Neutral Citation Number: [2009] EWCA Crim 651

Case No: 2006/05752/C1

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOLVERHAMPTON
MR JUSTICE MITTING

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd April 2009

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE AIKENS
MR JUSTICE MACKAY
MR JUSTICE CHRISTOPHER CLARKE
and
MR JUSTICE HOLROYDE

- -

Between :

	R	
	- V -	
	Wood	

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Mr Malcolm Bishop QC and Mr O Daneshyar for the Appellant
Mr Roger Smith QC for the Crown

Hearing dates : 25th February 2009

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Judgment

The Lord Chief Justice of England and Wales :

1.On 11 October 2006, after the jury rejected defences of provocation and diminished responsibility, Clive Wood was convicted of murder. He was sentenced to life imprisonment. The minimum term to be served was fixed at 18 years' imprisonment. An appropriate order was made under section 240 of the Criminal Justice Act 2003 (the 2003 Act).

2.On 20 June 2008 this court, differently constituted, quashed the appellant's conviction for murder and substituted a conviction for manslaughter on the grounds of diminished responsibility. The question of provocation did not arise for consideration. The jury was satisfied that the prosecution had disproved it, and the judge himself made plain that he did not believe a word of the defence case on the issue. After reflection the Crown did not seek a new trial for murder and accordingly the appellant must now be sentenced for

manslaughter.

3.The essential facts of this crime are set out at [2008] EWCA Crim 1305. For present purposes however we must underline that, in his own home, where he had offered accommodation to the appellant, the deceased, Francis Ryan, was subjected to a murderous attack of extreme ferocity. The attack was not only ferocious, it was persistent. There was ample evidence to show that the deceased had been attacked in two different rooms and the hallway, no doubt as he sought to escape from his assailant.

4.At post mortem 53 recent external injuries to his head, face, body and limbs were found. Many were consistent with having been caused by a meat cleaver. Other injuries were caused by blows with an object such as a lump hammer, yet further injuries may have been caused by gripping and yet others may have been defensive in nature. There were fractures in the thyroid cartilage, probably the result of pressure by an arm round the neck. The vast majority of the wounds in the scalp of the deceased extended down into the bone and there were underlying fractures in the skull corresponding to the wound in the left temple, the complex lacerations behind the left ear, and the complex wounds on the left side of the head. The fracture behind the left ear passed through the full thickness of the skull. The violence was indeed appalling, and the deceased's suffering and pure terror before he died must have been extreme.

5.Subsequent police investigations revealed a lump hammer, found in the deceased's lounge, which had contact blood staining, consistent with the DNA profile of the deceased, and a meat cleaver, found in the appellant's rucksack, similarly blood stained, and similarly linked to the deceased.

6.The deceased was homosexual. He did not conceal his sexual orientation, and we have little doubt that the appellant fully appreciated it before he joined the deceased at his home. According to the appellant, after they had arrived there and he fell asleep, the deceased made a homosexual advance to him. This formed the basis for a provocation defence ultimately rejected by the jury. However, the appellant told the police at interview that he hated "gays", an observation he sought to pass off in his evidence as something spoken in the confusion in his mind after his arrest, but if what he said was true, it is a little surprising that he chose to go with the deceased to his home. In addition there was evidence of some planning or preparation. The main weapon used in the attack on the deceased, the meat cleaver, was taken by the appellant to the deceased's flat. He normally carried it in a rucksack, but at some stage after his arrival at the deceased's home, he must have removed the cleaver from the rucksack and enfolded his jacket around it. When the attack began he went and "fetched" the cleaver from his jacket.

7.After the attack the appellant proceeded to search the deceased's home, looking for alcohol in order to steal it. He was also searching for fresh clothes, and he stole a clean pair of trousers to exchange for his blood-stained pair. During his search the flat was ransacked. Thereafter the appellant took steps to hinder the finding of the deceased's body, and to obstruct access to the living room where the deceased's body was left. As he left the flat he locked the front door mortise lock and took the key away with him. Later he threw the key away.

8.The appellant is now approaching 50 years old. He has a long criminal record, and for many

years he committed repeated offences of dishonesty and burglary. His record includes convictions for violence. In 2000 he beat his wife. In the attack her nose was broken and she suffered two black eyes. In 2004 he was convicted of common assault, and later of criminal damage, and in 2005 he was convicted of carrying an offensive weapon and criminal damage. The present offence occurred shortly after this conviction.

9. The most recent psychiatric report on the appellant is dated 1 September 2008. Dr Raki Abdur is a consultant forensic psychiatrist. He has examined the medical reports that were available at trial, although these, on examination, do not address the possible future risk presented by the appellant. Dr Abdur's report describes the appellant's history which shows that "although he is not violent on a regular basis, he has the ability to cause serious harm in the context of inter-personal conflict and especially when he (is) under the influence of alcohol. His history of carrying knives is certainly an additional risk factor". The report continues that although the appellant is not "an indiscriminate risk of violence on a day-to-day basis, if he were to offend in the future, he can pose a "significant risk" of "substantial harm" and that such a scenario could arise "at least theoretically" if the appellant were to drink heavily again…it is always possible, given his history, that in the community he could slip back into his previous lifestyle, which would lead to a rapid escalation of risk." Dr Abdur concludes his report by recording his judgment that the appellant probably lacks full insight into his own psychological functioning and that his explanations for the offence are "very simplistic". A significant amount of "psychological work focusing on issues like alcohol, anger, alleged sexual abuse and victim empathy" must be completed.

10. It is a striking feature of this case that the appellant's intention was to kill, and so it remained throughout the prolonged attack, until the victim was dead. That said, our decision must proceed on the basis that the appellant was suffering from abnormality of mind which substantially impaired his mental responsibility for acts in doing the killing. The abnormality arose from alcohol dependency syndrome. The submissions by Mr Malcolm Bishop QC on his behalf sensibly concentrated on the proposition that the sentence must reflect the acknowledged diminution of his client's mental responsibilities for his actions.

11. There are two distinct questions for decision. In the absence of any medical disposal (and none is suggested) the first question is whether the case requires a sentence of imprisonment for life under section 225(2) of the 2003 Act or imprisonment for public protection under section 225(3) of the Act as amended by the Criminal Justice and Immigration Act 2008. Whichever of these orders is appropriate, the second question is the assessment of the minimum term to be served by the appellant before any possibility of his release on parole may arise. That raises questions as to the nature of the link, if any, between the legislative structures introduced by section 269 of the 2003 Act for the determination of the minimum term in cases of murder, and the assessment of the minimum term where the defendant is convicted of manslaughter by reason of diminished responsibility.

Imprisonment for life or imprisonment for public protection

12. Section 225 (2) of the 2003 Act provides that if the offence is one attracting possible liability

to imprisonment for life and

> "…
>
> (b) the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life,
>
> the court must impose a sentence of imprisonment for life."

Section 225(3), as amended, identifies the conditions in which imprisonment for public protection may be ordered. In the present case, the conditions are met, and the power to impose imprisonment for public protection is available.

13. Mr Bishop founded his general contention on section 143 (1) of the Criminal Justice Act 2003 which requires the court addressing the seriousness of any offence to consider:

> "…the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause, or might foreseeably have caused."

He argued that the appellant's culpability was reduced by the substantial diminution in his responsibility for his actions. He drew attention to the advice of the Sentencing Advisory Panel to the Sentencing Guidelines Council, August 2004, in relation to manslaughter, where the Panel acknowledged that sentencing in cases of manslaughter was much more complicated than in cases of murder. He asked us to note the view of the Panel and the Guidelines Council that in manslaughter cases culpability rather than harm should be the primary consideration in determining the sentence. He emphasised that the court should focus on the extent to which the offender was responsible for his acts, otherwise the distinction between murder and diminished responsibility manslaughter would be blurred. The critical distinction does not arise from the consequences of the appellant's acts – whether his crime was murder or manslaughter, the deceased's death was an unchanging factor - but in the appellant's mental responsibility at the time when he committed them. These considerations should lead to an order of imprisonment for public protection rather than imprisonment for life. He reinforced his submission by highlighting the need for the sentence of life imprisonment to be reserved for the gravest cases, and the value of imprisonment for public protection in achieving the objective of public protection.

14. We agree with Mr Bishop that, self-evidently, section 143(1) of the 2003 Act requires the assessment of the seriousness of any offence to address the offender's culpability and the harm consequent on his actions. However neither consideration is paramount, and more important for present purposes, they are not exclusive considerations. Death is the consequence of every murder. The terms of Schedule 21 of the 2003 Act, to which section 269 requires the court to have regard when making its assessment of the seriousness of the individual case of murder, are now familiar. No detailed repetition is needed in this judgment. However the very fact that a series of paragraphs offer starting points for the minimal custodial sentences – whole life, 30 years, and 15 years, with equally specific provisions for offenders aged under 18 years – demonstrates what every judge knows, that in murder cases although the *result* – the death of the victim – is identical, the gravity of each individual offence is not. Accordingly we disagree that the

assessment of the seriousness of an offence of manslaughter on the grounds of diminished responsibility must be focused exclusively on the defendant's culpability.

15. Our approach is consistent with the authorities, in particular, *R v Chambers* [1983] CAR (S) 190 where the various sentencing options then available to judges in cases of diminished responsibility were summarised. Although reference was made to a hospital order if recommended by a psychiatric report and justified, where the defendant constituted a danger to the public for an unpredictable time, the right sentence would probably be life imprisonment. However if the defendant's responsibility for his acts was so grossly impaired that his degree of responsibility was minimal, then a lenient course would be open, but the length of any determinate sentence depended on the judge's assessment of the degree of the defendant's responsibility and his assessment of the time for which the accused would continue to represent a danger to the public. At the time when *Chambers* was decided imprisonment for public protection was not available. Nevertheless *Chambers* remains relevant to our decision. This is because the judge concluded that, notwithstanding the acceptance by the prosecution of manslaughter on the grounds of diminished responsibility, what the judge described as a "very substantial amount of mental responsibility remained". The court did not consider that his observation, and the process of proceeding to sentence on the basis of it, provided any grounds for criticism. Indeed the court decided that the conclusion was right. This approach has not, so far as we are aware, been called into question.

16. *R v Bryan* [2006] 2 CAR (S) 66 was also decided before the 2003 Act came into force. The court considered the relevant pre-2003 sentencing decisions of this court. Mr Bishop drew attention to the way in which the court approached the appellant's diminished responsibility when it was clear that the appellant was indeed "severely mentally ill and that the mental illness had a dominant effect in causing him to act as he did" in the peculiarly horrible circumstances of the case. The court's conclusion was that Bryan's culpability was "very considerably diminished by his mental illness". Mr Bishop further asked us to bear in mind that the determinate term in that case was assessed at a total of 30 years which, when halved as required, reduced the minimum term to 15 years.

17. In *R v Porter* [2007] 1 CAR (S) 115 a sentence of life imprisonment imposed under the 2003 Act in the context of provocation was varied to imprisonment for public protection. "The distinction between a sentence of life imprisonment and a sentence of imprisonment for public protection is not felt until after the offender's release on licence. As we understand it, the two sentences are treated identically within the prison system but after release a life sentence prisoner remains on licence for the rest of his life, whereas in the case of a prisoner who has served the custodial term of a sentence of imprisonment for public protection, and has then been released after an assessment that it is safe to do so, the Parole Board, after at least 10 years, may direct that the licence be revoked". Apart from identifying this distinction, the judgment continued with an observation that the court was not "satisfied" that the starting points laid down in schedule 21 of the 2003 Act were "of relevance to the issue of sentencing for manslaughter". Despite this reference, in a provocation manslaughter case, the court did not directly address, and had no reason to address, the possibility of any link between schedule 21 of the 2003 Act and diminished responsibility manslaughter. However David Clarke J continued that there was:

> "As yet no guidance…as to the application of s225(2)(b) and to the question whether the seriousness of the offence was such as to

> justify the imposition of life imprisonment. We can see that it may well be appropriate for cases, particularly where there is a high level of criminal intent, for example, in cases of attempted murder and no doubt in other types of case… "

18. In *R v Kehoe* [2008] CLR 728, the defendant was convicted of manslaughter on the grounds of diminished responsibility. Commenting on *Porter*, the court, presided over by Lord Phillips of Worth Matravers CJ, observed that:

> "When, as here, an offender meets the criteria of dangerousness, there is no longer any need to protect the public by passing a sentence of life imprisonment for the public are now properly protected by the imposition of the sentence of imprisonment for public protection. In such cases, therefore, the cases decided before the Criminal Justice Act 2003 came into effect no longer offered guidance on when a life sentence should be imposed. We think that now, when the court finds that the defendant satisfies the criteria for dangerousness, a life sentence should be reserved for those cases where the culpability of the offender is particularly high or the offence itself is particularly grave. It is neither possible nor desirable to set out all those circumstances in which a life sentence might be appropriate, but we do not think that this unpremeditated killing of one drunk by another, at a time when her responsibility was diminished, and after she was provoked, can properly be said to be so grave that a life sentence is required or even justified."

The conclusion which follows from this observation is that the mere fact that the case is one of manslaughter on the grounds of diminished responsibility does not preclude a sentence of imprisonment for life. In reality this sentence will be rare in such cases, usually reserved for particularly grave cases, where the defendant's responsibility for his actions, although diminished, remains high.

19. Naturally, Mr Bishop focused his attention on the feature of *Kehoe* which is analogous to the present that is, one drunk killing another, but whereas *Kehoe* was at the lowest level of seriousness for an offence of this kind, by contrast the present case was at the highest level. We have decided, without hesitation, that the striking feature of this offence is not simply that the victim was killed, but he was killed in the course of a prolonged murderous (on the judge's findings, unprovoked) attack of repeated and utmost ferocity. We accept, of course, that the appellant's culpability was diminished, but it was very far from extinguished, and his level of responsibility for his actions merits examination in the light of his immediate activities both before the attack began and after it was concluded, and his insight into the need to do what could be done to cover up the fact of the killing and his involvement in it. In our judgment the level of his responsibility was just, but only just sufficiently diminished for the purposes of section 2 of the Homicide Act. As in *Chambers,* a very substantial element of mental responsibility remained. Finally, the risk represented by the appellant has not yet diminished. While in custody he is not able to obtain alcohol but there is no basis on which we can be satisfied that the alcohol dependency syndrome from which he suffered at the date of his crimes is now permanently cured, and that if and when released, he would not return to his excessive

and dangerous drinking habits.

20. In the circumstances of this case, we are satisfied that the appropriate sentence is a discretionary sentence of imprisonment for life.

The minimum term

21. There is no express statutory link between the guidance in schedule 21 of the 2003 Act and the principles to be applied to sentencing decisions in diminished responsibility manslaughter. Where diminished responsibility is established it serves to reduce the defendant's culpability for his actions when doing the killing, but the remaining circumstances of the homicide are unchanged. Specific features of the seriousness of the homicide, for example a double rather than a single killing, or the sadistic killing of a child may be common both to murder and diminished responsibility manslaughter. At the same time the mitigating features expressly identified in schedule 21 extend to what may approximate but not amount to the defence of diminished responsibility and provide an additional connection between the schedule and the defence. Finally, the culpability of the defendant in diminished responsibility manslaughter may sometimes be reduced almost to extinction, while in others, it may remain very high. Accordingly when the sentencing court is assessing the seriousness of the offence with a view to fixing the minimum term, we can discern no logical reason why, subject to the specific element of reduced culpability inherent in the defence, the assessment of the seriousness of the instant offence of diminished responsibility manslaughter should ignore the guidance. Indeed we suggest that the link is plain.

22. One of the striking features of schedule 21 is well known but not as yet perhaps fully appreciated. Any of the suggested levels of sentence represent the time actually to the served in custody. A thirty year term is therefore the equivalent of a sixty year determinate sentence, and a fifteen year term equivalent to a thirty year determinate sentence. This reality cannot be ignored, and a vast disproportion between sentences for murder and the sentences for offences of manslaughter which can sometimes come very close to murder would be inimical to the administration of justice. At the lowest, this means that the actual sentences imposed in cases of diminished responsibility manslaughter decided before the 2003 Act came into effect should be treated with utmost caution. The decisions may helpfully point to relevant broad considerations, but the actual sentences themselves no longer provide an accurate guide to the level of minimum term sentences to be imposed now. Although we are grateful to Mr Bishop for his careful, detailed analysis of a variety of sentencing decisions, we are unable to accept the broad thrust of the argument that would lead to a vast reduction from the minimum term imposed by the trial judge after the appellant was convicted of murder.

23. We derive some further, indirect support to our approach from the stark reality that the legislature has concluded, dealing with it generally, that the punitive element in sentences for murder should be increased. This coincides with increased levels of sentence for offences resulting in death, such as causing death by dangerous driving and causing death by careless driving. Parliament's intention seems clear: crimes which result in death should be treated more seriously and dealt with more severely than before. Our conclusion is not governed by, but is consistent with this approach.

24. As a case of murder, the trial judge assessed the minimum term at 18 years. We have not been invited to, and we see no reason to disagree with this assessment. It carefully reflected the essential features of the case as described in this judgment. The minimum term must now be reduced to allow for the level of reduced culpability consequent on diminished responsibility. We shall not repeat the very grave features which led us to conclude that imprisonment for life is appropriate in this case. Bearing in mind that the protection of the public for the future is secured by the sentence of imprisonment for life, the minimum term should be fixed at 13 years.