IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203004/A3

[2023] EWCA Crim 241
Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 10 February 2023

Before:

LADY JUSTICE WHIPPLE DBE

MRS JUSTICE CUTTS DBE

RECORDER OF NORWICH
(HER HONOUR JUDGE ROBINSON)
(Sitting as a Judge of the CACD)

REX

V

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MS A HEALY KC & MR B WAIDHOFER appeared on behalf of the Applicant.

J U D G M E N T

LADY JUSTICE WHIPPLE:

Reporting Restrictions

1. An order under section 45 of the Youth Justice and Criminal Evidence Act 1999 was made in relation to the applicant in proceedings in the Crown Court in the following terms: no matter relating to the defendant shall, while he is under the age of 18, be included in any publication if it is likely to lead members of the public to identify him as a person concerned in the proceedings, and in particular (a) his name; (b) his address; (c) the identity of any school or other educational establishment attended by him; (d) the identity of any place of work and (e) any still or moving picture of him. We confirm that that order remains in force in relation to the current appeal proceedings.

Background

2. On 22 July 2022 the applicant was convicted of two offences following a trial at Harrow Crown Court. The trial judge was HHJ Dean. He was sentenced by the same judge on 12 September 2022. On count 1, a charge of murder, in relation to which the jury returned a conviction of the alternative offence of manslaughter, he was given an extended sentence of 13 years, comprising a custodial period of 10 years and an extended licence period of 3 years. On count 2, a charge of having a bladed article, he was sentenced to 2 years in a young offender institution to be served concurrently. The usual ancillary orders were made. He now renews his application for leave to appeal against sentence having been refused by the single judge.

3. The applicant was born on 4 December 2005. He was 15½ years of age at the time of

the offending; he was 16 years and 9 months old at the date of sentence. He was of previous good character.

The Facts

4. At approximately 8.30 am on Friday 11 June 2021 the applicant stabbed Jalan Woods-Bell who was also 15. Jalan was on his way to school. He was in the company of two friends when the applicant appeared on Blythe Road. Other members of the public and school children were also in the vicinity. The applicant was wearing a blue glove on his right hand and holding a large Rambo-style knife. In his left hand he was holding a mobile telephone and appeared to be filming. Jalan and his friends ran away from the applicant who gave chase. Jalan picked up a traffic cone in an attempt to fend the applicant off. The applicant stabbed and slashed Jalan across the face and his head with the knife. Jalan suffered six separate wounds to his face and head. Jalan was also in possession of a knife but he did not take it out during the attack. The applicant then fled the scene. Jalan was fatally injured by a stab wound to the back of his arm. He was pronounced dead at 9.31 am.

5. A post mortem concluded that the cause of death was a stab wound to the black of left arm which had divided the axillary artery.

6. Following the assault the applicant made his way to school in Southall arriving there at 9.27 am. En route he cleared his mobile phone and threw his clothes and the knife into the canal. Staff at the school had already been made aware of the events on Blythe Road and on arrival the applicant was detained by security officers at the school until police

attended. He gave "no comment" in his police interviews.

7. The background to this offending was gangs. The applicant was affiliated with "N Gang" from the Northholt area of West London. There was an ongoing dispute between N Gang and the "Rayners Lane Gang" from a neighbouring part of Northholt going into South Harrow. Material on the applicant's mobile telephone suggested that Jalan had recently switched alliances from N Gang to the Rayners Lane Gang and the applicant was seeking revenge. Text messages between March and June 2021 showed that the applicant had got someone else to purchase knives for him online using false identification. The messages suggested that he met with that person on 9 June 2021 to collect some of the knives, one of which was believed to have been used to kill Jalan two days later.

8. At trial the applicant's defence was that he had no intention to cause harm to Jalan and that he had good reason for having the knife with him that day. The indictment charged him with murder but the jury convicted of the alternative offence of manslaughter.

Sentence

9. In her sentencing remarks the judge recounted the shocking facts. She noted that the applicant was the aggressor and had attacked Jalan as he stood and even as he was on the floor. She noted the impact on the public by this offending because many passers-by, including children, witnessed this violence. She said that the applicant had filmed his actions, had posted pictures himself with other children in stupid poses on social media and had written lyrics which celebrated violence. She said he had an obsession with

knives, which he carried on a regular basis.

10. She held that the applicant was dangerous. He was easily led and was obsessed with knives and violence. She acknowledged the mitigating factors which had been advanced, that the applicant had been exploited by older gang members in the past, that the applicant was young and lacked maturity, that he had no previous convictions, that he had expressed some remorse although he had not accepted full responsibility for his actions.

11. She turned to the manslaughter guideline. She said it was important to avoid a mechanistic approach but that having heard all the evidence she accepted his culpability as very high falling within category A of that guideline. This was on the basis that Jalan's death was caused in the course of an assault which involved an intention by the offender to cause him harm falling just short of grievous bodily harm and in circumstances where the applicant's actions carried a high risk of death or really serious harm which was or ought to have been obvious to the applicant – he hit out at Jalan again and again with the Rambo knife even when Jalan lay on the ground. She identified the adult starting point of 18 years' custody in a range of 11 to 24 years. Alternatively, and if she was wrong about the offending falling in category A, she put the offending at the top end of category B which had a starting point of 12 years and a range of 8 to 16 years' custody, noting the aggravating features of this offending which put it at the top end of that category - the attack on Jalan as he went to school, in front of his friends and other school children, who were deeply traumatised by what they saw, an attack motivated by gang rivalry and aggravated by attempts to hide evidence. She took account of the

applicant's age and mitigation and on count 1 she imposed the extended sentence which comprised a custodial term of 10 years with an extension period of 3 years and on count 2 she imposed a concurrent sentence of 2 years.

Grounds of Appeal

12. We summarise the grounds of appeal advanced by Ms Healy KC and Mr Waidhofer on behalf of the applicant:

    (i) The judge erred in law in holding that the case fell within the "very high culpability" bracket of the guideline.

    (ii) Alternatively, the judge erred in law in holding that the case fell within the "high culpability" bracket.

    (iii) The judge erred in law by failing to set with clarity her starting point before any reduction and in particular by failing to set out the extent of any reduction for the applicant's age.

    (iv) The judge erred in law by failing to provide an adequate reduction from any notional starting point to reflect the applicant's age at the date of the offence and sentence.

    (v) The sentence imposed for each offence was manifestly excessive.

13. The applicant, by his counsel, accepts that it was open to the judge to put count 1 in category B by a finding of intent just short of an intention to cause grievous bodily harm. That finding was made in terms on page 5E of the sentencing remarks. It reflects the case as it was put to the jury, who were directed to consider the applicant's intention as part of the route to verdict. However, by counsel, the applicant argues that it was not

open to the judge, on the facts of this case and given the way the jury was directed, to find in addition that death was caused in the course of an unlawful act which carried a high risk of death. The judge purported to make that finding at page 5F. But, it is argued, that was to double count the same factors as had led to the finding that his intention was just short of an intention to cause grievous bodily harm; further, that was to rely on a factor listed in category B which did not apply in this case at all because it was only relevant in cases where recklessness had been an issue, which was not this case.

14. The applicant argued that by taking a starting point of 18 years the judge was apparently putting the case in category A and that it is not possible to follow her reference to category B high culpability in the alternative. Paragraph 6.46 of the guideline relating to sentencing children and young people suggests that a sentence in the region of half to two-thirds of the adult sentence is appropriate for those aged 15 to 17. But the judge failed to state her starting point before reduction and failed to state the amount of her reduction; indeed she made no express reference to this guideline at all. It is impossible to follow her reasoning and it appears that she gave no credit for mitigating factors other than youth. To arrive at a sentence of 10 years suggests an adult sentence of 20 years which is far outside the bracket for category B and is manifestly excessive.

15. In their oral submissions Ms Healy and Mr Waidhofer expanded these points with commendable precision and careful analysis. We are grateful to both of them.

Respondent's Notice

16. In their written submissions the Crown say that the judge was entitled to put this

offending in category A because the applicant's culpability was very high. In the alternative, the judge was entitled to conclude that this offending fell at the top of category B. There was no lack of clarity and no legal error in her sentencing remarks. An adult determinate sentence of 20 years or more would have been warranted in light of the extensive aggravation. The judge plainly did discount for the applicant's youth. The overall sentence was not manifestly excessive. The sentence for having a bladed article fell within the appropriate range for a category 1A offence and the concurrent sentence imposed for that was not manifestly excessive.

Criminal Appeal Office Note

17. Since the appellant's and the respondents' notices were filed and after permission was refused on the papers, the Criminal Appeal Office noted a technical defect with the sentence for having a bladed article. The judge imposed a sentence on count 2 of 2 years' detention in a young offender institution but the CAO points out that that sentence was not available under sections 249 and 250 of the Sentencing Code 2020. The statutory maximum for having a bladed article is 4 years. Section 249 specifies certain criteria to be met before a sentence of detention in a young offender institution can be imposed on a youth. One of them is that the offence must be subject to a statutory maximum of at least 14 years.

Discussion

Count 1: manslaughter

18. The first challenge is to the judge's categorisation of this offence as having high culpability within category A of the manslaughter guideline. The text of category A

states that very high culpability may be indicated by the extreme character of one or more culpability B factors and/or a combination of culpability B factors. It is therefore necessary to have regard to the factors listed at category B. There are four of them and the first two are relevant here:

> " - Death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling just short of GBH;
>
> - Death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender."

19. In our judgment, it was open to the trial judge to make a finding in relation to both factors. Specifically, we reject the proposition that the trial judge was not entitled to reach a finding on the second factor going to risk simply because the jury had not been asked to consider recklessness when reaching their verdicts. That is to confuse the jury's role in relation to the verdicts with the judge's different role when it comes to sentence. Having presided over the trial the judge was in a good position to assess whether the unlawful act committed by the applicant (the assault) carried a high risk of death or grievous bodily harm which was or ought to have been obvious to him.

20. The applicant argues that on the facts of this case the judge was in effect double counting when she found both of these category B factors established. We disagree. Intention is not the same thing as risk. Intention concerns a person's state of mind. Risk concerns the effects or possible effects of that person's actions. The same evidence may be relevant to both and thus there may be some degree of overlap between them, but they are logically and conceptually separate.

21. There is no challenge to the judge's finding that the applicant had the intention to cause harm just short of grievous bodily harm. When she made the finding about the risk posed by the applicant's actions she specifically referred to the fact that the applicant had created a very dangerous situation which had spiralled out of control very quickly (page 5F). She was focusing on risk as opposed to intention. She was justified in concluding that the applicant's actions had created precisely the foreseeable risk with which the second factor in category B was concerned.

22. We are supported in the conclusion that these two factors can co-exist in a case like this by the guideline, which lists both factors under category B without limitation of when either or both might apply. Further, previous constitutions of this Court have come to the same view when refusing renewed applications for leave to appeal against sentence. In R v Brown [2021] EWCA Crim 1764 at paragraph 32 the Court (Holroyde LJ as Vice-President) endorsed without question the sentencing judge's conclusion that both factors were present on the facts of that case which bore similarities to the facts of this case. In R v Noza Saffari [2022] EWCA Crim 167 at paragraphs 15 to 16, an argument along the lines now advanced by the applicant was considered and rejected (Andrews LJ giving the judgment of the Court). We are not persuaded that the R v Bola [2019] EWCA Crim 1507 is more than an illustration on its own facts of two category B factors co-existing and not in the event resulting in the sentence being elevated to category A. It says nothing of the reverse possibility that the presence of two category B factors may indeed elevate the sentence into A, that being a possibility expressly envisaged by the guideline.

23. In our judgment, it was open to the judge to find that both factors were made out on the evidence in this case. That we accept is possible as a matter of principle and indeed was permissible on the particular facts of this case. We accept that there is a degree of overlap but we are satisfied that the two factors remained distinct.

24. It is important to stress that the existence of these two factors does not automatically result in this offence being categorised as very high culpability. The introductory passage dealing with culpability in the manslaughter guideline is important:

> "The characteristics set out below are indications of the level of culpability that may attach to the offender's conduct; the court should balance these characteristics to reach a fair assessment of the offender's overall culpability in the context of the circumstances of the offence. The court should avoid an overly mechanistic application of these factors."

25. Moreover, it possible to put an offence in category A where there is just one factor present but it is of an extreme character. There are no rigid tramlines here. The categorisation involves an exercise in judgment.

26. We are satisfied that the judge had the guideline firmly in mind. She approached the issue of culpability without being overly mechanistic and she came to a fair assessment. We see no basis for questioning her overall assessment that the applicant's culpability was very high. After all, we repeat, the applicant had left home with his Rambo knife and he had gone out looking for Jalan; the context was gang violence; the attack happened in a public place with bystanders including children looking on; the attack was

brutal; the attack continued even after Jalan fell to the ground; the applicant then ran away and tried to conceal evidence.

27. Given our conclusions thus far it is not necessary for us to address the judge's alternative hypothesis that this offending fell at the top of category B. That deals with grounds 1 and 2.

28. As to the remaining grounds, the judge recorded that the starting point for an adult in category A was 18 years and a range of 11 to 24 years (page 5G). The judge did not state in terms her notional starting point for the applicant, nor did she refer in terms to the guideline on sentencing children and young persons or state what reduction she would allow to reflect the applicant's youth and immaturity. It would have been better if she had set out her workings more clearly. But the judge clearly had the correct principles in mind in passing sentence. The only question for us is whether her resulting sentence was manifestly excessive or arguably so.

29. The applicant argues that the starting point taken by the judge should not have been elevated above the category starting point of 18 years. Although the applicant, by counsel, accepts that there were aggravating factors to which we have already referred, it is submitted that there was also compelling mitigation which the judge failed to take into account, specifically that the applicant had previously been exploited by older gang members (this was of course noted by the judge at page 6A-B).

30. We consider that there is force in the Crown's contention that the notional sentence after

trial, if the applicant had been an adult, would be above the category starting point. That would be on the basis that the aggravating features, which are significant here, outweigh the mitigation by some margin. The aggravating features included the fact that the applicant had purchased a number of knives for his use and the use of other gang members; he distributed some of those knives to others and had hidden some for further use; he was a member of a gang and it was retribution in a gang context which motivated this killing; he took a knife to the scene; he committed the offence on a busy street at 8.30 am; many saw what happened and were traumatised by it; he had written lyrics which glorified this violence and this was to an extent premeditated violence; he tried to dispose of the evidence - the knife, the glove, the jacket - and he deleted material from his phone. These are aggravating factors of some potency, and we agree that the notional sentence for an adult might well have been around 20 years. On that basis the discount applied for youth and mitigation was 50 per cent. Even if the category starting point of 18 years is taken, the discount down to 10 years was around 44 per cent. On either scenario the judge applied a discount which was consistent with the youth guideline.

31. We stand back and ask ourselves whether this sentence was even arguably manifestly excessive. For the reasons we have given and to echo the view of the single judge, we conclude that it is not. That deals with grounds 3, 4 and 5.

32. This application for leave in the terms advanced by the applicant is therefore dismissed.

Count 2: having a bladed article

33. We turn then to the technical defect in relation to count 2 which has been identified by

the CAO. We have had regard to R v Carroll [2004] EWCA Crim 1367, a case involving section 91 of the 2000 Act (a predecessor provision to section 249 and 250 of the Sentencing Act 2020) in which the Court held at paragraph 27 that where an offender is to be sentenced for a number of offences, for some of which the power to order detention is available and for some of which it is not, the proper course is to order the offender to be detained for those sentences in respect of which power is available and to impose no separate penalty for those offences for which no power of detention exists. That approach was adopted in R v Dacus [2020] EWCA Crim 1879, where the Court quashed detention and training orders which had wrongly been passed concurrently with an extended sentence and substituted for them orders of no separate penalty. We adopt that approach here.

34. We grant leave to appeal for the sole purpose of correcting the defect identified. We quash the sentence of 2 years' detention in a young offender institution on count 2 and impose no separate penalty in its place.

Conclusion

35. We grant leave for the limited purpose of correcting the sentence on count 2. We correct that sentence in the manner we have identified by quashing the sentence of 2 years' detention and substituting no separate penalty on that count. In relation to all other grounds we dismiss this application for leave.
36. MS HEALY: With a degree of hesitation, given that although it is technical the Court has granted leave, I wonder whether it is bold to ask for a representation order.
37. LADY JUSTICE WHIPPLE: It is never "bold" to ask for one. If you do not ask you do

not get.

38. Ms Healy, we had considered in advance what the position in relation to representation would be and we thought then, and we confirm now, that it would not be appropriate for us to grant you a representation order. It is not that we think you should not get paid, it is that the defect which we have corrected in the end could have been corrected on the papers and did not require counsel to attend. But can I repeat my thanks to both of you for being here and for your very fluent and able submissions.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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