum term of 28 years (less the 499 days which he spent remanded in custody whilst awaiting his trial). On count 3, he was sentenced to custody for life pursuant to section 82A of the Powers of Criminal Courts (Sentencing) Act 2000, with a minimum term of 9 years. On counts 1 and 4 he was sentenced to concurrent terms of 42 months and 3 years detention.

3. The appellant appealed against that sentence by leave of the full court. At the conclusion of the hearing we announced that we would dismiss the appeal and would give our reasons in writing. This we now do.

The facts:

4. The offences were committed over a period of about 2 hours on 20 February 2018. For the purposes of this appeal, it is sufficient to give a brief summary of the relevant facts.

5. The appellant, and his co-accused, lived in the Camden area of London. On 18 February 2018 his friend Lewis Blackman was murdered in that area. A shrine to the memory of Lewis Blackman was erected on the Peckwater Estate. The appellant and others were gathered there on the evening of 20 February 2018. A group of young men, some with their faces masked, were seen leaving the estate in two vehicles: a stolen Mercedes van and a BMW car.

6. Count 1: at 2014 CCTV captured the BMW in London NW1. Two young men were chased and attacked by two men armed with knives. Hamza Syed was stabbed in the back, and required treatment in hospital.

7. Count 3: fifteen minutes later, in London NW5, CCTV captured the BMW following 17 year old Abdikarim Hassan. Moments later, he was attacked and stabbed. He sustained wounds to his chest and back and died at the scene. As he lay on the ground, the Mercedes van was seen driving past.

8. Count 4: at 2115 the Mercedes van was in London E8. Seven men armed with knives and machetes left the van and ran towards a group of men. They caught one and punched and kicked him, but were then disturbed and returned to the van. Their victim fortunately escaped serious injury.

9. Count 5: at 2213, in the Belsize Park/Chalk Farm area, four masked men were seen to leave the Mercedes van and run in pursuit of two young men. One of the two succeeded

in hiding. The other, Sadiq Mohammed aged 20, sought refuge in a car, but was dragged from it by his pursuers. He was put to the ground and stabbed repeatedly, suffering 30 wounds from which he later died.

10. The appellant was arrested on 22 February 2018. He attempted to discard a car key, which proved to fit the BMW car, found parked in the local area. Abdikarim Hassan's blood was found on the bonnet and rear seats of the car. The appellant's DNA was found on a facemask in the boot. Sadiq Mohammed's blood was found on one of the appellant's trainers.

11. Even that brief summary is sufficient to show the seriousness of the offending. The appellant was convicted of offences committed in four discrete violent incidents. Two youths were killed, bringing anguish and heartache to their bereaved families, to whom we offer our condolences. A third was stabbed in the back and seriously wounded. A fourth was lucky to escape serious injury.

The sentence:

12. The judge in his sentencing remarks thought it likely that these attacks were carried out in revenge for the murder of Lewis Blackman, though it was unclear whether the victims had been deliberately targeted. He continued:

> "What is clear is that whatever the reason, you were fired up that night and you engaged in what can only be described as an orgy of street violence, the nature and extent of which was truly shocking. Some, but not all, of it was captured on CCTV, which was truly chilling to watch. It must have been absolutely terrifying for the victims, as well as for members of the public who witnessed some of these events."

13. The judge accepted that the appellant may not have been one of the assailants in counts 1 and 3, and may have been convicted as a secondary party, though it made little difference. The jury's verdict on count 3, acquitting the appellant of murder but convicting him of manslaughter, must have been on the basis that he lacked the necessary intent for murder. The judge was sure that the appellant was one of the seven armed attackers in count 4, and was an armed member of the group who dragged Sadiq Mohammed from the car and repeatedly stabbed him (count 5): a short but sustained and brutal attack, with intent to kill, on an outnumbered, defenceless victim.

14. The appellant had shown no remorse. The judge noted his age, 18 at the time. He disregarded the appellant's previous convictions (mainly for motoring offences), and accepted that these offences were entirely out of character.

15. The sentence on count 5 was intended to reflect the seriousness of all the offending. The judge emphasised that the offences were separate incidents in different locations. Paragraph 5A of schedule 21 to the Criminal Justice Act 2003 applied to count 5, and so the starting point for the minimum term was 25 years. In determining the minimum term of 28 years, the judge said,

> "I take account of your youth, as well as your relatively good character, and I make it plain that in particular, but for your

> youth, the minimum term in your case would have been in excess of 30 years. I have to set against your youth and your relative good character the fact that you were involved in four separate incidents and the fact that you killed two people, albeit that your conviction on count 3 was for manslaughter. Your conduct, Popoola, throughout these terrible events, in which you were a constant presence from first to last, can only be described in my judgement as calculated, vicious, cowardly and wicked beyond belief."

16. A co-accused Ben Drummond, who was convicted on counts 4 and 5, was sentenced to custody for life with a minimum term of 23 years. He was some 6 months younger than the appellant, but had a worse criminal record.

The appeal:

17. The full court granted leave to appeal against sentence on a single ground, namely that the minimum term was manifestly excessive because insufficient account was taken of the appellant's very young age, and proximity to the age threshold which increases the appropriate starting point from 12 years to 25 years: there should have been a greater downward adjustment of the minimum term to reflect this.

The proposed fresh evidence:

18. The full court also ordered a report from a child psychiatrist or psychologist. A report was obtained. It was unsatisfactory, and is no longer relied upon; but it raised for the first time an issue as to whether two head injuries sustained by the appellant in adolescence – a blow with a baseball bat in 2015, and a punch to the head about a year later - may have affected his subsequent behaviour. Both attacks had resulted in a loss of consciousness. The appellant's parents have made statements to the effect that from about the age of 15 or 16, he lost interest in his school studies, seemed overly influenced by his friends and started getting into trouble.

19. In the event, the appellant seeks to adduce as fresh evidence, and to rely upon in support of his ground of appeal, reports subsequently obtained from a consultant neurologist, Dr Yogarajah and a consultant neuropsychiatrist, Dr Igboekwu. Both those expert witnesses were asked to consider the impact of the head injuries on the appellant's neurological development and behaviour.

20. Dr Yogarajah reviewed medical records from the hospital at which the appellant was treated following the first head injury, including a CT scan of the appellant's head and cervical spine which was reported as normal, and general practitioner records, which contained no other record of head injury and no significant medical history. He felt it was likely that the appellant had suffered, at most, a probable mild traumatic brain injury. He discussed the complexity of the relationship between the fact that crime peaks in late adolescence and early adulthood, and the fact that traumatic brain injury is very common in young persons. He observed that, while traumatic brain injury may be a risk factor for crime, the relationship is not simple and "is confounded by an array of other pre-morbid factors". Moreover, it is probable that the risk of crime after mild traumatic brain injury is lower than that associated with more severe brain injury. On the information available to him, it was in his opinion difficult to ascribe the reported

changes in the appellant's personality and behaviour solely to the reported head injuries, and more likely that they were one of numerous factors.

21. Dr Igboekwu similarly noted that, apart from the CT scan in 2015, the medical records contained nothing relating to any head injury. He felt that the appellant had suffered an enduring personality change following the trauma in 2015. The parental observations of changes in the appellant's behaviour and outlook after the head injuries were consistent with what might be seen in an adolescent who had suffered brain injury. However, he found no cognitive deficit and could not quantify the level of antisocial personality behaviour attributable to his changed personality or increased level of suggestibility.

The legal framework:

22. The provisions of schedule 21 to the Criminal Justice Act 2003 applied to this offence. They have now been replaced by the corresponding provisions of schedule 21 to the Sentencing Act 2020. So far as is relevant for present purposes, the new provisions are materially the same as the old.

23. In relation to the offence of murder (count 5), the judge was required to, and did, impose the appropriate form of life sentence. He also had to determine the appropriate minimum term to be served before the appellant can be considered for release on life licence. In that regard, schedule 21 specifies a number of different starting points. It was and is common ground that the appropriate starting point in this case, pursuant to paragraph 5A, was 25 years. In the case of an offender aged under 18 at the time of the offence, however, the appropriate starting point would have been 12 years (paragraph 7).

24. By paragraphs 8 and 9 of the schedule:

> "8. Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point.
>
> 9. Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point), or in the making of a whole life order."

25. The 2003 Act thus prescribed (and the 2020 Act prescribes) very different starting points in a case such as this, depending on whether the offender had or had not attained the age of 18 at the time of the murder. In *R v Peters (Benjamin) and others* [2005] EWCA Crim 605, [2005] 2 Cr App R (S) 101the court emphasised the need to consider not only the chronological age but also the maturity of the offender. The court was there concerned with a case in which the appropriate starting point was 15 years for an adult offender, but the principles stated apply equally to a case such as the present in which the difference between the starting points, depending on age, is much greater.

26. At paragraphs 11 and 12 the court stated:

> "11. It has long been understood that considerations of age and maturity are usually relevant to the culpability of an offender and

the seriousness of the offence. Schedule 21 underlines this principle. Although the passage of an 18th or 21st birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual's true level of maturity, insight and understanding. These levels are not postponed until nor suddenly accelerated by an 18th or 21st birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity. In two of these appeals, the offender was aged 19 and a half when the offences were committed. In the third, the offender was 18 years and two months. If the murder which culminated in the death of someone precious to the third offender had happened in the course of a dispute three months earlier, she would not quite have reached 18 years. A rigid application of the starting point in Sch.21 would mean that the three months difference in age should be reflected by a difference of three years in the sentence. Sentencing decisions cannot be prescribed by such accidents of time. We can illustrate this problem a little further by taking the all too familiar case of a group of youths convicted of murder following an attack on a passer-by in the street late at night. They may be 17, 19 and 21 years old. Normally the 21 year old would be likely to be the most mature. But there are cases where the 17 year old, although the youngest, is in truth the leader of the group, and the most violent of the three, and the most culpable, who triggered off the attack and indeed inflicted the fatal blow. It may produce an unjust result if on the basis of his age alone, the minimum term in his case were lower than the sentence on his co-defendants. Therefore, in relation to offenders aged up to 21 or even 22 years, the determination of the minimum term in accordance with the legislative framework in Sch.21 needs to be approached with an acute sense of how inevitably imprecise the statutory criteria may sometimes be to issues of culpability, and ultimately to "seriousness" as envisaged in s.269 itself.

12. The first stage in the process nevertheless remains the prescribed statutory starting point. This ensures consistency of approach, and appropriate adherence to the relevant legislative provisions. Sch.21 does not envisage a moveable starting point, upwards or downwards, from the dates fixed by reference to the offender's 18th or 21st birthdays. Nor does it provide a mathematical scale, starting at 12 years for the 18 year old offender, moving upwards to 13 years for the 19 year old, through to 14 years for the 20 year old, culminating in 15 years for the 21 year old. The principle is simple. Where the offender's age, as it affects his culpability and the seriousness of the crime justifies it, a substantial, or even a very substantial discount, from the starting point may be appropriate."

27. The same principles were restated, in the context of offences other than murder, in *Attorney General's Reference, R v Clarke* [2018] EWCA Crim 185, [2018] 1 Cr App R (S) 52 at paragraph 5:

> "Reaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R. v Peters [2005] EWCA Crim 605; [2005] 2 Cr. App. R. (S.) 101* (p.627) is an example of its application: see [10]–[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. The Age of Adolescence: *thelancet.com/child-adolescent* ; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday. The ages of these offenders illustrate the point. The youth and immaturity of Clarke and Thompson were appropriate factors for the judge to take into account in these cases even though both were over 18 when they offended."

28. In *R v Balogun* [2018] EWCA Crim 2933, a case involving sexual offences, the court at paragraph 41 referred to *Clarke* and to the Sentencing Council's definitive guideline Sentencing children and young people, and said:

> "… the fact that the appellant had attained the age of 18 before he committed the offences does not of itself mean that the factors relevant to the sentencing of a young offender had necessarily ceased to have any relevance. He had not been invested overnight with all the understanding and self-control of a fully mature adult. It is also relevant to note that if the appellant had committed his offences a few months earlier than he did and had therefore been under 18 at the time of the offending, a court sentencing him at a later date would have been required by section 6.2 of the Definitive Guideline to "take as its starting point the sentence likely to have been imposed on the date at which the offence was committed"."

29. The importance of considering not only the chronological age but also the maturity of a young adult offender is also emphasised in the Sentencing Council's General guideline: overarching principles. It is unnecessary, for present purposes, to consider every aspect of the relationship between that guideline and Schedule 21 in cases of murder. The guideline gives an expanded explanation of the common mitigating factor "age and/or lack of maturity" which includes the following:

> "Age and/or lack of maturity can affect:
>
> the offender's responsibility for the offence
>
> the effect of the sentence on the offender

> Either or both of these considerations may justify a reduction in the sentence.
>
> The emotional and developmental age of an offender is of at least equal importance to their chronological age (if not greater).
>
> In particular young adults (typically aged 18-25) are still developing neurologically and consequently may be less able to:
>
> evaluate the consequences of their actions
>
> limit impulsivity
>
> limit risk taking
>
> Young adults are likely to be susceptible to peer pressure and are more likely to take risks or behave impulsively when in company with their peers.
>
> …
>
> There is a greater capacity for change in immature offenders and they may be receptive to opportunities to address their offending behaviour and change their conduct.
>
> Many young people who offend either stop committing crime, or begin a process of stopping, in their late teens or early twenties… ."

The submissions:

30. Mr Henley QC, on behalf of the appellant, accepted that a substantial minimum term was inevitable, but submitted that the judge failed to give sufficient weight to the important principle to which we have referred, which he said required the minimum term to be reduced by "significantly more than a year or two" below the statutory starting point. He placed particular emphasis on the General guideline, and invited the court to view the offences as "a relatively spontaneous and emotional reaction to the death" of the appellant's friend, and thus an example of the impulsive, risk-taking behaviour in the company of peers to which the guideline refers.

31. Mr Henley pointed out that if the appellant had been just 9 months younger at the time of the offences, the starting point for the minimum term would have been 12 years; and he relied in addition on the expert evidence as showing that the appellant's behaviour had been affected by the traumas to his brain. He accepted that the effects of the brain injuries did not end the appellant's culpability for his crimes, but submitted that this was an important additional mitigating factor. In all the circumstances, he submitted, the minimum term of 28 years did not adequately reflect the principle that a young adult, who is still developing, should be treated differently from, and therefore less harshly than, a fully-formed adult. Adopting words used in *Peters*, he submitted that in this case "a substantial, or even a very substantial discount" should have been made from the statutory starting point.

32. Mr Jarvis, for the respondent, submitted that the expert evidence depended entirely on the information provided by the appellant and his parents, and that the suggested effects of significant head injury – relied on for the first time at the appeal stage - were unsupported by any independent medical record. He submitted that the proposed fresh evidence did not meet the criteria in section 23 of the Criminal Appeal Act 1968 and should not be received by the court.

33. In any event, he submitted, the judge did take account of the appellant's age, but had to impose a minimum term which reflected the seriousness of all four offences, including one of manslaughter. Those offences, committed over a period of about 2 hours, could not be regarded as impulsive, and the appellant must have foreseen the consequences of himself and others attacking their victims with knives. Mr Jarvis accepted that the young age of the appellant had to be reflected in a sizeable reduction from the statutory starting point, but submitted that the judge must have made that reduction before taking account of the other serious offences.

34. We are grateful to both counsel for their very helpful submissions.

Analysis and conclusions:

35. As *Peters* makes clear, the provisions of schedule 21 (to both the 2003 and the 2020 Acts) underline the principle that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence. Thus the principle is as relevant and important in cases of murder as it is in relation to any other type of crime, notwithstanding that the schedule identifies starting points which differ, and in some respects differ dramatically, according to the age of the offender. Those differing starting points will in some circumstances make it necessary to specify a minimum term which is longer than the lifespan of the offender; but they should not be treated as a cliff edge from which an offender must inevitably fall as soon as he attains the relevant age.

36. It is of course important for a sentencer not to count a factor twice in the course of the sentencing process, and it must therefore be recognised that considerations of age and maturity are to some extent built into the lower starting point applicable to offenders aged under 18. The application of the principle to the facts of a particular case cannot, however, be reduced to an arithmetical process. The sentencer must consider the offender's level of maturity at the time of the offence, and assess the extent to which young age and lack of maturity reduced the offender's culpability in committing the murder. If a long period of time has passed between the commission of the crime and the sentencing hearing, it will be necessary to consider whether there has been significant maturation during that period.

37. We accepted Mr Henley's submission that considerations of age and maturity should have resulted, in the circumstances of this case, in a reduction of "more than a year or two", from the statutory starting point. We did not however accept that the judge only made a modest reduction of that kind. He clearly had the young ages of both the appellant and Drummond well in mind. However, he also rightly had in mind the number and seriousness of the offences which had to be reflected in the appellant's minimum term. The appellant was involved, as the judge said, in four distinct attacks. Either the victims were targeted by way of revenge for the death of Lewis Blackman, or they were chosen at random as victims of the "orgy of street violence": whichever

be the case, the attacks, by young men armed with knives, were grave offences of a kind which causes great concern to the public. The manslaughter of Abdikarim Hassan, count 3, attracted a guideline starting point of 18 years' custody, with a range from 11 to 24 years. The judge, having presided over a lengthy trial, was in the best position to assess the level of the appellant's culpability. There was no evidence before the judge which suggested that the appellant was any less mature than his peers.

38. As to the proposed fresh evidence, we would be prepared to accept as a fact that the appellant had twice been rendered unconscious by blows to his head when he was in his mid-teens. The expert evidence of Dr Yogarajah and Dr Ikboegwu is clearly capable of belief, and would have been admissible in evidence at the sentencing hearing. We were however satisfied that the evidence did not afford any ground for allowing the appeal. At most, in our view, it provided a partial explanation of one of the reasons why, sadly, the appellant seems to have lost his way as an adolescent and fallen into bad company. The evidence did not provide any basis for regarding the appellant as materially less culpable than he would otherwise have been for willingly involving himself in these crimes, and in particular for his deliberately taking part in stabbing to death someone even younger than himself. We therefore concluded that the evidence of the two witnesses was not admissible pursuant to section 23 of the Criminal Appeal Act 1968, and so declined to receive it.

39. In those circumstances, we were satisfied that the minimum term imposed by the judge was within the range properly open to him to reflect the seriousness of the offending as a whole. We think it important to emphasise the combined gravity of the murder and the three other offences. When the judge observed that, but for the appellant's young age, the minimum term "would have been in excess of 30 years", he must in our view have had in mind that a mature adult convicted of such serious offending would merit a minimum term significantly in excess of 30 years. We were therefore satisfied that the reduction made on grounds of young age and maturity was significantly more than the year or two which Mr Henley suggested. In all the circumstances, the minimum term which this appellant was ordered to serve was stiff, but was not manifestly excessive.

40. It was for those reasons that we refused the application to adduce fresh evidence and dismissed the appeal.