IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203028/A2

Royal Courts of Justice
Strand
London
WC2A 2LL

[2023] EWCA Crim 861

Tuesday 4 July 2023

Before:

LADY JUSTICE CARR DBE

MR JUSTICE JAY

THE RECORDER OF SHEFFIELD
[His Honour Judge Jeremy Richardson KC]
(Sitting as a Judge of the CACD)

REX

V

DEAN KILKENNY

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MR R FERM appeared on behalf of the Appellant.
MR R WRIGHT KC appeared on behalf of the Crown.

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J U D G M E N T
(APPROVED)

THE RECORDER OF SHEFFIELD:

Introduction

1. This is an appeal against sentence in a case of manslaughter. The appellant is Dean Kilkenny. He is aged 47 years.

2. In addition to the appeal, in respect of which he has been given leave on grounds 1 and 4, he seeks to renew leave to appeal upon grounds 2 and 3, upon which the single judge (Goose J) refused leave. The appellant has jettisoned his renewal application in relation to grounds 5 and 6.

3. The appellant pleaded guilty to manslaughter before His Honour Judge Kelson KC in the Crown Court at Kingston upon Hull on 29 July 2022. The date of plea was well beyond the plea and trial preparation hearing (PTPH) but before the date of trial on 8 August 2022. There was a risk the trial date may have been vacated had there not been a plea of guilty. Sentence was adjourned to 15 September 2022, when the judge imposed an extended sentence of 17 years, with a custodial term of 13 years and an extension period of 4 years pursuant to section 279 of the Sentencing Act 2020. The appellant was adjudged to be a dangerous offender. There was no pre-sentence report on the date of sentence. The judge had ordered one when the case was the subject of plea on 29 July 2023. It was accepted it was no fault of the appellant that one was not prepared for the date of sentence.

4. When the case came before this court on 10 May 2023 (Carr LJ, McGowan J and HHJ Bate) the appeal was adjourned to obtain a pre-sentence report. That is now before the court.

5. There was a co-accused called Moverley. He pleaded guilty to affray and inflicting grievous bodily harm in respect of which there were sentences of 5 months and 15 months' imprisonment consecutive. His total sentence of 20 months has not been the subject of appeal.

The Grounds of Appeal

6. The two grounds of appeal of substance are: (i) there was no proper basis for the imposition of the extended sentence (ground 1); and (ii) the custodial sentence of 13 years was manifestly excessive (ground 4). As we have explained, the appellant seeks to renew his application for leave to appeal in respect of grounds 2 and 3. He has wisely abandoned grounds 5 and 6.

7. Grounds 2 and 3 are the judge was wrong in his assessment of the case being within category B of the manslaughter guideline; and he also erred, factually, by finding the appellant was not acting in a form of self-defence or defence of his brother, short of the legal defence, at the time immediately before committing the unlawful act.

The Facts

8. The events of the late evening of 11 March 2022 occurred at the Pier Hotel at Withernsea in East Yorkshire. The deceased was Darren Bower, who was aged 43 at the time of his death. The death of the deceased was caused by the appellant restraining him in a strong neck-hold, whereby he had his arm firmly gripped around the neck of the deceased for approximately 50 seconds. This followed a series of brawls in the entrance way to the hotel. It was in the midst of an affray. Much of what occurred was captured on CCTV cameras. We have seen the various recordings of the key events.

9. The more detailed facts are these. The deceased had been drinking in the bar of the hotel. The appellant and Moverley were also customers in the bar area. Shortly before the fatal incident an argument developed between two other male customers, one of whom (Ben Robinson) was a friend of the deceased. The appellant and Moverley both involved themselves in the argument between Robinson and the other male, though only to the extent of escorting Robinson out of the bar area into the entrance hallway. It is clear from the CCTV footage and the account of the bar manager, that it was a heated argument between Robinson and the other man. It is also clear that Robinson had been assaulted by the other man. Furthermore, at that stage, the appellant and Moverley were seeking to calm the situation to prevent it from escalating. Both the appellant and Moverley were in the entrance hallway with Robinson, at which point the deceased entered the hallway from the bar area and asked his friend (Robinson) what was happening. That simple inquiry very rapidly developed into an aggressive confrontation between the deceased and, principally, Moverley. Robinson sustained a bleeding injury to his face when another man assaulted him. It is not clear who caused that injury or how it occurred.

10. The initial confrontation was captured on clear CCTV footage. The deceased, who was wearing a fluorescent jacket, had Moverley in one hand and his other hand on the neck of the appellant. The deceased stood facing Moverley. Each man was grappling with the other and each was holding the other about the neck. It was at this point the incident, which was undoubtedly an affray, became much more serious.

11. As the grappling and standoff continued, the appellant having broken away, came back behind the deceased and delivered two very hard punches to the back of his head. He then put his arm around the neck of the deceased and wrenched him backwards in a head or neck-lock, with such force that he took the deceased to the ground. The appellant landed under the deceased. A number of others then came on top of that pile including

Moverley. It is clear from the CCTV footage that the appellant maintained a significant and constant pressure around the neck of the deceased until he lost consciousness. The deceased became limp and, despite a number of others trying to pull them apart, the appellant kept up sustained and significant pressure on the neck of the deceased for approximately 50 seconds. The hold was eventually released by the appellant. He and Moverley then left the Pier Hotel. Attempts were made to resuscitate the deceased but these failed. He did not regain consciousness.

12. Dr Parsons, the consultant forensic pathologist, concluded that the cause of death was sustained and forceful compression of the neck, in conjunction with underlying and severe heart disease. There was extensive congestion of the head and face. Petechial haemorrhages were observed which demonstrated that blood pressure was building inside the head. There was also bruising to the tongue, the muscles of the neck and the larynx - indeed two fractures of the larynx were found, albeit one was described as "a hairline" fracture.

13. It appears that after the appellant and Moverley left the Pier Hotel, a further episode of violence took place between Moverley and another man who was in the street.

14. Following arrest, in interview with the police, the appellant denied he had applied a chokehold or similar to the neck of the deceased and asserted that he had only tried to get the deceased off his brother. Plainly that was not true.

The Hearing at the Crown Court

15. The appellant pleaded not guilty to all counts at the PTPH. It was only after receipt of certain medical reports, and at a stage when the trial was about 3 weeks away, that the appellant offered to plead guilty to manslaughter; and the plea was accepted. The judge was prepared to grant the appellant credit approximating 15 per cent for the guilty plea at the stage at which it was entered.

16. The prosecution and defence submitted a note of opening. The prosecution and defence notes expressly covered the issue of *dangerousness*. The defence note at paragraph 12 simply invited the judge not to make the appellant a *dangerous* offender and not to pass an extended sentence or a life sentence. It appears the judge did not discuss that issue with defence counsel or raise any points on it during the opening of the case or mitigation. The judge was aware of the issue as it was in the prosecution opening and defence notes. It was specifically mentioned as an issue by Mr Richard Wright KC in the opening.

17. A pre-sentence report had been ordered when the plea was taken. It was not prepared by the date of sentence. We have been told a mistake was made as to the custodial status of the appellant. The probation service thought he was on bail whereas in truth he was on

remand. It appears the judge was content to proceed without one.

18. The judge set out his view of the facts in his sentencing remarks and placed the case firmly within category B of the *Definitive Guideline of the Sentencing Council on Manslaughter* of 2018. This was on the footing the death was caused in the course of an unlawful act which carried a high risk of death which was or ought to have been obvious to the offender. The judge took the view the appellant had grabbed the neck of the deceased (a vulnerable part of the human body) and this compression lasted for about 50 seconds. This, he stated, continued despite others trying to pull the appellant off the deceased.

19. The judge identified two aggravating features, which were the appellant was intoxicated and this all occurred in a public place at night. The judge accepted that he must not approach his task mechanistically, however he rejected defence contentions that the appellant was in some way defending himself and concluded that any violence offered by the deceased was momentary or "fleeting". He also made it clear that the fact the appellant had a prosthetic leg was irrelevant. The judge had a sentencing note from both the prosecution and defence prepared by leading and junior counsel when he came to sentence. The deceased also had some form of heart defect, but the judge pointed out that a person who attacks another person must take his victim as he finds him.

20. The judge was of the view the attack was somewhat premeditated although he curiously formed that view based upon the longevity of the neck-hold. The sentence was elevated from the starting point of 12 years within the Guideline and placed at 15 years following trial. He then reduced it by approximately 15 per cent to take account of the plea. This produced a sentence of 13 years. After this, the judge decided the appellant was a *dangerous* offender, having listed his previous offending. He therefore extended the licence component of the sentence by 4 years.

The Previous Convictions of the Appellant

21. The appellant has previous violence to his name. He has six convictions for 11 offences between February 1994 and October 2014. In February 1994, he was fined for an offence of common assault. In July 2014, he received 12 months conditional discharge for two offences of battery and one for criminal damage. On 14 September 2001 he was sentenced to 2 years' imprisonment for offences of assault occasioning bodily harm, false imprisonment, criminal damage and battery. On 9 November 2001 he was sentenced to 6 months' imprisonment for assault occasioning actual bodily harm. In July 2006 he received a 12-month community order for an offence of battery. Finally, in the October 2014 he was fined for an offence of battery. He also had cautions for assault occasioning actual bodily harm in 1993 and criminal damage in 1999.

22. Whilst not the worst form of offending for violence, he has a number of crimes of violence to his name, but none since 2014 (some 8 years before the current criminality), although there is evidence within the facts of the previous criminality that he is somewhat

explosive of character.

The Pre-Sentence Report

23. Although the court below did not have a report, this Court has taken the necessary precaution of securing one. We have read it with care. The report is both detailed and insightful to the current situation of the appellant. We are grateful to Mr Mark Sambrook for his thorough report. The report makes clear the appellant was disinhibited by alcohol having consumed 5 or 6 pints of beer plus a rum and coke between 6.00 pm and 11.00 pm on the day of the killing. The appellant had a baleful upbringing with a disruptive childhood, where he also witnessed domestic violence, and violence was visited on him. He has poor problem-solving skills and poor emotional regulation. There is also cognitive distortion and poor temper control. The report amplifies these matters fully. Remorse was expressed to the probation officer.

24. In terms of risk the report contains this important passage:

> "[The appellant] is assessed as posing a high risk of serious harm to members of the public, though this is likely to be other males he comes into conflict with. In essence, there are identifiable indicators of risk of serious harm. High risk of serious harm means the potential event could happen at any time and the impact would be serious."

25. The conclusion of the report is clear: there are factors of importance that reveal the appellant harbours ingrained propensities to be engaged in "instrumental and expressive violence".

The Submissions on behalf of the Appellant

26. We have read the grounds of appeal and it is submitted that the judge was wrong to conclude the appellant was *dangerous* on the information he had before him; and the custodial term was excessive in all the circumstances of this admittedly serious case.

27. This morning Mr Ferm has advanced criticism of the judge in relation to his failure to adjourn for the purpose of obtaining a pre-sentence report and to proceed without one. In other words, he argues an error of principle was made. Notwithstanding the presence of a report now before this court, he seeks to argue that the appellant is not a *dangerous* offender by reference to certain selective passages in the report. Mr Ferm additionally emphasises that the appellant has demonstrated remorse by reference to what is stated in the fresh pre-sentence report. In terms of categorisation, Mr Ferm has sought to argue

this was a category C case by reference to certain facts he has called to our attention during the course of submissions.

28. In relation to the length of sentence, Mr Ferm argued the judge made every possible finding against the appellant and did not balance matters appropriately in the factual matrix of this case. He asserts the judge was not entitled to reach the conclusions he reached. He called attention to the mitigation advanced, in the sense the appellant initially tried to intervene to prevent violence earlier in the incident. He submitted the judge did not accept, or properly balance, that aspect of the case. Furthermore, he calls attention to the disability of the appellant and the difficulties this will cause him whilst in prison.

29. In relation to the absence of the pre-sentence report, we have been told today, as we explained a little earlier, that a mistake was made by the Probation Service as to the status of the appellant. It was perceived by the Probation Service that he was on bail, whereas in reality he was on remand. Whatever the reasons for the mistake, the error could not be corrected by the time of the sentence hearing.

The Submissions on behalf of the Prosecution

30. Mr Richard Wright KC, on behalf of the prosecution, has prepared a very full and helpful respondent's notice and has amplified certain points contained therein during the course of submissions this morning. He submits the judge at all stages was correct in his analysis and was entitled to form the views he did. He submitted it is unarguable the defence were unable to deal with the issue of *dangerousness* as it is part and parcel of the Definitive Guideline.

31. During the course of submissions this morning, upon the issue of the length of sentence, Mr Wright called attention to a number of specific and important points. He particularly asserts the appellant held the victim for a period of approximately 50 seconds with vice-like pressure. He argues that is a very serious feature of this case. Furthermore, he called attention to significant aggravating features, including the previous criminality of the appellant which, although not of the worst kind, reveals a tendency to sudden explosive behaviour. He also calls attention to the alcohol consumption of the appellant.

32. Mr Wright argues the mitigation is modest, and it is simply a case of the appellant's age and his previous convictions being of some antiquity. He, notwithstanding these features, asserts the judge was entitled to adjust the sentence in the upwards direction in the way that he did.

Discussion and Conclusion

33. First, in respect of the two grounds upon which renewal of leave to appeal is sought, we have no hesitation in rejecting them without any further ado. This case plainly falls into category B. Any individual who grabs another individual around the neck and does so for a substantial amount of time plainly has appreciated, or ought to have appreciated, there is a high risk of death associated with such conduct. In the context of this case, that is made out, without hesitation.

34. As for the other ground relating to the argument there was an element of self-defence, we reject that with equal celerity. The judge saw the CCTV recording as we have. In our judgment, the judge was perfectly entitled to form the view he did. Accordingly, we refuse the renewed application for leave to appeal on grounds 2 and 3. We endorse the observations of the single judge.

35. Second, we turn to the real arguments in this case surrounding the length of the sentence and the issue of the appellant being a *dangerous* offender.

Length of sentence: Was it manifestly excessive?

36. Any court where sentence is to be passed for the crime of manslaughter must approach its task by reference to the Definitive Guideline of the Sentencing Council issued in 2018. The conventional stepped approach is required and, in this case, there is no doubt that the judge followed the steps required. In this case he correctly placed the case in category B when assessing culpability and correctly avoided being mechanistic in his approach. The judge then proceeded to step 2 relating to the starting point and category range. In this case, there are aggravating features increasing seriousness. These are the previous convictions of the appellant. There was an element of persistence of the appellant in the particular circumstances of this case, where he had the deceased in a neck-hold for approximately 50 seconds to the point where the deceased was rendered unconscious. This was an episode of serious violence and disorder executed in a public place, at night, when the perpetrator was inebriated. The appellant told the probation officer he had consumed 5 or 6 pints of beer and a rum and coke between 6.00 pm and 11.00 pm.

37. We feel there is force in the submission that the conduct of the appellant cannot be properly characterised as premeditated. Whilst premeditation does not require proof of a detailed or formal plan of action, it does require some element of planning before the event. This case discloses no evidence of that, but the conduct of the appellant was sustained or persistent in the sense that a neck-hold, for a substantial period of time, was an exceptionally dangerous act. To do that demonstrates an act of sustained violence which has to be marked as an aggravating factor. It is to be noted that the list of

aggravating factors in the Definitive Guideline is non-exhaustive.

38. The judge was, in our judgment, entitled to say the intoxication of the appellant and the fact this was all unfolding in a public place, were also factors affecting the seriousness of the case. We accept the view that the appellant expressed belated remorse by his late guilty plea but we, like the judge, discern nothing else to reveal heightened remorse. We have read the letter the appellant wrote to the judge and the other letters where individuals regarded the appellant favourably. In a case such as this, these are matters of marginal significance.

39. The main issue is whether the judge elevated the level of sentence by too much so as to make the custodial term manifestly excessive. We accept the proposition of the prosecution that this is a case where elevation from the starting point is necessary. The judge was right to think it was. We have considered whether the judge went beyond the outer reaches of the sentence open to him. We have come to the conclusion that to increase the notional sentence to 15 years, that is to say an increase of 3 years before taking account of plea, is not manifestly excessive. It is at the upper end of that open to the judge, and it is very severe. But there are features here which warrant that approach.

40. There is very little personal mitigation which in any way would serve to reduce the sentence apart from the guilty plea.

41. The appellant has previous violence to his name. This terrible episode was in public and involved a sustained violent neck-hold lasting approximately 50 seconds. It also involved two hard blows to the back of the head of the deceased. This form of violence, perpetrated in a public place, when the attacker is inebriated, demands condign punishment, without doubt. It is our view the elevation to a notional term of 15 years was not manifestly excessive. The appellant was entitled to credit for plea in the vicinity of 15 per cent. This brought the custodial term down to the level indicated by the judge, namely 13 years. That component of the sentence is not manifestly excessive, albeit it is very severe.

Was the appellant a Dangerous Offender?

42. This Court has stated several times that it is usually wise for the sentencing court to obtain a pre-sentence report to specifically address the issue of *dangerousness* if it is within the contemplation of the court that such a sentence may be imposed. We reiterate that observation.

43. It is unfortunate the report which had been ordered was unavailable. It would have been wise to seek an adjournment despite the problems occasioned by the further delay.

44. We also reiterate that just because a court adjudges an offender to be *dangerous* within the statutory definition, does not demand the court passes an extended sentence. If the court takes the view that the ordinary levels of supervision are adequate, it is not necessary for the court to pass an extended sentence.

45. We have the benefit of a pre-sentence report. We have to ask ourselves whether the judge, in all the circumstances of this appeal, was either wrong in principle to adjudge the appellant as *dangerous*, and whether, if he was correct in that assessment, he imposed a period of extension which was either unnecessary or the extension period was manifestly excessive.

46. The appellant has previous convictions for violence. He perpetrated a sustained, violent attack in this case. The pre-sentence report reveals him to be *dangerous* in the way described, as we have quoted a little earlier. We remind ourselves of the definition of *dangerousness* which is required when extra protection of the public is needed. Section 308 of the Sentencing Act 2020 provides the court must assess whether there is a significant risk to members of the public of serious harm occasioned by the commission of further specified offences by the offender. The court must of course take into account all the information that is available about the offender, including his previous criminality and the pattern of his offending. The case of **R v Lang** [2005] EWCA Crim 2864 is always instructive in this regard.

47. This appeal is not an appropriate vehicle for this Court to revisit or reiterate the various decisions of this Court upon that subject. We have firmly in mind the statutory test and the guidance in the various decisions of this Court. It appears to us that the appellant is a man of violence, who has a propensity to violence, and is unable to regulate his temper. When disinhibited by alcohol, this provides a recipe for him to act with violence and, in this case, sustained and prolonged violence which was inherently dangerous. A neck-hold is a particularly dangerous act when it is prolonged.

48. In these circumstances, although this very experienced judge did not have the benefit of a pre-sentence report as we have, we are of the view he was entitled, based upon what we now know, to have formed the view that the appellant was *dangerous* within the definition of section 308. We feel the judge was therefore entitled to extend the sentence and we do not regard an extension of 4 years as being in any way excessive. It was unfortunate that the judge did not specifically draw to the attention of counsel for the defence that he was actively considering a finding of *dangerousness* and contemplating an extended sentence. However, that is not fatal to the sentence imposed. The court is required to follow the stepped approach in the Guideline. It has to be addressed by the court, and by counsel when making submissions. It is wise to raise the issue even if it is not to be actively considered, simply because the Guideline makes reference to it at step 5. It is particularly important to raise it when it is to be actively considered.

49. In the light of the issues in this appeal, we emphasise the following points:

(1) Courts when passing sentence in manslaughter cases, as in other cases, must follow the stepped approach in the Definitive Guideline.

(2) Where the Definitive Guideline has a step (step 5 in a manslaughter case) which requires consideration of *dangerousness*, that issue must be specifically addressed by counsel and the judge. Even when it is not being actively considered, it requires passing reference, to ensure it is not being overlooked, and the judge, as well as counsel, are not passing-by an important topic.

(3) If a judge is contemplating a finding of *dangerousness,* and is thereby considering passing an extended sentence or life sentence, he or she should ordinarily raise that with defence counsel to allow submissions.

(4) We also remind courts when passing sentence, it is generally an essential and necessary requirement to obtain a pre-sentence report when an extended sentence is within the active contemplation of the court. It is not a mandatory statutory requirement, but it would be generally unwise to decline to do so, save in the most obvious or exceptionally serious forms of violence falling for sentence, or where the offender is without a shadow of doubt a *dangerous* man, or where it is accepted by his defence lawyers that he is *dangerous.*

(5) If a report has been sought, and it is not available on the day of sentence, it is important that steps are taken immediately to secure the report. If an adjournment is required, however regrettable the resulting delay may be, an adjournment should ordinarily be sought and granted.

50. In this appeal the judge was entitled to form the conclusion he did, although he should have obtained a pre-sentence report. He was not wrong in principle to pass an extended sentence; nor was the extension period manifestly excessive. Judge Kelson KC rightly commented the sentence in this case in no way reflected the value of the life of the deceased. He was a much-loved man. The judge plainly paid attention to the personal statements of his family. We too have read them. The sentence in this case was very severe, in our judgment, but not manifestly excessive.

51. This appeal is dismissed.

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