No: 9607084/X5

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London WC2

Monday 18th May 1998

B E F O R E :

LORD JUSTICE WALLER

MR JUSTICE SMEDLEY

and

MR JUSTICE SULLIVAN

- - - - - - - - - - - -

R E G I N A

- v -

KEVAN BORTHWICK

- - - - - - - - - - - -

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MR J SAUNDERS QC appeared on behalf of the Appellant
MR C TREACY QC appeared on behalf of the Crown

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JUDGMENT
(As Approved by the Court)

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Monday 18th May 1998

LORD JUSTICE WALLER: On 25th October 1997 this Court, at that stage composed of myself, Owen J and Sullivan J, adjourned this appeal to enable further psychiatric enquiries to be pursued. The judgment of the Court on that occasion set out fully the facts and provides the reasons why it was thought right to adjourn the matter on that occasion. It is unnecessary to do more than refer to that judgment and outline the position, very briefly, for the purposes of giving the final ruling on this appeal.

The appellant had been convicted of murder. His defence had been that he was not responsible in any way for the deceased's death. No defence of diminished responsibility was run in the alternative or at all. Following the conviction, the psychiatrist who had examined the appellant prior to the trial, that is a Dr Bond, re-examined the appellant. During this interview the appellant accepted responsibility for the killing and Dr Bond came to the conclusion that it was strongly arguable that the appellant was suffering from an abnormality of mind at the time of the killing. It was also clearly arguable that the appellant's mental responsibility for his acts were substantially impaired at the time of the killing but Dr Bond said that that was a matter for the jury.

Prior to the previous hearing, the Crown also consulted a psychiatrist, a Dr Kennedy. Dr Kennedy produced a report which, if anything, was rather stronger, so far as the appellant's case was concerned in relation to establishing that he suffered from an abnormality of the mind at the time of the killing. But Dr Kennedy also expressed the view that it was a matter for the jury as to whether that abnormality of mind substantially impaired the appellant's responsibility.

On that last occasion, the Court was concerned about two factors and ruled that the evidence of the psychiatrists should be admitted at that stage, but thought that further reports should be obtained from the psychiatrists. The Court was of the view that the psychiatrists could be of more assistance in giving opinions as to the impairment of responsibility. The Court was also of the view that it was of materiality to the question as to whether the appeal should be allowed, whether the appellant's mental faculties had in any way prevented him giving rational instructions as to his defence at his trial. What was said on that last occasion was this:

"But equally, if there was overwhelming or clear evidence to demonstrate that a defence of diminished responsibility would have succeeded and there was clear evidence that the mental illness itself was a cause of a decision taken to run such defences as were run, or putting it another way not to run the defence of diminished responsibility, then the interests of justice would seem to require probably the substitution of a verdict of manslaughter but at least to order a retrial."

So the matter was adjourned on that last occasion to give the psychiatrists a further opportunity to consider the position, and both be available to give evidence, if necessary, on the appeal.

The position as at today's date, this resumed hearing, is that two further reports have been produced, again one from Dr Bond and one from Dr Kennedy. Mr Saunders has read out and has opened today the material parts of the opinions expressed by those two doctors. It is clear from the opinions expressed by both of them that the abnormality of mind from which the appellant suffered did substantially impair his mental responsibility as at the time of the killing. It is also clear, from both opinions, that the abnormality of mind also impaired the appellant's ability to give rational instructions. He, in their view, would have been likely to be very suspicious of the psychiatrists who were seeing him and of his legal advisers, and that may well have been the reason why he ran the defence that he did, which was that he had no responsibility at all.

The evidence indeed is so powerful on this occasion that the Crown accept that, provided of course this Court

approves, that the appropriate course in this case is for there to be a substitution for the verdict of guilty of murder, a verdict of guilty of manslaughter.

We have no doubt that, in the light of the two reports of Dr Kennedy and Dr Bond, it is appropriate that there should be a substitution. In those circumstances, the appeal must be allowed, and a verdict of manslaughter substituted for that of murder.

As regards sentence, the position of course was that for the offence of murder, a life sentence was mandatory, and there was a recommendation that the appellant should serve at least 18 years. That recommendation was not challenged on appeal, no doubt because of the circumstances of the killing, and the danger that the appellant posed.

On this occasion, of course, the matter is very different. It must, first, be said that neither psychiatrist has been able to recommend a hospital order. The reason for that is that at the present stage it is felt that the appellant is not susceptible to treatment. The position though, of course, also is that the appellant does still pose a very real danger. In those circumstances, the only course we feel open to this Court is to impose a life sentence, which will mean that the appellant cannot be released while he poses that threat.

We then have to consider what recommendation should be made. The exercise we must go through is as follows. Having passed the life sentence which deals with the very serious danger that the appellant is, we must now go through the exercise of considering what determinant sentence might have been passed on a finding of manslaughter on the grounds of diminished responsibility. The position, of course, is that the culpability for this offence, having regard to the mental impairment, must reduce the responsibility. In our view, the appropriate sentence, if one was passing a determinate sentence would have been one of 8 years.

It follows that, in our view, the period that the appellant must serve before he can apply for parole should be calculated by reference to that determinate sentence. In our judgment, the appropriate period is one of 5 years. We accordingly substitute a sentence of life imprisonment, but with a recommendation that 5 years be served prior to any right to apply for parole. We, of course, emphasise, so that there is no misunderstanding, that the appellant will be detained well after that period of 5 years, if he is not safe to be released. We feel it is also right to say that the stage may come when the Home Secretary feels it is sensible to have the appellant transferred to a hospital. Nothing we have said should prevent that course being taken.

In those circumstances, this appeal is allowed and the sentence becomes that which we have indicated.