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No: 201106250/A6
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 13th March 2012

B e f o r e:
LORD JUSTICE JACKSON
MR JUSTICE IRWIN
HIS HONOUR JUDGE ROOK QC
(Sitting as a Judge of the CACD)

R E G I N A

v

ALAN KENNETH LEVEY

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Mr T Raggatt QC & Miss J Davidge appeared on behalf of the **Appellant**

Judgment

As Approved by the Court

1. LORD JUSTICE JACKSON: This is an appeal against sentence in a murder case.

2. The facts giving rise to this appeal are as follows. In February 2011 the appellant was living in a hostel at Hamble Court in Reading. He was a drug user. On the 22nd February 2011 the appellant had a conversation with Darren Akers, a fellow resident outside the hostel. The appellant asked Akers if there was anyone that Akers wanted dead. The appellant then said that he intended to kill someone, in particular a Big Issue seller called Alan. The appellant then showed Akers that he had a large kitchen knife inside his jacket pocket.

3. Akers did not take seriously what the appellant was saying. The appellant went off into the town carrying a suitcase and a bag. On the evening of 22nd February the appellant encountered a man called Thomas Wade in Chain Street, Reading. The appellant showed Wade two knives (one large and one small) and said: "I'm going to kill somebody, I'm looking for him now". Wade did not believe the appellant meant what he said.

4. At 11.29 pm that evening the appellant was back in Chain Street. This time the appellant was in the company of the victim, Damian Whyte. They can both be seen on the CCTV. Mr Whyte was known in Reading as an alcoholic, who slept rough or in hostels. The appellant and Mr Whyte walked off towards View Island on the River Thames. View Island is a quiet area, which is sometimes used by dog walkers or drug users.

5. When they arrived at View Island the appellant attacked Mr Whyte and stabbed him 25 times in the back, left shoulder and arm. Three of these wounds were deep enough to penetrate the lungs. Mr Whyte died as a result of blood loss.

6. After this attack the appellant went back into Reading. He can be seen in the town centre on CCTV at 12.23 am. Shortly after that he can be seen returning to the hostel. At 1.30 am the appellant spoke to another hostel resident, Jamie Belshaw. The appellant made some angry comments, then he went off to do some laundry. Then he said to Belshaw that he had stabbed Cockney Paul 30 times. "Cockney Paul" is another name for Damian Whyte.

7. The appellant also said: "I'm fucked now, I dropped my driving licence there and dipped his pockets for money too. I only stopped stabbing him because he was crying for his Mummy. He is fucking dead, he is bleeding out of his eyes, ears, his nose, everything. I stabbed him in the back and guts. It's like putting a hot knife through butter." The appellant said he had used a large knife which he had thrown in the river and that he was going to do the same with his clothes. Belshaw did not believe the appellant and told him to "fuck off."

8. At 9.30 am on Wednesday 23rd February Damian Whyte's body was found on View Island by a member of the public. Some time after midday on 23rd February the appellant visited his girlfriend, Siwan Ambler. He told her he had stabbed someone and might have killed them.

9. At 2.35 am on 24th February the appellant and Miss Ambler attended Reading police station. The appellant said that he wished to confess to murder. The appellant then told the police that he had had an argument with "Tottenham Paul" (another name for Damian Whyte). The argument became heated and the appellant stabbed Tottenham Paul several times.

10. The appellant was arrested and charged with murder. On advice the appellant did not plead guilty to murder, whilst psychiatric evidence was being obtained to see if a defence of diminished responsibility was available.

11. The defence obtained a psychiatric report from Dr Tina Richardson. That is a lengthy and detailed report. Dr Richardson concluded that the appellant did not suffer from a mental impairment, he did suffer however from borderline personality disorder. There is a lengthy discussion of that disorder in the report.

12. The prosecution obtained a psychiatric report from Dr Philip Joseph. Dr Joseph also concluded that the appellant had a form of personality disorder. In paragraph 5 of his conclusions Dr Joseph wrote as follows:

> "The defendant's personality disorder can be classified as an abnormality of mental functioning within the terms of Section 2 of the Homicide Act 1957 (as amended 2009). His abnormality of mental functioning arises from his personality disorder which is a recognised medical condition. As a result of his personality disorder, the defendant is prone to sudden outbursts of aggression over which he claims to have little control, however this behaviour is exacerbated by his drug abuse. In contrast, the circumstances of the killing suggest that the defendant decided to kill someone some hours before the killing. This suggests a degree of pre-meditation which is inconsistent with the behavioural outbursts associated with an emotionally unstable personality disorder. I conclude therefore even if the defendant was suffering from an abnormality of mental functioning, it does not provide an explanation for the defendant's conduct at the time of the killing."

13. Dr Richardson prepared a brief supplemental report having read the report of Dr Joseph. In that report Dr Richardson wrote:

> "In my clinical opinion Mr Levey has an 'abnormality of mental functioning' (as per s.2(1)(a) Homicide Act 1957... arising from a recognized medical condition, that is a mental disorder within the meaning of the Mental Health Act 1983. That mental disorder being principally a borderline personality disorder with additional features suggesting a dissocial personality disorder and a paranoid personality disorder, as described in my report.
>
> In my clinical opinion his personality disorder is a complex and severe disorder, albeit that there is no separate psychiatric diagnoses of 'personality disorder' and 'severe personality disorder'.

> It is ultimately a matter for the jury as to whether Mr Levey's 'abnormality of mental functioning' substantially impaired his ability to do one or more things mentioned in s 2(1A) Homicide Act 1957 as amended, but in my clinical opinion it is open for a jury to find that his ability to do such things was 'substantially impaired', if my opinion that he has an 'abnormality of mental functioning' arising from a recognized medical condition is accepted."

14. On the day of trial the appellant instructed his counsel that he wished to plead guilty to murder and he duly did so at Reading Crown Court. On the following day, the 11th October 2011, at Reading Crown Court, Her Honour Judge Smith sentenced the appellant to life imprisonment. The judge specified 24 years as the minimum term. The judge explained her decision as follows:

> "This case falls within paragraph 5A of schedule 21 of the Criminal Justice Act 2003. The opinion of the court is that you took a knife to View Island intending to use it to stab. The appropriate starting point is therefore one of 25 years. I must now consider any aggravating or mitigating features. The aggravating features are that you have a history of committing violent offences and being involved with knives. Secondly, though you met Mr Whyte by chance you had already intended to kill someone and therefore there was a significant degree of premeditation. These factors mean that the starting point should be significantly increased. Your mitigation is that in the early hours of 24th February you presented yourself at Reading police station and confessed to stabbing Mr Whyte. In interview, when you were represented, you made no comment, but after interviewing procedures had concluded you volunteered to the police where you had placed your clothing and the knife of and made certain significant comments regarding your personal responsibility for his death."

The judge then went on to say that after giving credit for the appellant's plea of guilty the minimum term would be 24 years.

15. The appellant now appeals against sentence with the leave of the single judge. Mr Raggatt QC, who appears for the appellant together with Miss Davidge, submits that the judge fell into error in that she raised the starting point too high for what he regarded as aggravating features and she failed to make a sufficient reduction for the mitigating features and the plea of guilty.

16. Mr Raggatt begins by criticising the judge's analysis that there was a significant degree of premeditation. Mr Raggatt submits that the starting point of 25 years, with which he does not quarrel, implies a degree of premeditation. That starting point only applies where the offender takes a knife with him to the scene of the crime. Mr Raggatt submits that by treating this as a case of significant degree of planning or premeditation within paragraph 10 of schedule 21 to the Criminal Justice Act 2003 the judge was in effect double counting.

17. In argument it was pointed out to Mr Raggatt that the appellant in this case had in two separate conversations, during the course of the day, told others that he was carrying a knife, or knives and that he was intending to kill someone. That suggests a greater degree of premeditation or planning than the bare element of intent which is implicit in paragraph 5A of schedule 21 to the 2003 Act.

18. In connection with this issue Mr Raggatt has helpfully drawn our attention to the analysis of the inter-relationship between those two parts of schedule 21 to be found in Attorney-General's Reference No 103 of 2011 [2012] EWCA Crim 135 and R v Kelly [2011] EWCA Crim 1462. We have carefully considered the guidance in both those authorities and we have come to the conclusion that the facts of this case do reveal a greater degree of premeditation than that which is inherent in paragraph 5A of the schedule. Therefore, the premeditation in this case is an aggravating feature. Indeed, when pressed in argument Mr Raggatt was inclined to accept that there may be an element of premeditation as an aggravating feature, but he submitted it is a question of degree. This is not one of those cases where on earlier days the offender was planning or rehearsing the murder which he committed. We do accept that submission. There is a degree of premeditation in this case, it is an aggravating feature but not as strong an aggravating feature as occurs in many of the other cases which come before this court.

19. The second aggravating feature which was identified by the judge is the fact that the appellant's previous record includes a number of offences of violence. That is a proper matter which the judge took into account and in his submissions Mr Raggatt did not seriously quarrel with that.

20. Mr Raggatt then drew our attention to the psychiatric reports and the picture which they presented of the appellant's condition. Mr Raggatt pointed out that paragraph 11 of schedule 21 to the 2003 Act identifies as one mitigating feature:

> "The fact that the offender suffered from any mental disorder or mental disability which though not falling within section 2(1) of the Homicide Act 1957 lowered his degree of culpability."

21. We accept the submission of Mr Raggatt that the appellant's mental condition as revealed by the psychiatric reports to which we have referred earlier does constitute a mitigating factor in this case. Mr Raggatt submits that the judge in the sentencing remarks, which we have quoted, dismissed that factor too readily.

22. We see force in that submission, and we do not think that the judge made sufficient allowance for the borderline personality disorder which played a significant part in the killing in this case.

23. The third criticism made by Mr Raggatt of the judge's sentencing analysis is this: the judge did not specify what credit she was giving for the plea of guilty. Furthermore, it can be seen from her final figure for the minimum term, namely 24 years, that she must have given too little credit for the plea of guilty. Although the plea of guilty was entered on the day of trial, nevertheless this was a case where there were serious issues as to diminished responsibility. The appellant could not tender a plea of guilty at an

early stage because psychiatric evidence was being obtained. Furthermore, by the time the day of trial came, it was clear on the psychiatric evidence that there was an arguable issue concerning diminished responsibility. Despite that the appellant decided to plead guilty. He gave firm instructions to that effect and, says Mr Raggatt, the appellant should have proper credit for such a plea.

24. We see force in those submissions. It would indeed have been helpful if the judge had indicated what credit she was allowing for the plea of guilty. However, on the bare material set out in the sentencing remarks, it does seem to us that the judge gave insufficient credit for the plea.

25. Having accepted that there are good grounds made out for this appeal in respect of the minimum term, we turn now to consider what the proper minimum term should be. In our view, as Mr Raggatt rightly concedes, the starting point here is indeed 25 years. This is a case where the appellant went to the scene of the murder carrying a knife and intending to commit the offence. On the other hand, we do consider that the conversations which the appellant had earlier in the day reveal a degree of planning and premeditation, which goes beyond that implicit in paragraph 5A and does indeed fall within paragraph 10. However, the element of additional premeditation falling within paragraph 10 is not as great as in many cases. We also consider that the appellant's previous offences of violence are an aggravating factor which needs to be taken into account.

26. We then accept that there is a need to make a reduction to reflect the mitigating factor, namely the appellant's borderline personality disorder. Weighing up all of those aggravating and mitigating factors and ignoring for present purposes the plea of guilty, we would arrive at a minimum term of 26 years. It is then necessary to give credit for the plea of guilty.

27. The sentencing guidelines indicate that the maximum credit which should be given for a plea of guilty in a case like this is 1/6th. We propose to give credit approaching but not quite amounting to 1/6th. We shall give credit of 4 years. In the result therefore, we reduce the specified minimum term to 22 years' imprisonment and this appeal against sentence is allowed to that extent.