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IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT CHELMSFORD
HHJ MORGAN T20227099
[2024] EWCA Crim 1345

CASE NO 202304084/B4-202304086/B4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 23 October 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE SWIFT

MR JUSTICE GRIFFITHS

REX
V
"EE"

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MS S ELLIOTT KC appeared on behalf of the Appellant.
MR C PAXTON KC appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE MACUR:

1. There are Family Court reporting restrictions which protect the identity of "JE" (the child of the applicant/appellant and the deceased). In those circumstances, we do not intend to identify the victim by name, lest to do so reveals the identity of her child. We intend no disrespect in referring to her throughout this judgment as "the deceased". It also means, of course, that we must edit the name of the applicant/appellant who is the father of JE.

2. On 26 September 2023, EE was convicted, after trial, of murdering his wife on 1 June 2022. The jury thereby rejected his partial defence of diminished responsibility. The trial judge had previously ruled that there was insufficient evidence to leave partial defence of a loss of control to the jury. EE was sentenced to life imprisonment, with a minimum term of 25 years less time spent on remand.

3. He renews his application for permission to appeal against conviction, following a refusal by the single judge, and appeals against sentence with the leave of the single judge. He is represented by Ms Elliott KC, the prospective respondent is represented by Mr Paxton KC

Application/Appeal

4. The single draft ground of appeal against conviction is that the judge was wrong in law not to leave the partial defence of loss of control to the jury. The single ground of appeal against sentence is that the 25-year minimum term was manifestly excessive.

Relevant background facts

5. EE and the deceased were intending to divorce. EE was convinced that his wife was unfaithful to him, albeit it was agreed between the prosecution and the defence at trial that she was not. The prosecution case was that EE's jealousy ultimately caused him to lose his temper in the kitchen of the marital home and stab his wife to death.

6. A pathologist found there were 15 areas of sharp force injury to the deceased distributed over her face, neck, upper chest and both hands. The incised wounds to the hands were in keeping with defensive injuries. The fatal injury was a stab wound to the neck that divided the left carotid artery resulting in severe haemorrhage with subsequent hypovolemic shock and cardiac arrest. The pathologist concluded that the findings were consistent with a sustained sharp-force assault involving multiple movements of a bladed weapon in the direction of the deceased.

7. EE was found with stab wounds to his abdomen which he claimed the deceased had inflicted prior to his attack upon her. EE's case was that he was the victim of domestic abuse. He had made contemporaneous and near contemporaneous allegations to friends and acquaintances of incidents of mental suffering and of minor physical injuries which he said had been inflicted upon him by the deceased in the past.

8. Also the defence relied upon a video, shot close in time to the killing, in which JE complained that her mother had injured her arm by, as the judge described, "twisting or pulling it".

9. The applicant made "no comment" in interview and did not give evidence at trial. As to

this, see paragraph 43 of the case of *Goodwin* referred to hereafter; that is a defendant who does not assert a loss of control does not necessarily loose the opportunity to pursue that defence but this may factor into a judge's 'vigorous' evaluation of the sufficiency of evidence in due course.

10. EE told two psychiatrists and a psychologist, who had prepared reports prior to trial, that he was in the kitchen with the deceased and he asked her if they could talk. He said that the deceased became angry and stabbed him. He remembered taking the knife from the deceased and then having a flashback about JE and what had happened to her but he had no memory of stabbing the deceased. To the psychologist he actually uttered the words, "I lost control".

11. At the close of the prosecution and the psychiatric evidence, the judge indicated that there was insufficient evidence of loss of control and that the partial defence would not be left to the jury. He subsequently gave a written ruling upon the same. The ruling summarises the evidence before the jury, the submissions of Ms Elliott and Mr Paxton on the point and indicates the legal principles, which he described as "not controversial", that he applied to the evidence led before the jury. We see no good reasons to reiterate all of those principles now well traversed in the authorities in this renewed application for permission to appeal, albeit we refer to two authorities below which have particular relevance in respect of certain aspects of this case.

12. Paragraphs 45 to 58 of the judge's ruling are the pertinent paragraphs so far as this renewed application is concerned. They read as follows:

“45... His only claim to have lost control was made to the psychologists and psychiatrists who were assessing him primarily to see whether the partial defence of diminished responsibility was available to him.

46. In my judgement a bare assertion, although not determinative of the issue, in the circumstances of this case cannot amount to evidence of loss of control sufficient to leave the issue to the jury. My judgement is reinforced by the defendant’s decision not to give evidence in his own defence.

47. However... [the judge considered that a] bare assertion of loss of control in the light of the other evidence...may support loss of control.

48. In considering the other evidence and for the purposes of my ruling I am going to assume, having vigorously examined the evidence, the following as being correct as it is the most favourable view of the evidence to the defendant.

49. Firstly, there is some independent evidence to support his case that [the deceased] had physically assaulted him in 2017 and in 2021. There may have been other instances. However, I do not accept the frequency alleged by EE as it is not supported by independent evidence. Nor do I accept that in the therapy session on the 3rd of February 2022 EE was describing [the deceased] threatening him with a knife on a previous occasion. I therefore conclude that the last physical assault was in 2021. There is no independent evidence of [the deceased] emotional abusing EE.

50. Secondly that there was an incident between [JE] and her mother that upset [JE].

51.Thirdly, I am prepared to accept that [the deceased] did stab EE with a knife causing the two wounds to his stomach...[The applicant] also has an injury to his hand that is consistent with a ‘defence type’ injury.

52. I deal with previous incidents of domestic assault by [the deceased] towards the defendant and its potential relevance to events on the 1st of June 2022. The evidence raised during the trial, to the extent that I have assumed it to be true, demonstrates at best physical assaults of a minor nature. I find on analysis of the evidence that such incidents were not frequent, and the last

> physical act independently evidenced occurred in 2021... The defendant complained to others but did not state that he considered the assaults serious. There is evidence that the defendant's behaviour towards his wife was described by her as being 'intimidating, threatening and abusive.'
>
> 53. I conclude that where [the deceased] was physically and 'psychologically' abusive as [the applicant] claims, the abuse was not sufficiently contemporaneous with or of sufficient gravity that would explain or justify his actions on the 1st of June 2022, over a year after the last physical violence.
>
> 54. The alleged assault of [JE] standing alone or in combination with the earlier incidents of domestic violence would not be sufficient in my judgement to lay the ground for a loss of control.
>
> 55. On the 1st of June [the applicant] went to the kitchen... to speak about the divorce. He stated to the Doctors that [the deceased] became angry and abused him. She then stabbed him. He then states that he managed to get the knife off her. At that point he had a flashback of the 'attack on [JE]' or the 'video of her crying.' The next thing he recalls is his wife on the floor bleeding. If the defendant's account is accepted having obtained the knife after being stabbed, he doesn't immediately use it to inflict injury. In his mind, if his account to the Doctors is accepted as being accurate, it is not the past domestic violence, the two stab wounds inflicted moments before or a concern of [the deceased] obtaining another knife that has resulted in his using the knife. It is a flashback to what he claims was an assault on his daughter a few days before.
>
> 56. I am not assisted by looking at the nature and number of the injuries inflicted...
>
> 57. Whilst I accept that killings following a loss of control do sometime involve a frenzied or sustained attack, that is not to be equated with a loss of control per se and the statute does not require evidence of a frenzied attack. In this case I would conclude that the injury to the throat in combination with the grip marks to the arm is not suggestive of a loss of control."

13. The judge went on to find that the matters advanced on behalf of the defence provided:

> "... at best an extremely weak evidential basis for the contention

> that EE had lost his control at the time of the killing and does not begin to satisfy the test of sufficiency."

14. In Ms Elliott's written submissions in support of the renewed application for leave to appeal, she contends, in effect, that the absence of any premeditation, the fact that the circumstances of the attack appeared to be spontaneous and the nature of the injuries all supported loss of control. The applicant's comments made immediately after the neighbours at the scene were significant, she submits, that is, he said, "She stabbed me. I think I've killed her".

15. During the course of discussion, Ms Elliott argued that the nature and number of the injuries were indicative of a frenzied attack which, together with the fact that the applicant had never before inflicted physical violence on his wife and was a man in his 50s, of good character, and was not making any attempt to conceal or excuse what he had done should be seen as a sufficient factual basis indicative of a loss of control.

Discussion

16. Section 54 of the Coroners and Justice Act 2007 provides for the partial defence to a charge of murder if

    (1) (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

    (b)the loss of self-control had a qualifying trigger, and

    (c)a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to

D.

(2)For the purposes of subsection (1)(a), it does not matter whether or not the loss of control was sudden.

(3)In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

17. The trial judge must consider the three components of section 54(1) (a) – (c) of the Coroners and Justice Act 2009 sequentially. If the judge considers that there is "no sufficient evidence of loss of control (the first component) there will be no need to consider the other two components" (see *R v Gurpinar* [2015] EWCA Crim 178 at [13]).

18. Albeit that the judge in his ruling addressed and thereby appeared to conflate all three elements of the partial defence, his undoubted conclusion was that a rigorous evaluation of the circumstantial evidence did not indicate that the defendant had experienced ' a loss of control' in the absence of any evidence from the defendant, whether in interview or at trial to that effect .

19. We find that the judge quite clearly came to "a common sense judgment based on an analysis of all the evidence" (see *Goodwin (Anthony)* [2018] EWCA 2287 @ [35]). As Paragraph 38 of the case of *Goodwin* makes clear, the judge's duty is to conduct a rigorous evaluation of the evidence on the most favourable reading to the defendant. However, the statute and case law imposes a clear duty that s/he must withdraw any such defence from the jury if there is insufficient evidence of the same for to do

otherwise would lead to the defensive summing-up.

20. In so far as Ms Elliott seeks to pray in aid the "remarkable and relevant similarities" in *R v Turner* [2023] EWCA 1626, we would, if relevant, draw attention to the obvious several dissimilarities. We say if relevant because there can be no viable assistance that is obtained from a decision dependent upon its own facts and which does not expand on the well-established principles that have been well traversed in the authorities to which the judge referred.

21. Ms Elliott submits that a principle which does emerge from Turner is this Court disapproving the 'dismantling of arguments' that go in favour of the defence of loss of control.

22. We do not accept those submissions apply in this case. We have considered the 'similar' features , upon which Ms Elliott relies as indicated in [15] above but we do not find any of these points undermine the ultimate analysis of the evidence by the judge as regards the first stage of investigation, that is, was there sufficient evidence of a loss of control?

23. As we indicate above, the judge's ruling does cover evidence that could, subject to subsection (1)(a) being satisfied, go to trigger and normal self-restraint, but it is clear that he found no sufficient evidence of loss of control and we have no need to consider the other arguments posed by Ms Elliott regarding trigger and response. Consequently, the renewed application for leave to appeal conviction is refused.

Sentence

24. The judge was satisfied the offence occurred because the applicant (or appellant) could not accept the autonomy of the deceased as a woman, both within the marriage and in her work life. He found combined with the appellant's maladaptive personality traits and autism, this created tension which led to arguments. In April 2021, the judge found the appellant had developed an intense jealousy and become obsessed with proving infidelity which led to confrontations. That, assessment aside, the judge made findings of fact to the criminal standard, following trial, to the following effect. First, the appellant entered the kitchen to confront the deceased about the divorce and the relationship. In a message in January 2022, the appellant had said that if she did not accept his offer, he was going to make her life hell. The judge said:

> "I am sure that you entered that kitchen and confronted her in a manner that you knew was likely to upset her, make her angry and provoke a response."

Secondly, the grip marks on the deceased's arms were likely to have occurred when she did not want to talk to the appellant so he grabbed her. However, he proceeded on the:

> "on the most favourable basis to you, that she did have a knife at that stage, she may well have, to use your words, stabbed [you] but the injuries were not deep or penetrating.
>
> However, I am sure that if she did stab you, she had no intention to hurt you and she did not stab you as the aggressor...
>
> Whatever the true circumstances, there was a struggle. You obtained the knife. Your injuries were not life-threatening."

Thirdly, the deceased was stabbed repeatedly. There were 14 incised wounds and a deep

penetrating stab wound which divided the carotid artery from which she died. At the time of the fatal injury the deceased was:

> "on or close to the floor. She was no threat to you... She was defenceless ..."

There was an intention to kill.

Fourthly, the offence occurred in a domestic context. The appellant had spied on the deceased, surreptitiously recorded conversations during arguments at the house or during marriage therapy, spread false lies about her, had gaslighted her effectively and had denigrated her to their daughter.

25. So far as mitigation was concerned, the judge was not satisfied that the appellant's "maladaptive personality traits and autistic traits" did amount to a mental disorder, and whilst there could have been some impairment of ability to control actions through dysregulation that arises, it was not, in his judgment, substantial and therefore there was little mitigation to be afforded from that mental disorder. The judge noted that the appellant had no previous convictions but had been seen in the context of his behaviour towards the deceased as indicated above. The judge accepted, "albeit late in the day that there was some remorse".

26. The judge agreed that the appropriate starting point for the minimum term was 15 years, that is, in accordance with Schedule 21 paragraph 5 but considered that the cumulative aggravating features:

> "... take or elevate the starting point in this case to that which, ordinarily, would apply to those who have to hand or carry with the intention of using a knife."

We take that to mean, 25 years in accordance with Schedule 21 paragraph 4.

27. In summary, Ms Elliott submits that this was not Schedule 21 paragraph 4 case and, whilst the use of the knife in the deceased's own home in the context of an emotionally psychologically abusive relationship was a serious aggravating feature, the correct starting point should have been in the region of 20 years.

Discussion and Decision

28. The judge explicitly discounted a starting point of 25 years, because he could not say:

> "... on the facts that you took the knife into the kitchen or obtained it."

However, whatever the appropriate starting point specified in Schedule 21, there is no doubt that a judge, in reflecting what s/he regards to be the seriousness of the particular case before them, is entitled to arrive at a higher minimum term than that specified as a *starting point*. Equally the circumstances may call for a decrease from the appropriate starting point. It does not follow in this case that the judge regarded the presence of significant aggravating features to require him to move from paragraph 5 to paragraph 4 in Schedule 21.

29. During his sentencing comments, the judge found the appellant's remark that it may be

"easier to kill" on receiving advice from his solicitor regarding his intended divorce from the deceased was not a throw-away remark. Nevertheless, we bear in mind that the judge determined that although "There is some evidence... it is limited... it is not significant or of such a significance that it requires further aggravation of the offence."

30. There were also the undoubted aggravating features of the offence occurring within a domestic setting , previous domestic abuse, an intention to provoke and ultimately an intention to kill at the time of the infliction of the final blow.

31. We find no error in the judge's conclusions that, in the context of a domestic situation and the mental abuse that the judge found to have occurred, the situation did call for a marked increase from the 15-year starting point. However, we are persuaded that the judge gave insufficient weight to previous findings that the appellant had also been affected by the tensions within the marriage. The judge did find it likely that the deceased, after whatever provocation, did inflict the first blows. The injuries to the appellant did require his hospitalisation and surgery.

32. We are satisfied that the judge may reasonably have reached the starting point of 25 years bearing in mind all aggravating features. We agree with the judge that the fact of the appellant's maladaptive personality traits does not feature highly in the sentencing equation. However, we consider that taking into account what mitigation could be urged realistically on the appellant's behalf, as we indicate above, that a marked reduction was appropriate and the sentence is manifestly excessive.

33. Consequently, we quash the sentence of 25 years and in its place, we substitute a minimum term of 21 years less the 506 days spent on remand.

    To this extent and this extent only, we allow the appeal against sentence.

34. LADY JUSTICE MACUR: Is there any other matter arising, Ms Elliott?
35. MS ELLIOTT: No, thank you, my Lady.
36. LADY JUSTICE MACUR: Mr Paxton.
37. MR PAXTON: My Lady, no thank you.
38. LADY JUSTICE MACUR: Ms Elliott, thank you very much for your written and oral submissions today. Thank you, Mr Paxton, for your respondent's notice. Quite clearly a matter of import to all members of the appellant's family but also the deceased's family. It follows that in allowing the appeal against sentence we do not suggest that the loss of the deceased is any less grave or serious than that which everyone knew it to be, both a loss to her immediate family but most particularly to her daughter.
39. MS ELLIOTT: Quite so, my Lady.

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