Neutral Citation Number: [2013] EWCA Crim 2185

No: 201301200 C3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 8th November 2013

B e f o r e:

LORD JUSTICE TREACY

MR JUSTICE GREEN

SIR DAVID MADDISON
(Sitting as a judge of the Court of Appeal Criminal Division)

R E G I N A

v

NICOLA CAROLINE EDGINGTON

Computer Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2A
Tel No: 020 7404 1400 Fax No: 020 7831 883
(Official Shorthand Writers to the Court)

Mr J Cooper QC appeared on behalf of the Applicant

Mr M Heywood QC & Mr L Mably appeared on behalf of the Crown

J U D G M E N T

(Approved)

1. MR JUSTICE GREEN: This is an application for leave to appeal against both conviction and sentence. The application has been referred to the Full Court by the Registrar. On 7th February 2013, in the Central Criminal Court, the applicant was convicted of murder (count 2) and attempted murder (count 1).

2. In respect of the murder, the applicant was sentenced by the then Common Sergeant of London, His Honour Judge Barker QC, to life imprisonment, with a period of 37 years being specified as the minimum term. In relation to count 1, attempted murder, the applicant was sentenced to a minimum term of 10 years imposed concurrently with the sentence for murder. We deal with the issue of time on remand below. The total sentence was life imprisonment with a minimum term of 37 years.

The facts

3. The facts of this case may be summarised as follows. On 4th November 2005 the applicant returned to her home from a night out with her brother and sister. Her mother was alone in her house. The applicant stabbed her mother and killed her, leaving the property and thereafter disappearing for three weeks. She was arrested and charged with murder. She later pleaded guilty to manslaughter, a plea that was accepted by the prosecution. On 23rd October 2006 she was made subject to a hospital order, with a restriction order without limit of time under sections 37 and 41 of the Mental Health Act 1983. Between 2006 and 2009 the applicant was treated as an in-patient in a medium-secure psychiatric facility run by the Oxleas NHS Foundation Trust. During this period she was diagnosed with schizophrenia with a prominent mood component complicated by emotionally unstable personality traits. The applicant has a history of substance abuse. During her period in the secure unit she was treated with anti-psychotic and mood-stabilising medication.

4. In 2009 the applicant was released, and as from September of that year she was living in a supported flat in Greenwich managed by a housing association. By October 2011 she was under the care of the Bracton Centre and she was being reviewed regularly by her consultant psychiatrist, her social supervisor and her community nurse. The last contact which the applicant had with these professionals was on 6th October 2011.

5. On the night of Thursday 6th October 2011 the applicant rang 999 on three occasions in the course of ten minutes. On the first occasion she complained that she had been receiving threatening text messages. However, by the time of the last call she had indicated to the police that she did not wish them to attend. She told them that she would report the matter on the following day.

6. On 7th October 2011 she telephoned her employer to tell them that she would not be attending work that day. Later on the same day she telephoned the police, on this occasion to make a complaint about an ex-boyfriend whom she said lived in Manchester.

7. On Sunday 9th October 2011 the applicant called a minicab. When it arrived she told the driver that she was going to Deptford High Street. However, after about a mile she instructed the driver to return her to her flat and asked if he would wait for her for about 15 minutes. He told her that she would have to re-book. At about 9.45 pm on the same day she made a further three 999 calls to the police. She complained that she had let some "crackheads" into her flat and that they had stolen her keys. However, by the time of the third call she informed the police that she had found the keys and there was no need for the police to attend.

8. At about 3 am on the morning of Monday 10th October 2011 the defendant went to the minicab office on Woolwich Road, Greenwich. She asked to for a cab to take her to Lewisham Hospital. When she arrived she said to the driver, "I think the hospital is closed". The driver, however, checked and found that it was open. He noticed that her head was down and there was saliva coming from her mouth. She then asked to be taken to another hospital and she was taken to the Queen Elizabeth Hospital in Woolwich. When she arrived she told the driver that she did not have the fare to pay him. The driver remonstrated, telling her that she would have to pay. She asked him to take her to the nearest cash point. Eventually the driver returned her to the cab office. There was a short struggle as she attempted to leave, during which it was alleged that the driver had beaten her up. However, she remained at the cab office, shaky and distressed. She said that she needed to be sectioned and that she needed to go to the place she had been to before. Emergency services were called and police officers and ambulance personnel attended. She was taken to the Queen Elizabeth Hospital at around 4.30 am, where she told staff she was hearing voices, had not slept for weeks and needed to be sectioned.

9. In the course of these events the ambulance service and police were of the view that she seemed calm and normal and did not display any bizarre or unusual behaviour. To the police officers she made appropriate answers, although she also volunteered that she had been abused by her father and that she had recently slept with a man which she regretted. The hospital staff, however, perceived her differently. The triage nurse described her as fidgety, not making eye contact and agitated. The nurse referred her to the psychiatric team, who immediately accepted her into their care. There was a delay, however, in her transfer, and during that transfer delay she made a further series of telephone calls to 999 during which she repeatedly stated that she might harm someone or even kill.

10. At about 7.05 am, whilst she was in the care of the psychiatric unit, she said "I'm going to call my care co-ordinator". She pushed open the outer door of the building and departed. She made her way to a nearby bus stop and boarded a bus towards Bexleyheath. She alighted from the bus near to the main shopping centre in Bexleyheath, went into the local Asda store and selected a large packaged knife that was for sale. Sale of such items is restricted and she had the help of a member of staff to authorise the transaction, which she otherwise carried out by himself at one of the self-service tills. She then went to the lady's toilet and extracted the knife from its packaging. She discarded the wrapping and secreted the knife in her clothing or in her shoulder bag and then she left the store.

11. Kerry Clarke was on her way to work when the appellant approached her, holding the knife aloft with the blade aimed at her chest. The applicant was shouting obscenities. Ms Clarke tried to prevent the blade touching her and fell backwards to the ground. The applicant managed to get on top of Ms Clarke, wielding the knife and attempting to slash her. One witness described the attack as "ferocious". There was a struggle and, in an attempt to save her own life, Ms Clarke grabbed the blade of the knife firmly with her bare right hand as she wrestled with her attacker. After a few moments she managed to loosen the applicant's grip, taking the knife from her grasp and she managed to free herself from underneath her. She struck out at her attacker and kicked her in an attempt to get her away from her. At this point Ms Clarke and the applicant both got to their feet. The applicant demanded the return of the knife but, not surprisingly, Ms Clarke refused. Eventually the applicant walked away whilst onlookers came to Ms Clarke's aid.

12. The applicant then crossed the road and entered a butcher's shop. Whilst the butcher's attention was elsewhere, she grabbed a 12-inch knife from the butcher's block. When the butcher turned and saw her she pointed the knife at him, but eventually she changed her mind and left the premises.

13. Mrs Sally Hodkin, aged 58, was walking to the train station on her way to work. She was approached by the applicant, who, without warning, attacked her repeatedly with the knife. Mrs Hodkin suffered a number of wounds delivered with severe force to her head and neck, and tragically she died at the scene.

14. The applicant walked away from the scene of the murder towards some shops, where she told shopkeepers that she thought she had killed someone. By this time the police had been called and she was arrested.

15. At trial the salient facts were not materially in dispute. The prosecution contended that the proper conclusion to be drawn from the evidence was that, at the material time, although the applicant suffered from an abnormality of mental functioning, it did not substantially impair her responsibility. It was contended that the applicant acted deliberately and that it was frustration and anger at not having been taken seriously that led her to take a conscious decision to commit these terrible offences.

16. The defence case was that at all material times the applicant suffered a relapse into a psychotic state which impaired her ability to form a rational judgment. In relation to the murder it was contended that her state of mind was such that she was responsible only for manslaughter by virtue of diminished responsibility.

17. It followed that the issue for the jury was whether the applicant had shown to the appropriate standard "whether it was more likely than not" that at the time of the killing she was suffering from an abnormality of mental functioning so as to reduce her crime from murder to manslaughter.

The issues before the court

18. There are now two issues raised before the court. The first concerns the fact that the judge stopped defence counsel obtaining, in the course of re-examination of his expert, evidence as to whether, as a matter of practice, the applicant would ever be released if she was convicted of manslaughter and sentenced under the Mental Health Act. The second concerned the sentences imposed for attempted murder and for murder and whether the correct starting points had been identified in both case and whether sufficient credit had been given for mitigation.

Issue one: The admissibility before a jury of evidence relating to sentence and release practice

19. We turn to the first issue: evidence relating to sentencing.

20. This issue raises a point of principle of some significance. There are two components to the issue: first, whether it is proper to place before a jury evidence as to the sentencing options available to the judge following conviction; and, secondly, whether it is proper to

place before a jury evidence as to whether in practice a person such as the applicant would ever be released from hospital were she to be sentenced under the mental health legislation. The first matter concerns the decision which a judge must make following conviction; the second concerns the possible decisions that medical practitioners might make at some unspecified point in the future.

21. The starting point is that both the applicant and the respondent recognise that disposal upon conviction is not prima facie a matter for the jury. Mr John Cooper QC stated in his Advice on Appeal against Conviction as follows:

"We are of course aware of the basic principle that disposal upon conviction is not within the domain of the jury and in many cases there is sound reason for this. The concern that we must express relates to the confined and highly exceptional circumstances of this case."

Mr Mark Heywood QC for the respondent stated in his skeleton as follows:

"... as the applicant has conceded, as a matter of principle, the consequences of conviction are not a matter for the jury. Evidence relating to such consequences is inadmissible for the following two reasons: (a) it is irrelevant to the question of guilt or innocence; (b) the jury should not be inhibited or distracted in its task of reaching a true verdict according to the evidence."

22. The issue for this court is not whether the basic rule is correct but whether (1) there are exceptions to it, and (2) whether, if there are exceptions, they arise on the facts of this case. No authority has been cited to us which addresses these points. We start by considering the scope of the basic rule and whether there are exceptions to it, and we do this from the vantage point of first principle.

23. The issue arose in the following way. In the course of his re-examination of Dr Adrian Cree, a consultant forensic psychiatrist for the applicant, counsel for the applicant asked the following question:

> *"Q: Can you pause a moment there, please, on that? A distinction, therefore, between the care and the control of an individual in prison and the care and control of an individual in hospital?*
>
> *A: Yes.*
>
> *Q: Can I ask you this? So far as this matter is concerned, as a matter of practice, wherever Nicola Edginton ends up, in your view, will she ever been released?"*

At this point the judge intervened. He said:

> *"THE COMMON SERJEANT: Well, I am not sure that is exactly relevant on the overall position --*
>
> *MR COOPER: All right. Well --*
>
> *THE COMMON SERGEANT: -- for what the jury have to decide."*

24. Mr Cooper QC for the applicant contends that there are exceptions to the basic rule and that the facts of the present case were, as he put it, "highly exceptional". He submitted that the judge erred in preventing the line of questioning being pursued. He submits that it would be naive to contend that had the applicant been convicted of manslaughter on the grounds of diminished responsibility, she would have been released in the foreseeable future, if at all. He argued in the advice, and he sustained the argument today before us, that there is, and I quote from his advice:

"... a serious risk that this jury rejected the Defendant's case, not on the evidence presented, but on inappropriate speculation as to disposal, which in any event, was, in practice, wrong."

On this basis he submits that the defence was unfairly denied the opportunity to develop with expert witnesses the likelihood of the applicant ever been released in the foreseeable future on a manslaughter verdict. It is said that the problem arose not only because of the history in this case of past release leading to disastrous consequences, but also because the prosecution referred to manslaughter as being "the lesser offence". Mr Cooper submits that the jury should have been fully appraised of the realistic background and detail of the consequences of a hospital disposal since this would have ensured that, in the context of the jury being reminded that a manslaughter verdict was a "lesser verdict" than murder, they were not misled into believing that in the context of this particular case that extended also to sentence.

25. In our judgment, it is extremely difficult to imagine circumstances which create exceptions to the basic principle; nor, in our view, were there grounds for treating this case as exceptional. We say this for the following reasons.

26. First, the applicant seeks the right to adduce evidence about two matters, neither of which are prima facie the proper province of a jury. The first concerns the sentence following convictions that a judge might impose. The second concerns the practice that would be applied over a period of time in a secure unit which govern the possibility of release. Neither is proper for the jury to address itself to. To permit the jury to consider such matters violates the principle of the separation of duties between the judge and the jury and the further principle that the jury should address itself only to relevant matters relating to whether the offence has been committed or not.

27. Secondly, if and insofar as there arises in a case a real issue which tends to suggest that the jury is at risk of taking into account irrelevant matters, then this is a matter for the judge to address by way of appropriate directions to the jury. These could be made in the course of the trial and/or in the summing-up. It is the responsibility of the advocate to raise concerns with the judge and for the judge to tailor his or her directions accordingly. It is not, in our view, the task of the advocate to put evidence before the jury on irrelevant matters relating to sentence and release practice and procedure.

28. Thirdly, to permit a defendant to adduce such evidence risks creating additional problems, and indeed encourages a jury to speculate about irrelevant considerations. By its very nature the evidence which the defendant sought to adduce in the present case, namely as to present release practices and what this would mean for the applicant, is inherently speculative and uncertain. It is questionable that any expert can proffer an opinion about what might happen in, say, 15 or 30 years' time in the light of changes in the defendant's mental state or in the light of changes in medical or psychiatric treatment or practice. To permit this

sort of evidence risks encouraging the jury to be distracted from its essential task by evidence that might well be highly speculative and uncertain and which might itself have the effect of encouraging the jury to decide the case other than on the merits. For example, if a hypothetical expert in a particular case had responded to the question sought to be posed by saying he did not know or could not say when the applicant might be released, this could actually serve to encourage a jury to return a murder verdict because of a concern that there was indeed a risk of further premature release were they to return a verdict of manslaughter.

29. Fourthly, we are not satisfied that the issue which is raised is indeed an exceptional problem. On the contrary, it is a problem which could arise in any murder case where a defence of manslaughter by virtue of diminished responsibility arises. Indeed, the risk that the jury might seek to determine its verdict by reference to subsequent disposition could arise in any far less serious case where different sentencing options exist (for example, custody versus a community sentence) contingent upon the jury's choice of verdict.

30. Finally, in the present case the applicant cites two factors said to give rise to an exceptional risk. It is notable that none of these focus upon the conduct of the jury itself. For example, at no point did the jury provide a note to the judge saying that they were confused or wished to receive more information about sentencing options, or practices thereafter in relation to release. The two matters referred to were, first, the use of the expression "lesser" by the prosecution in describing the difference between murder and manslaughter and, secondly, the fact that the applicant had been released at an earlier stage only to commit the offences for which she was later convicted. But as to both of these suggested features, it does not seem to us that they necessarily create an exceptional risk that the jury will stray from its proper task and reach a verdict according to irrelevant considerations. As regards the expression "lesser", the judge explained to the jury the distinction between murder and manslaughter in his summing-up in careful and orthodox terms. The jury would have understood the context in which "lesser" and associated expressions such as "much lesser offence" were used as involving a lesser degree of culpability for the death, and there is, in our view, no basis arising from the summing-up to suggest that they would have assumed that the phrase "lesser" in the context in which it was used by the prosecution had resonance in relation to sentencing options. With regard to the fact that the applicant had been released from a secure unit in the past, it is submitted that the jury might have preferred a murder conviction so as to avoid the risk that the applicant would be released prematurely again following a Mental Health Act disposition. However, it is equally, and possibly more, likely that the jury would take the view that the same mistake would not be made twice were they to find the applicant guilty of manslaughter, i.e. once bitten, twice very shy indeed. In short, neither of the two features identified by the applicant as exceptional necessarily suggest to us the existence of a heightened risk that the jury would, for the wrong reasons, find the applicant guilty of murder. But even if this was a discernible risk, the correct course of action as we have explained would have been for counsel to raise the matter with the judge but not to seek to adduce explanatory evidence before the jury.

31. In the present case there is no criticism made of the directions given by the learned judge to the jury. The objection lies in the judge preventing a line of re-examination. In his summing-up the judge addressed himself to all matters which could relate to this issue, including the need to avoid sympathy and emotion, the relative functions of the judge and jury, the need to avoid speculation about evidence not before the court and as to the burden and standard of proof. The judge gave to the jury a careful and detailed direction on the components of diminished responsibility and as to the relevant evidence and he emphasised

precisely what it was that the jury had to address its collective mind and judgment to. No application was made to the judge at any point during the trial to give the jury any warning or direction about any matter relating to the concerns now expressed.

32. For all of these reasons, we can identify no error in the judge's approach. We refuse leave to appeal against conviction.

33. We turn now to issue 2, sentence.

Issue Two: Sentence

34. Given the severity of the sentence, we consider that this is an appropriate case in which to grant leave, but the essential issue for us is whether the sentence was in all the circumstances manifestly excessive.

35. The applicant contends that in relation to both counts 1 and 2 the starting point adopted by the judge was too high and that the judge failed properly, or at all, to give the applicant proper credit for mitigation and the absence of aggravating features.

36. Mr Cooper QC has today carefully taken us through the relevant aggravating and mitigating factors set out in schedule 21 paragraphs 8 to 11 inclusive of the Criminal Justice Act 2003. It is also submitted that the judge failed properly to reflect in the sentence that the applicant had previously suffered a mental illness which had resulted in her killing her mother.

37. In relation to the murder (count 2), the judge addressed which category the case fell into within schedule 21 of the Criminal Justice Act 2003. He concluded that it fell within paragraph 5 upon the basis that the seriousness of the offender was "particularly high" and that accordingly the appropriate starting point was 30 years. He observed that the applicant's case did not fall within examples of cases set out in paragraph 5(2), but he concluded, and in our judgment correctly, that the list was non-exhaustive and that on the facts of the present case a 30 year starting point was appropriate. In coming to this conclusion he took account of a range of factors.

38. First, he held that the applicant displayed aggression, intimidation, disruption, anger and emotional instability when her demands were not met and that a regular feature of her conduct was "blaming everybody else" for her situation. He addressed the submission advanced in mitigation that it was relevant that she had not been given the help that she was seeking due to the apparent failures by various authorities. The judge stated, however, that he disagreed with the proposition that responsibility for these acts could be "laid at the door of others".

39. Secondly, he held that the dominant characteristic of the applicant was "a borderline personality disorder with the ability when necessary to form rational judgment". He accordingly expressly addressed himself to the extent to which the applicant's mental state affected her culpability. It is to be recalled that the judge had seen and heard a great deal of relevant medical evidence on this point.

40. Thirdly, he took into account that her behaviour was "manipulative and exceptionally dangerous".

41. Fourthly, he took account of the fact that she had killed before and that she came very close to having three deaths laid at her responsibility. He observed that the applicant made a deliberate choice to commit these "terrible acts" and that she simply had to take responsibility for her actions. The fact that there has been a prior conviction for diminished responsibility murder does not mean that there is no culpability on the part of the offender whatsoever, it is an indication of reduced culpability, and in any event the prior conviction remains a relevant aggravating feature.

42. Fifthly, he took account of the fact that the offences were unprovoked and were random.

43. It was in the light of these circumstances that he concluded that it was appropriate to adopt a 30 year starting point.

44. In relation to aggravating factors, he identified the following. First, the existence of significant premeditation. In this regard it is relevant that having listened to the evidence, which we have summarised, the judge rejected the submission to the contrary (that there was no premeditation) by Mr Cooper. Secondly, he referred to the determination on the applicant's part to overcome failure in order to achieve her ends. Thirdly, he referred to the fact that she obtained two knives for only one conceivable reason, namely attempts to kill. Fourthly, he referred to the fact that she chose the ideal location to re-arm herself, namely the butcher. In addition, he treated the attempted murder as an aggravating factor and reflected it in an increase to the minimum to be served to the life sentence. Finally, he took account of the terrible impact which the murders had exerted upon the family of the deceased and upon Ms Kerry Clarke herself.

45. As to mitigating factors, he recorded that the applicant suffered from mental disability, but he added that on the facts of the case there was no convincing case to conclude that the abnormality reduced her culpability to any significant extent.

46. In the circumstances of this case we have concluded that the judge addressed the points in mitigation advanced by counsel and he was entitled to find that the applicant fell within schedule 21(5) and thereby to adopt a starting point of 30 years. He was also entitled to take account of the aggravating factors, resulting in an increase of seven years. We do not accept the submission that he failed to take account of relevant mitigating matters. We do note that the applicant is entitled to have the 510 days spent in custody before sentence taken into account. There is no reference to this in the sentencing remarks, which we take to be an oversight.

47. So far as the attempted murder was concerned, we have already observed that the judge dealt with this as an aggravating factor in relation to the murder, and for that reason made the sentence concurrent. Mr Cooper QC realistically accepted that the point was largely academic because the attempted murder was indeed taken into account as an aggravating factor for the 30 year minimum term. He also accepts that this was an entirely proper course for the judge to take. The applicant submits, however, that the judge did err in adopting a minimum term of 20 years and we consider that we should deal with the point.

48. In our view, the actual minimum term imposed was eight years and 220 days. The judge did not explicitly state his conclusion as to minimum term. Nonetheless, it may be

deduced from his sentencing remarks at page 13D to 13H of the transcript that he followed the following reasoning. First, he identified the notional determinate term as 20 years. He then indicated that he had to reduce that 20 year period by half and then take account of 510 days spent on remand in custody. It is therefore implicit in the manner in which the judge addressed sentence that the minimum term was ten years less 510 days on remand, giving a figure of eight years and 220 days. We note that in treating the attempted murder as an aggravating factor in relation to the murder the judge did not increase the minimum term by this figure but by some materially lower figure. There is, in our view, no basis for concluding that the reasoning of the judge in relation to the sentence for attempted murder was anything other than proper.

49. In all the circumstances the appeal against sentence is dismissed, save insofar as the need to take account of an appropriate reduction in the sentence for murder for time spent in custody prior to sentence is concerned, i.e. th 510 days. Thus, the minimum term is 37 years less 510 days.

https://www.mentalhealthlaw.co.uk/R_v_Edgington_(2013)_EWCA_Crim_2185,_(2013)_MHLO_102