IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00144/A4
[2023] EWCA Crim 349

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 14th March 2023

**B e f o r e:**

**THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION**
**(Lord Justice Holroyde)**

**MR JUSTICE HILLIARD**

**MR JUSTICE CHAMBERLAIN**

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**ATTORNEY GENERAL'S REFERENCE**

**UNDER SECTION 36 OF**

**THE CRIMINAL JUSTICE ACT 1988**

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**R E X**

**- v –**

**ROSS McCULLAM**

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**Miss A Morgan KC** appeared on behalf of the Attorney General

**Mr K Fuad KC and Mr R Howat** appeared on behalf of the Offender

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**J U D G M E N T**
**(Approved)**

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Tuesday 14th March 2023

**LORD JUSTICE HOLROYDE:**

1. On 12th December 2022, following a trial in the Crown Court at Leicester before His Honour Judge Head and a jury, the offender Ross McCullam was convicted of the murder of Megan Newborough on 6th August 2021. He was subsequently sentenced to life imprisonment, with a minimum term of 23 years (less the 493 days which he had spend remanded in custody).

2. His Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentence may be reviewed.

3. At the time of the murder, the offender was aged 29. He lived with his parents. He had previously suffered from episodes of depression and had been diagnosed as suffering from ADHD, for which he was prescribed medication, although he had ceased to take it.

4. Miss Newborough was aged 23. They had met at their place of work and for a time had been involved in a casual relationship, involving some sexual activity. They had exchanged sexualised text messages in which the offender had suggested that their sexual activity could become "a lot more rough". It appears that the offender had disclosed to Miss Newborough, and – at her suggestion – to his manager at work, that he had been the victim of sexual abuse as a child.

5. On 6th August 2021, the offender and Miss Newborough exchanged messages arranging to meet that evening for sexual activity at the offender's home, when his parents would be absent. Miss Newborough arrived soon after 8 pm and they went into the living room. Within the next 30 to 40 minutes she was strangled to death by the offender, who applied manual pressure to

her throat for several minutes. As she lay unconscious and dying, or perhaps already dead, he collected a large knife from the kitchen and cut her throat. He inflicted a number of wounds with such force that post-mortem examination revealed seven incisions to the front of the spine.

6. The offender then spent some time cleaning the living room before changing his clothes and putting Miss Newborough's body into the passenger seat of her car. At some stage he sent text messages to Miss Newborough's phone, to suggest that they had spent a good time together. He drove to a remote area of open countryside. He discarded Miss Newborough's mobile phone en route, and put her body over a wall into tangled undergrowth. He disposed of the bloodstained clothing of himself and his victim, left the car in a car park with the keys lying on the ground nearby, and took a taxi home. Once home, he continued to send misleading messages to Miss Newborough's phone.

7. In the early hours of the following morning, the offender made internet searches, including in relation to serial killers. He repeatedly checked news websites, and he accessed pornography to which he masturbated.

8. At around midday on 7th August 2021, Miss Newborough's family reported her missing. Police officers spoke to the offender. He initially claimed that Miss Newborough had left his home at around 9 pm the previous evening and that he was worried he had not heard from her. However, when arrested later that night, he told the police where Miss Newborough's body could be found.

9. In interviews under caution, the offender accepted that he had killed Miss Newborough, but denied that he had planned to do so. He said that their activities together brought to mind his childhood sexual abuse, and he had been worried that Miss Newborough would tell others about that he had disclosed. He said that everything had suddenly gone crazy in his head. He

had told Miss Newborough to "shut up". She had slapped him, and he had then pushed her over, got on top of her and strangled her with all his force, despite her struggles and pleas. He said that he had cut her throat to ensure that she was dead.

10. Whilst awaiting trial, the offender engaged in what the judge found to be an attempt to create a psychiatric defence, with a view to reducing his sentence, whilst at the same time being heard to make callous remarks about Miss Newborough.

11. The offender pleaded guilty to manslaughter. That plea was not accepted by the prosecution.

12. At the trial of the charge of murder, the offender gave evidence in his own defence and relied on medical evidence as to his PTSD and ADHD. The jury convicted him of murder.

13. The offender's crime ended one young life, full of promise and hope, and also blighted the lives of many others. At the sentencing hearing on 22nd December 2022, victim personal statements were read to the court by Miss Newborough's father and sister. Each member of this court has read those statements. We agree with the judge that they movingly describe Miss Newborough's qualities and the dreadful impact of her death on her family and friends, to whom we offer our condolences.

14. In his sentencing remarks the judge said that he did not know what precisely caused "the dam of the offender's rage to burst", but it was likely to have been "sexual frustration at that point, working on all your grievances". He was sure that the offender's mental health issues did not reduce his culpability for the crime. He found that the offender had known exactly what he was doing as he strangled Miss Newborough, cutting off her air supply for between three and five minutes, and inflicting 28 areas of injury on her body. It had not been suggested

by the prosecution that the offender had planned to kill Miss Newborough, but the judge was sure that when he attacked her, he did intend to kill, and that he cut her throat to make sure that she was dead.

15. The judge considered the provisions of Schedule 21 to the Sentencing Code, which indicates starting points for the minimum term which should be applied by way of punishment for the crime of murder. He noted, correctly, that the law required him to be sure of facts if he relied on them to place the crime into a particular category. He referred to the evidence that Miss Newborough's purchase of a new house must have underscored her success and the offender's failures, and said that he was sure that the offender, who suffered from erectile dysfunction, was very anxious about his sexual capacity. The judge did not, however, accept submissions by the prosecution that the murder involved sexual or sadistic conduct. He said (at page 10G to 11B of the transcript of his sentencing remarks):

> "It is common ground that though consensual sexual activity was intended by you, none had in fact happened. I have already set out the combination of factors that are most likely, in my judgment, to have caused your actions. To suggest that you derive sexual pleasure from the killing of her itself is speculative. Your behaviour early the following morning by masturbating whilst accessing pornography and sending your last message is a disturbing insight into your mind that the prison authorities and eventually the Parole Board will need to consider with great care, but it cannot make me sure of a sexual element in your killing her. Cutting her throat was for the reason I have set out. I cannot be sure that it gave you sadistic satisfaction. A submission that you wished to decapitate her is, again, something that I cannot be sure of. In short, there is no sure evidence to justify a conclusion that the killing itself involved either sadistic or sexual conduct. Neither, self-evidently, did you bring the knife to the house."

16. The judge therefore took a starting point of 15 years' custody in determining the appropriate minimum term. He identified as aggravating features the terror which Miss Newborough must have experienced whilst she was conscious and resisting; the cutting of her throat which was

"a dreadful and sustained way" of ensuring that the offender succeeded in his intention to kill; and the attempts made by the offender to conceal his crime and cover his tracks.

17. The mitigating features were the absence of previous convictions, the absence of premeditation, and the assistance which the offender later gave the police to find Miss Newborough's body and car.

18. Balancing those factors, the judge increased the minimum term which the offender must serve as punishment for his crime to 23 years (less the time spent remanded in custody).

19. On behalf of His Majesty's Solicitor General, Miss Morgan KC submits that this case fell within paragraph 3(2)(e) of Schedule 21, because it was "a murder involving sexual … conduct", and that the starting point for the minimum term should therefore have been 30 years. She submits that the judge was accordingly wrong to take a starting point of 15 years and that the minimum term was as a result unduly lenient. She acknowledges the difficulty she faces in challenging a factual finding by a trial judge, but argues that the judge adopted too narrow an approach towards the assessment of whether a murder involved sexual conduct. The core of her argument is that the offender had previously expressed a wish to engage in acts of violence and domination in the context of consensual sexual activity, and the strangulation of Miss Newborough had occurred within the context of sexual activity with her, which Miss Morgan submits indicates that the offender had acted upon his fantasies to engage in violent conduct in the context of sexual relations. In support of her core submission, she points to the offender's subsequent action in masturbating to pornography around the same time as sending misleading messages to Miss Newborough's phone. She submits that it was "simply not open" to the judge to fail to find that the murder involved sexual conduct.

20. The alternative submission which was made to the judge, that a 30 year starting point was

appropriate because the murder involved sadistic conduct, is not pursued by the Solicitor General in this court. Nor is it argued that the judge should have assessed the murder as one of particular seriousness, and therefore falling within paragraph 3 of the Schedule, even if the judge was entitled to find that it did not involve sexual conduct. The basis of the application to this court is accordingly a narrow one.

21. Mr Fuad KC and Mr Howat, representing the offender in this court as they did in the court below, submit that the judge made no error of principle and was correct to take a starting point of 15 years' custody. They rely on what they submit was a meticulous analysis by the judge of his factual findings and his reasons for them. They point out that the evidence heard by the judge over the course of a lengthy trial included evidence from the offender himself, who was cross-examined over a period of some days. Mr Fuad helpfully tells us that the evidence at trial showed that before the strangulation, the planned sexual activity had reached only the stage that Miss Newborough was kneeling in front of the offender and had unzipped his trousers.

22. We are grateful to counsel for their submissions.

23. In *R v Walker* [2007] EWCA Crim 2631, [2008] 2 Cr App R(S) 8, Lord Phillips CJ said at [26] that the reference in paragraph 5(2)(e) of Schedule 21 to the Criminal Justice Act 2003 – which for present purposes was materially the same as paragraph 3(2)(e) of the present Schedule 21 to the Sentencing Code – was "intended to cover circumstances where the acts which resulted in the death of the victim were sexual in nature or accompanied by sexual activity that increased the ordeal of the victim, or the depravity of the murder, or both".

24. In the light of that statement of principle, the learned editors of Sentencing Principles, Procedure and Practice suggest, in a passage at paragraph A.725 of the 2023 edition with which

we agree, that "… it is likely that whether the 30 year starting point is appropriate will depend on the nature and extent of the sexual activity, and the extent to which it simply formed the background to the murder being committed, or was a part of the murder itself".

25. In *Attorney General's References (R v Maynard-Ellis and Leesley)* [2021] EWCA Crim 317, this court, differently constituted, considered submissions that the sentencing of the offender Maynard-Ellis, who had been convicted of rape and murder, was unduly lenient because the judge had failed to take a 30-year starting point in determining the appropriate minimum term. The court concluded that the judge had been entitled to make the findings he did and refused leave to refer. Rejecting a submission that the judge had reached findings of fact which were not open to him, Davis LJ, giving the judgment of the court, said this at [34] to [36]:

> "34. … This was a matter for the trial judge who had seen and heard all of the evidence as it unfolded. The judge had accepted that a sexual or sadistic motivation could have a part to play in the assessment which he made. But overall the judge had to focus, looking at the evidence as a whole, on whether there was sexual or sadistic conduct. On the evidence which he had heard he could not be sure that there was, as he held. It is always difficult to challenge a trial judge's evaluation of the facts. It is particularly difficult where a trial judge is not making a positive finding of fact but rather making a finding that he cannot be sure to the criminal standard that a particular factual situation exists. We can see no error in law or principle on the part of the judge at all in this context. The question here, in the last analysis, was one of evidential appraisal; and his evidential appraisal was, we conclude, open to him.
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> 35. There can be occasions, we accept, where an appellate court can find that a judge had reached a conclusion simply not open to him in terms of whether or not the judge had been made sure (see, for example, *Attorney-General's Reference Nos 25 and 26 of 2008* (*R v George and Walters*) [2008] EWCA Crim 2665; [2009] 2 Cr App R(S) 116. But, in our view, this is not such a case.
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> 36. It has been repeatedly stressed in this context that the matter is one for the evaluation of the trial judge who has heard the evidence both factual and expert: see, for example, cases of *R v*

> *Kolman* [2018] EWCA Crim 2624; [2019] 1 Cr App R(S) 33 and *R v Bonellie* [2008] EWCA Crim 1417; [2009] 1 Cr App R(S) 55. Moreover, as those cases also confirm, the mere fact that a defendant may at the time have taken pleasure in the killing does not of itself necessarily bring the matter within paragraph 5(2)(e) of schedule 21 [to] the 2003 Act."

26. We respectfully agree with and endorse that clear statement of well-established principles. It is in recognition of those principles that Miss Morgan acknowledges the difficulty of persuading this court that a judge who has had the benefit of seeing and hearing all of the evidence reached a finding that was not open to him, or failed to make a particular finding in circumstances where he was bound to do so.

27. In the present case the judge, as we have said, had the benefit of having presided over the trial for some six weeks. He had heard all the evidence, including that given at length by the offender. He concluded, for the reasons he clearly explained, that he could not be sure that the murder involved sexual conduct.

28. As was said in *Maynard-Ellis*, it is particularly difficult to challenge a trial judge's conclusion that the evidence he had heard did not make him sure of a particular fact. The words of paragraph 3(2)(e) of the Schedule are capable of covering a range of situations, but we are not here concerned with exploring the boundaries of that range. The issue for this court is whether it can be said that the judge was bound to conclude that this murder did involve sexual conduct. True it is that the offender and Miss Newborough had met that evening for the purpose of consensual sexual activity and had made some moves towards embarking upon it. But that is not in itself sufficient to dictate a conclusion that the murder a short time later involved sexual conduct. There was no evidence that the strangulation was in some way part of a sexual act, and indeed no evidence that, apart from Miss Newborough having unzipped the offender's trousers, any sexual activity had taken place. As the judge said, to suggest that the offender

derived sexual pleasure from the act of killing was speculative.

29. The offender's subsequent accessing of internet pornography had to be viewed against the background of prosecution evidence at trial that he had been addicted to pornography for many years, and we do not see how the judge can be criticised for concluding that it was insufficient to make him sure of a sexual element in the murder.

30. In those circumstances we can see no basis for the submission that the judge was not entitled to reach the conclusion he did. Far from being one which was not properly open to him, it was, in our view, amply justified by the reasons which the judge gave. That is not, of course, to say that the murder of Miss Newborough was anything other than a dreadful crime. It had many aggravating features. We would mention in particular the pain, suffering and terror which Miss Newborough must have experienced prior to death; the fact that the murder was committed in the domestic context of a relationship in which Miss Newborough was entitled to feel safe; the use of the knife; and the fact that the offender wanted to ensure that Miss Newborough was dead, because he feared the consequences if she lived to report what he had done. The judge rightly found that the aggravating factors greatly outweighed the mitigating factors, so that the minimum term, which started at 15 years, ended as one of 23 years.

31. For the reasons we have given, however, we are not persuaded that there is any basis on which it can be said that the judge fell into error, as suggested by the Solicitor General. Leave to refer must accordingly be refused.

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