Neutral Citation Number: [2021] EWCA Crim 1706

Case No: 202003068 B1 and
Case No: 202003221 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HIS HONOUR JUDGE LICKLEY QC
T 20207057

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/11/2021

Before :

LADY JUSTICE THIRLWALL
MR JUSTICE GOSS
and
HIS HONOUR JUDGE MARTIN EDMUNDS QC

- -

Between :

CHRISTIAN FEARON	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Michael Holland QC for the Appellant
Brian O'Neill QC and Catherine Pattison for the Respondent

Hearing date: 19 October 2021

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Approved Judgment

Reserved Judgment Protocol: This judgment will be handed down by the Judge remotely, by circulation to the parties' representatives by email and if appropriate, by publishing on www.judiciary.net and/or release to Bailli. The date and time for hand down will be deemed to be 10.30 am on 17 November 2021.

MR JUSTICE GOSS **:**

Introduction

1. Lennox Alcendor was murdered on 21st February 2020. He died from a single stab wound to his neck. He was 42 years old. On 6th November 2020 at the Central Criminal Court James Rochester, who was 43 years of age, and Christian Fearon, who was 30, were convicted of his murder. Rochester was also convicted of having an offensive weapon, the knife that was used to commit the murder. He admitted that he inflicted the fatal wound but claimed he was acting in self defence. He had pleaded guilty to robbery of the deceased at the start of the trial. Christian Fearon was convicted of robbery by the jury. He was acquitted on the judge's direction at the close of the prosecution case of having an offensive weapon, which was a screwdriver without a handle that was found on him on his arrest, the prosecution having indicated that there was insufficient evidence to maintain the allegation. He did not give evidence. He renews his application for leave to appeal against his conviction for murder, having been refused leave by the single judge, who did grant him leave to appeal against sentence. We shall refer to him as the appellant.

2. For the offence of murder he was sentenced to life imprisonment with a minimum term of 24 years less the days spent on remand with a concurrent sentence of 4 years for the robbery. Rochester was sentenced to life imprisonment with a minimum term of 28 years for murder with concurrent sentences of 4 years and 10 months respectively for the offences of robbery and having an offensive weapon. We are grateful to Mr Michael Holland QC, who represented the appellant at the trial, for his written and oral submissions. He has represented the appellant at this hearing on the sentence appeal only. The prosecution have been represented by Mr Brian O'Neill QC and Ms Catherine Pattison, to whom we are also grateful.

The facts

3. On 21 February 2020 the appellant and Rochester had two bottles of rum, which the appellant had stolen and wanted to sell or exchange for class A drugs, to which he was addicted. Lennox Alcendor and Ashley Tudor had received a call to buy the alcohol. They met the appellant and Rochester on Cricklewood Broadway, having arrived there by car at about 06.30 am. The four men went into a flat on Cricklewood Broadway where a disagreement developed. After about 3 or 4 minutes CCTV footage captured the four men on the Broadway. Ashley Tudor and Lennox Alcendor had taken the rum without providing any payment or supplying any drugs. As the group had left the flat, Rochester picked up a blue handled saw/knife and put it in the back of his waistband. The group walked along the Broadway and CCTV captured the argument between Lennox Alcendor and Rochester developing into a fight. As they walked, Lennox Alcendor took one of the bottles of rum from Ashley Tudor and turned towards Rochester, who produced the saw/knife from his waistband and held it in his right hand. What happened thereafter was not captured by CCTV but, after about 50 seconds, a witness began recording events on a mobile phone. By this time the fatal wound, which was to the front of Lennox Alcendor's neck and 11.5cm deep, had been inflicted and he was lying on the ground. The mobile phone footage showed the appellant and Rochester punching and kicking him. Rochester accepted that he took his watch.

4. Rochester was arrested on 23 February 2020. The appellant was arrested two days later and gave an account in interview in which he accepted at trial that he had lied about not being violent towards the deceased. The prosecution case was that Rochester and the appellant had acted together when they murdered and robbed Lennox Alcendor with the appellant acting as a secondary party. In addition to the recordings, the prosecution relied on eye-witness evidence, his untruthful account when interviewed and his failure to give evidence. His case was that the jury could not be sure he knew Rochester had a knife before the fatal injury was inflicted or that he was party to an attack on the deceased at the time the fatal injury was inflicted or had the requisite intent for murder.

5. Rochester gave evidence that Lennox Alcendor was threatening and in possession of a knife. He picked up the blue handled saw/knife from a table in the flat as he was fearful of being attacked. Outside he was threatened with a bottle and a knife, so he took the saw/knife out of his waistband and stabbed the deceased in self-defence, not realising he had stabbed him in the throat. He accepted stealing the watch and that the recordings showed him assaulting the deceased by punching, kicking and stamping on him.

The renewed application for leave to appeal against conviction

6. The three grounds of appeal against conviction all relate to jury conduct save a discrete matter arising out of one question asked of his co-accused in cross-examination by prosecuting counsel, which forms part of the rolled-up third ground. We deal with that question first.

7. Under cross-examination Rochester agreed that he was addicted to crack cocaine and the only way to fund his addiction was by crime: he stole and robbed to get money to buy drugs. He was asked whether that lifestyle applied to the appellant as well and he said that it did. Following submissions made in the absence of the jury, the prosecution accepted the suggestion in respect of the applicant's lifestyle should not have been made. The matter was dealt with by an agreed fact being read to the jury that "such a suggestion should not have been made. There was no evidence to support the contention that he has robbed in the past. The suggestion was withdrawn."

8. The first ground is that the conviction of the appellant is unsafe because of a lurking doubt that the Jury deliberations may have been conducted inappropriately, thereby not following the legal directions given, particularly given the apparent inclination of a Juror to seek to go behind the directed acquittal on count 3.

9. This ground arises out of a note sent by a juror at the conclusion of the summing-up in which clarification and legal direction was sought as to whether, even though the count had been 'dropped', if proved, could his possession of the screwdriver be used on the murder and robbery counts. Following an exchange with counsel, in which he accepted Mr Holland's contributions, the judge directed the jury in clear terms that the appellant had been found not guilty, they must abide by that, the prosecution having accepted that there was insufficient evidence to maintain the allegation, and therefore that count had no relevance at all to any count he faced or any allegation against him. The judge's directions were correct and appropriate, and can have left the jury in no doubt that the count had no relevance to the case against the appellant on the other counts. No submission of no case to answer was made and there was a significant body of evidence against him on those counts.

10. Ground two is that that the conduct of jurors in deliberations may have been oppressive to dissenters thereby rendering the appellant's conviction unsafe. On the fourth day of their deliberations a note from the jury disclosed that one of them had researched the definition of manslaughter, upon which the judge had given full directions. The response of the juror in question, who accepted he had conducted such research, stated in a separate note that, although he had been responsible for submitting jury notes during the trial, he had been prevented by fellow jurors from sending more. His research had raised his curiosity as to 'loss of control' and 'sober'. Enquiry of him by the judge as to what he had disclosed to fellow jurors before he was told to stop by them revealed that he had said very little. The judge made all necessary enquiries, confirmed that very little had indeed been disclosed by the juror, heard submissions from counsel and adopted an agreed approach of discharging that juror and giving appropriate directions to the remaining jurors as to their responsibilities and the need to apply his directions. His approach was entirely conventional and correct. No application was made to discharge the whole jury. Nothing occurred thereafter and the jury reached verdicts two days later. There is no basis for concluding that any untoward pressure or otherwise inappropriate conduct had occurred or influenced the verdict.

11. The final ground is that, cumulatively, the conviction should be regarded as unsafe given the inappropriate cross-examination suggesting the appellant had a propensity to use serious violence, the reluctance of at least one juror to accept that he did not use a blade in assisting his co-accused despite his acquittal, the conduct of another juror in seeking information during retirement from internet sources (who was discharged) and the conduct of other jurors in preventing one of their members seeking guidance from the trial Judge while in retirement, and the relatively weak evidence in the case against the appellant. The court is invited to direct further enquiries be made of the juror who was discharged as to the conduct of fellow jurors in deliberation.

12. Whilst it was unfortunate that the lifestyle question was asked, the matter was appropriately remedied with the agreement of counsel. As the single judge explained in his reasons when refusing leave, whether looked at individually or cumulatively, none of the issues that arose undermined the jury's ability to reach a safe verdict nor was there anything to suggest that the 11 jurors who returned verdicts did not follow the judge's directions that were agreed by counsel or to justify any further enquiry. There was clear evidence of the applicant's involvement in the offences and is no arguable basis for his conviction being unsafe.

13. Accordingly, his renewed application is refused.

Appeal against sentence

14. The appeal against sentence proceeds on two bases. First, it is submitted that the appropriate starting point for the minimum term was 15 years and not the 25 years taken by the judge. Alternatively, the fact that the appellant's knowledge of the knife was for a matter of seconds before its use by the co-defendant and his significantly lesser role should have led to a greater discount from the 25 year starting point or to limited aggravation from a 15 year starting point, and that Judge did not apply the principles expressed in Kelly v R [2011] EWCA Crim 1462 "sufficiently favourably" to the appellant. Further, it being accepted this was not a murder for gain and that the robbery was an impulsive act following the infliction of injuries, the principle of totality should not have led to a significant uplift in the minimum term. It is also argued that the

difference in the two defendants' previous convictions should have led to a greater distinction in sentence.

15. Both men were heavily convicted. Rochester had 56 previous convictions, including 5 for offensive weapon or bladed article offences, and must have been on licence when he committed the murder having been sentenced to 5½ years' imprisonment for an offence of wounding with intent to cause grievous bodily harm in 2016. The appellant had 72 previous convictions, including 4 for offensive weapons or bladed article offences between 2006 and 2018. He had no previous convictions for serious violence though had threatened with weapons in the past and had a conviction for affray.

16. The judge placed the robbery in Category 2 Culpability B of the Definitive Guideline for which the Starting Point is 4 years and the range is 3-6 years' custody. He identified the victim's vulnerability as a result of having been fatally injured and having disposed of the watch as aggravating factors. There was little or no planning.

17. When summing-up the judge had directed the jury that in order "to find [the appellant] guilty of murder or manslaughter you will have to be sure that he knew of the saw/knife in the possession of Rochester". In his sentencing remarks he said "You, [the appellant], knew that Rochester had the weapon from at least the point of its production by (him), intending to have it available for use and it was. The jury convicted you on the basis you knew of the weapon before the fatal wound was inflicted… You therefore participated in the crime of murder of Lennox Alcendor with the intention that he would be caused at least really serious harm by a weapon brought to the scene by Rochester".

18. The saw/knife was taken by Rochester from the house and was removed from the rear of his trousers or belt as he was retreating with the appellant in the street when the deceased raised a bottle to ward them off. The appellant was standing a short distance behind him when he did that and then, as the judge said, "became aware of the knife at that point, if… not before". Rochester moved at great speed. The prosecution did not suggest the appellant had knowledge of the knife before it was produced.

19. It is common ground that the judge's finding for the basis of sentence was that the appellant knew of the saw/knife only moments before the fatal wound was inflicted. He was not a party to having taken the weapon from the house to the scene nor was he aware, let alone well aware that a saw/knife was being carried by his co-defendant until moments before it was used to fatal effect. That, submit the prosecution, is not to the point. Their case is clear. Paragraph 5A of Schedule 21 of the Criminal Justice Act 2003 (now paragraph 4 of Schedule 21 to the Sentencing Act 2020) applies to a joint participant who, though not personally responsible for the fatal injury, participates in a murder with murderous intent in which a weapon that was brought to the scene by another attacker is used and he had knowledge of that weapon. They rely on the judgments of this court in **R v Goodall [2019] EWCA** Crim 1109 at paragraph 42 and, in particular, the judgment in **R v. Semusu [2021]** EWCA Crim 513 at paragraphs 19 and 20, in which Edis LJ, giving the judgment of the court said: -

> "19. In sentencing for joint offences, the provisions of Schedule 21 apply to secondary participants as well as principal offenders, but there might properly be a distinction between the minimum terms to reflect the lesser culpability of the secondary party (See Attorney General's Reference (No. 24 of 2008), R v Sanchez

> [2008] EWCA Crim 2936). That, though, is because the culpability of a secondary party may be less than that of a principal offender (see paragraph 33):
>
> > "Although the culpability of the secondary party may in many cases be less than the principal, the sentences must be viewed proportionately in the light of the policy of the law, that he who encourages the commission of a murder or assists with the commission is to be dealt with as a murderer.
>
> 20. The number of cases of the present kind where there is a wide gap between the culpability of the principal offender and that of the secondary party has been reduced by the decision of the Supreme Court in R v Jogee [2016] UKSC 8, [2017] AC 387 . The person who encourages or assists the principal merely foreseeing that he might intentionally cause death or really serious harm is not guilty of murder. In the modern law the secondary party must encourage or assist the principal intending that the principal will intentionally cause death or really serious harm. That is the basis on which Semusu was convicted. He was acquitted of the count of possession of an offensive weapon. We suppose this means that the jury was not sure that Semusu had been any part of the expedition by Nami to arm himself for the fight and that he arrived at the scene at a somewhat later point than Nami had done. Nevertheless, the jury's verdict means that he knew that Nami had that knife before he produced it and that he knew that it was to be used, and assisted in or encouraged that use."

20. We observe that the facts of that case, summarised in paragraphs 5-8 of the judgment, were that Nami, the principal, had armed himself with a weapon, a large Rambo style hunting knife, to use in an attack and that Semusu knew he was so armed and that he was planning to use the knife. He was, therefore, a secondary party fully engaged in the plan.

21. Each case has to be considered on its own facts and requires an assessment of the culpability of the offender. In this case, the appellant only became aware of Rochester having the saw/blade moments before the attack. Without seeking to lay down any criteria for drawing distinctions in the wide range of factual situations that arise in cases such as this, we do not consider that because he knew just before it was used that Rochester had a knife it follows that he must be fixed with the statutory culpability of the principal. As was made plain in **Kelly v R [2011]** EWCA Crim 1462, no scheme or statutory framework can be fully comprehensive and the judge must achieve a just result. In paragraph 16 the court said: -

> "16. Problems of the kind we have identified arise equally starkly in the context of murders committed with a knife taken to the scene where two or more offenders are convicted of murder on the basis of joint enterprise…. Given some of the difficulties which can arise in joint enterprise murders where a weapon is used by one, but only one, of the murderers, the

> difficulties for sentencing judges are likely to multiply. There will continue to be convictions for multi-handed murders where one or more of the defendants was not aware that a knife or knives were being taken to the scene but who, once violence erupted, were participating in it well aware that the knife would be or was being used with murderous intent. Although guilty of murder they were not party to the taking of the fatal weapon to the scene. For them, their offence is aggravated by the fact that they participated in a knife murder. Paragraph 5A would not provide the starting point in the sentencing decision. For those who did take part or were party to the taking of the knife to the scene, then it would, but care has to be taken not to double count the fact that they participated in a knife murder which has already been factored into the normal paragraph 5A starting point. The judge will therefore be required to make the necessary findings of fact to identify the appropriate starting point, and thereafter to reach the sentencing decision required by the justice of the case. On the basis of the single case currently before us, we cannot give any broader guidance."

22. In the circumstances of this case, the starting point should, in our judgement, have been 15 years. There were a number of aggravating features, namely, his record of previous convictions, which the judge indicated aggravated the crime of murder "to a limited extent", his participation in the killing when he knew a saw/knife was to be used and the physical suffering inflicted by the vicious and gratuitous beating by both men after the fatal wound had been caused and then robbing him of a watch, which were all significant. The only mitigating factor was an intent to cause really serious harm rather than death.

23. Balancing these factors, we consider that considerable upward adjustment from the starting point was appropriate. Although Rochester received the same concurrent sentence for the robbery, he had pleaded guilty at the first available opportunity. The appellant's culpability for that robbery had to be factored in to the minimum term, but not double-counted.

24. There were significant distinctions in Rochester and the appellant's cases and circumstances. The former armed himself with the saw/knife and used it. He was on prison licence at the time for wounding with intent. He took the lead in the attack and the robbery. There was evidence from Ashley Tudor that, moments before the attack, the appellant indicated he did not want to fight, he simply wanted his bottle back.

25. In our judgment, the appropriate just and proportionate minimum term to reflect the appellant's total culpability was 21 years' imprisonment. Accordingly, we allow the appeal by quashing the minimum term of 24 years imposed in the lower court and substituting a minimum term of 21 years to be served under the life sentence for the offence of murder. The concurrent sentence of 4 years' imprisonment for the offence of robbery remains unaltered.