Neutral Citation Number: [2013] EWCA Crim 1161

Case No: 201301955 A4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM HER MAJESTY'S ATTORNEY GENERAL
His Honour Judge Keen QC
T20127369

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2013

Before:

LADY JUSTICE RAFFERTY DBE
MR JUSTICE KEITH
and
HIS HONOUR JUDGE GOSS QC (SITTING AS A JUDGE OF THE COURT OF APPEAL CRIMINAL DIVISION)

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Between :

JORDAN SHEARD	**Respondent**
- and -	
REGINA	**Appellant**

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- -

Crispin Aylett QC (instructed by **Crown Prosecution Services**) for the **Appellant**
Andrew Smith MBE TD (instructed by **P&R Howard Solicitors**) for the **Respondent**

Hearing date: 6th June 2013

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Approved Judgment

Lady Justice Rafferty:

1. In reliance on the provisions of S36 CJA 1988 this is an application by HM AG for leave to refer to this court as unduly lenient a sentence of three and a half years' detention in a young offender institution imposed on 21st March 2013 in the Crown Court sitting at Sheffield upon Jordan Sheard. He had earlier pleaded guilty to manslaughter. Born on 17th March 1993 JS is 20 years old. We give leave.

2. Steven Simpson, born on 22nd June 1994 died on 24th June 2012 as a result of burns sustained at his 18th birthday party two days earlier. He was vulnerable – he suffered Asperger's syndrome, was speech-impaired, epileptic, and had learning difficulties. He lived alone in a flat and attended Barnsley College and a Youth Club. Openly gay, he was described as sociable, with a large circle of friends, a very nice lad who wouldn't hurt a fly. His friend Miss Sweeney said he was "easily influenced and if he firstly refuses to do what is asked of him, people know that if they badger him and ask him again and again he will eventually do what is asked." He was "easily led and suggestible."

3. On Friday 22nd June 2012 Steven held a party at his flat to celebrate his 18th birthday. He had invited a number of his friends from the Youth Club. At about 9 p.m JS, then 19, turned up with others. Steven said that he *had* invited them but did not seem too sure about it.

4. In the course of the evening, a great deal of alcohol was drunk.

5. JS and his friends tried to persuade Steven to remove his clothes, chanting, "Strip! Strip! Strip!" At first apparently reluctant Steven stripped down to his boxer shorts, events still seen by Miss Sweeney as good-natured fun, but there followed an amount of horseplay. Steven did not by then seem happy. As the evening wore on he had more and more to drink. JS mocked him calling him, "a gay cunt." He wrote on Steven's stomach, "I love dick". He also wrote on Reece Thompson's stomach "I love Jordan". Someone drew a penis and testicles on Steven's face. "Gay boy" was written on the bathroom door.

6. At about 11p.m., police attended after a complaint about the noise. The party continued after the police had gone.

7. A witness saw Steven, fully dressed again, angry and telling JS and Brendan King to get out of his bedroom. He said they had been "trashing it". JS and King came out, JS holding a small hammer. Miss Murphy took it and told him off. He laughed at her. His plea of guilty was accepted on the basis he had found in Steven's bedroom two youths causing damage, gone into the bedroom to stop them. seen and removed the hammer.

8. Horseplay resumed, Steven and JS dancing with their trousers at their ankles. By about 2 a.m., a number had left. Steven was in a bedroom with JS, Thompson, King and two others. Steven's trousers had been pulled down and his genitals exposed. Thompson had sprayed him with tanning oil. The bottle label shows a warning in small print that its contents were flammable. Steven did not object; indeed, he appeared still to be enjoying himself.

9. JS held a lit cigarette lighter to Steven's groin. Steven immediately caught fire and ran into the sitting room, the lower half of his body engulfed in flames. A guest tried with his bare hands to extinguish the flames. Material from Steven's trousers stuck to his hands. Using his own top, he tried to smother the flames. He rang 999. Those who had been in the bedroom with Steven ran from the flat.

10. By the time the ambulance crew arrived, Steven was in a bath of cold water and appeared calm. P.C. Taylor asked what had happened. Steven said, "I didn't want to. They sprayed fire lighter on my dick and set fire to me. I think it was Reece. After that, I dunno what happened." He suffered 60% burns, in large part full thickness. He was transferred to a specialist burns unit.

11. Later that day Steven told his father he and others had been "messing about with tanning lotion." The next thing he could remember was going up in flames. He told the police that he had invited three named friends, others he did not know arrived uninvited. He remembered Thompson squirting him with a bottle of liquid – including on his penis. Someone put a lighter to his penis and set it alight.

12. He died the following day.

13. After running away JS returned to the area and was arrested at 3.15 a.m. He said, "I burnt my hand trying to take his trousers off when he was on fire." He had partial thickness burns to three of the fingers of one hand.

14. Interviewed, he first claimed Steven had set himself alight but later admitted having held the lighter to Steven's groin. He said others in the room said, "'Light it, light it. See what it does.' And like an idiot I did."

15. He said that he had expected the oil to have flared up and burned out without causing injury. He said that he had previously deliberately set his own pubic hair alight. He claimed he had not intended to cause any injury. He would not have acted as he did had he been sober.

16. A Basis of Plea read:

    i) Steven had invited JS to the party earlier that day;

    ii) Two others had been causing damage in Steven's bedroom. JS went in to stop them. Once inside he had seen a hammer and picked it up to remove it from harm's way;

    iii) He had freely involved himself in what he saw as "good-natured horseplay." He and others had sprayed Steven with shaving foam and written on his body. References to Steven's sexuality had been part of this horseplay. Steven had been enjoying himself and had gone along with it;

    iv) Others had egged on JS into lighting the cigarette lighter. He had not given any thought to the consequences. The risk of injury would have been obvious to anyone sober;

    v) He had tried to extinguish the flames and burnt his hands in the process;

vi) He ran away in panic and soon returned**.**

The Crown did not accept (iii) and (iv). It was necessary to resolve the question of bullying/horseplay and whether JS had been encouraged to act as he did. It was agreed with the defence that a Newton hearing ("a Newton") could be conducted on the papers and it was listed on 21st March 2013.

17. The Judge expressed some surprise at how it was proposed the issues should be dealt with. Nonetheless, faced with agreement at the Bar, he agreed to resolve the matter on the papers.

18. The Crown submitted that what had taken place amounted to cruel behaviour towards a vulnerable target; and that there was no evidence to support the claim that JS had been egged on. Mr Smith for JS submitted that the Judge could not be sure that what had gone on had been as a result either of the victim's vulnerability or his homosexuality. Counsel accepted that were the contrary true it would be a serious aggravating feature.

19. Mr. Smith raised the extent to which JS would have been aware of Steven's disabilities: the Crown appeared to be able to prove no more than that JS and Steven might have met before but there was no evidence they had known each other "very well." Absent detailed knowledge it would have looked as though Steven had been "going along with this raucous, boisterous activity". Mr. Smith contended no evidence pointed to anyone having discouraged JS though it did not matter greatly.

20. The Judge made plain he would hear any evidence Mr. Smith wished to call and if JS chose not to give evidence that would not be held against him. Mr. Smith took instructions and called no evidence.

21. The Judge pointed out that the Crown had not drawn to his attention anything to show JS was aware of the difficulties from which Steven suffered. The evidence had to be seen in the context of the timescale of some five hours. JS and his friends had made references to Steven's homosexuality and were "ribbing" him. However, "There is also evidence that JS involved himself in homosexual play and no evidence I can find that SS objected to what was taking place. The only evidence to which I have been referred indicated that he was having a good time, as were others…The Crown submits it's irrelevant whether or not he appeared to be enjoying himself because he could not make an informed decision. The Crown has drawn no evidence whatsoever to my attention to support that submission and it is not something that can be inferred from the evidence……I apply the test: has the Crown made me sure that this was cruel behaviour towards a vulnerable, easy target? It falls very far short of making me sure, and therefore the defendant is entitled to be sentenced on the basis he put forward……the Crown has no evidence to contradict what the defendant is saying [about anyone discouraging him] and asks me to infer from silence on the point from other witnesses that it did not happen. It is not a properly constructed argument. So, again, the Crown has not persuaded me so that I am sure that they are right and the defendant is entitled to be sentenced on the basis that he put forward".

22. To the author of the psychiatric report, Dr. Hayes, JS appeared "very subdued and overwhelmed by the results of his prank". He exhibited symptoms of post-traumatic

stress disorder as a result of what had happened. The author of the pre-sentence report felt this offence an aberration unlikely to be repeated.

Aggravating features for which the Attorney General argues.

23. Assuming JS knew little or nothing of Steven's vulnerability before the party (albeit he should at least have known of his speech impairment), over five hours he realised Steven tolerated or endured the following:

24. Mockery of the size of his penis, homophobic abuse verbal and written, damage to his bedroom, removal of his clothes, and oil sprayed on his genitals whilst a crowd looked on. There was ample evidence to tell JS that Steven was vulnerable and taken advantage of (sic). The finding of the Judge to the contrary was wrong. Horseplay turned into bullying.

25. Aware a guest said "Light it, light it – see what it does" on his own account JS took a risk as to the consequences.

26. He fled albeit he returned.

27. He first claimed Steven had set himself alight.

28. Steven suffered terribly.

Mitigating features conceded by the Attorney General.

29. Others also took advantage, He pleaded guilty. He is remorseful. He had been of good character.

Developed arguments advanced before us

30. The AG argues that the Judge paid insufficient regard to Steven's vulnerability, to JS's behaviour overall, to the highly dangerous nature of applying the lighter and to the terrible consequences. He took us to extracts from JS's interviews under caution from which he distils the following as supporting that contention:-

31. Told he had been identified as setting Steven alight, JS claimed to have said, "It weren't me, Steven, was it?" Steven agreed and pointed at someone else. The AG suggests this makes it only too clear that JS had read the suggestibility of Steven.

32. JS said "And then I just reached forward, 'cos somebody said, 'Light it, see what happens.'"

33. He fled because he had been told by another partygoer that he would get twenty years.

34. Walking past JS's house Steven was asked if JS and his friends could come to the party. He had talked to Steven a few times. He denied knowing Steven had problems. He became distressed and insisted it had been an accident.

35. The Attorney-General accepts that the Crown should have made clear that JS and his friends had invited themselves and that Steven acquiesced. No reference was made to

the hammer by the Crown during the Newton or in opening nor was it relied upon in mitigation. Mr Aylett QC for the AG submits that the only way for the Judge to resolve factual disputes ensuring justice to both sides was by receiving oral evidence, from guests and, if JS chose, from JS. JS might have raised a doubt as to the Crown's submissions. Alternatively he had already given contradictory accounts and risked being disbelieved. The responsibility for the failure to call evidence rests with the Crown, Mr Aylett concedes. On the other hand, it was open to the Judge to ask for oral evidence. Indeed the Judge said he was "at a total loss to understand" why the case had been listed as it was.

36. Additionally, during the Newton the Crown failed to refer to evidence which might have affected the findings. Nothing was said about someone pulling down Steven's boxers, counsel referred only to someone pulling down his trousers, someone mocking the size of Steven's penis, the suggestion Steven had become unhappy, someone (per Basis of Plea not JS) trashing Steven's bedroom, that Steven had initially blamed another, and that JS tried to exploit Steven's suggestibility by getting him to withdraw his accusation against JS and to blame someone else.

The Ruling

37. The Attorney-General does not challenge the finding that JS had not set out to subject Steven to homophobic bullying. Nonetheless he argues that the Judge should have found there came a time when JS realised Steven was vulnerable. JS and his friends had taken over and the party had become theirs. The Judge also set some store by events at the party being over a period of five hours. Since there was ample evidence that JS and his friends were taking advantage of Steven it was not necessary for the Crown to call evidence of Steven's inability to make an informed decision.

38. The Attorney-General does not quarrel with the finding that JS was egged on. "Light it, see what it does" is an aggravating feature, importing implicit recognition that setting oil alight carried some risk of bodily harm.

39. The AG contends that assuming as he said he had done that the Judge had read all the papers, he should have realised, even as late as during submissions at the conclusion of the Newton, that there was more he needed to explore and he should have directed the calling of evidence. He could not of course have obliged JS to give evidence, but the Crown could certainly have been alerted to his analysis, and JS even if he stood firm in relying on the privilege against self-incrimination put in a position to make an informed decision.

The authorities

40. In *Attorney-General's Reference Nos. 27 and 28 of 2008 (Lewis and Walker)* [2008] EWCA Crim. 2027, the victim, aged 16, was believed to have stolen a bicycle. The offenders, 21 and 23, forced him to jump into in a dangerous pool. As he struggled to get to the edge, he was driven back with sticks and gravel thrown at him. Forced into deeper water he drowned. One offender dived in to try and save him. The offenders pleaded guilty to manslaughter. They were sentenced to five-and-a-half years' imprisonment. The Court of Appeal said the appropriate sentence after a trial was ten

years; allowing for their pleas seven-and-a-half years was imposed. What had taken place had not merely been horseplay, it had been bullying.

41. In *Attorney-General's Reference Nos. 26 and 27 of 1994 (McAllister and Still)* [1995] 16 Cr. App. R. (S) 675, both adults offenders had taken a hand-held flare and a marine distress rocket to a football match. The rocket was fired and it struck a man on the other side of the ground, killing him instantly. They pleaded guilty to manslaughter by reason of gross negligence and on the basis they had thought it a flare not a rocket. They were sentenced to three years' imprisonment. The Court of Appeal, concluding ignorance not malice, declined to interfere.

42. In *R v Whitbrook and Smith* [1998] 2 Cr. App. R. (S) 322, the appellants, 17 and 18, placed a lit firework through the letter-box of a house. In the resultant fire a ten-year old died. They pleaded guilty to arson being reckless as to whether life were endangered. Their appeals against sentences of three and of three and a half years detention were dismissed.

43. In *R v K.C.* [2005] 1 Cr. App. R. (S) 97, the appellant, 15, and two friends took it in turns to shut one another in a large metal waste container. The appellant was first shut in then the victim. Knowing there was flammable material in the container, but thinking the door easy to open, a view reasonably held, the appellant threw in a lit piece of paper. The door jammed and the victim died. The appellant was convicted of manslaughter after a trial in which he blamed others including the victim. Four years' detention was reduced to three.

44. In *Lewis and Walker*, the offenders directly exposed the victim to risk of death; in the other cases such risk was more tenuous. The Attorney-General submits that while falling short of *Lewis and Walker*, this case is closer to it than to the other three cases cited, Flame had been applied to skin, so that JS exposed Steven to the risk of harm with the possibility of far more serious harm.

45. All authorities cited preceded *Attorney-General's Reference (No. 60 of 2009) (R v Appleby)* [2010] 2 Cr. App. R. (S) 46, which raised the sentencing bar for homicide. This case post-dated it.

46. For JS Mr Smith explained that he relied on what he took to be an indication from the J in dialogue. During the Newton Mr Smith made what in a trial would be termed a submission of no case to answer. The Judge told him that the evidence could make him sure, and the emphasis was on "could". Mr Smith thought he read the runes to indicate that a finding for the Crown was less likely than likely and after taking instructions called no evidence. It was a judgment call, similar to those made day in day out by counsel who know and hope to read a Judge. Mr Smith read them correctly, if runes they were, because, without calling evidence, he succeeded. The J found for JS on both Newton issues.

47. Mr Smith submits that consequently this court should pause to examine the effect of a conclusion that the sentence was unduly lenient. So to find would necessarily amount to our substituting for the findings of the Judge findings of our own because it would require us to take a view on the Newton issues adverse to JS. There is no possibility of remitting the matter to the Crown court for a rehearing of the Newton issues. It

follows that JS has lost the potential advantage of giving oral evidence during the Newton. We see the force in that argument.

Discussion and conclusion

48. A Judge - already surprised to find the Newton hearing listed without witnesses to attend - might on a careful reading of these papers have been prompted to review whether that were the appropriate course. We readily understand the AG's contention that it was not. Hearing witnesses, called not only for the Crown but potentially also for JS, could so have affected the Judge's findings as to inform his assessment of the appropriate loss of liberty. Equally, their tested evidence might have reinforced the view he took and led to the same or a yet more sympathetic sentencing outcome.

49. We are wary of going further. Though each of us might have directed the attendance of witnesses the better to satisfy ourselves of the true position, we must be careful now to avoid reaching a confident conclusion without that very advantage.

50. Had the AG's contentions been supported by oral evidence during the Newton hearing the likelihood is that his appeal would have been allowed and the sentence quashed as unduly lenient. However, on the reasoning we have adopted JS lost the opportunity to present himself sympathetically assuming he elected to give oral evidence. It would not be fair or right to penalise him at this stage.

51. We decline to interfere with the sentence of three and a half years detention in a young offender institution.