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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 21 February 2019

B e f o r e:

LORD JUSTICE GREEN

MR JUSTICE STUART-SMITH

HIS HONOUR JUDGE PAUL THOMAS QC
(Sitting as a Judge of the CACD)

R E G I N A
v
RYANDEEP SINGH SIDHU
DECLAN KEMP-FRANCIS
TYRONE ANDREW

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(Official Shorthand Writers to the Court)

Mr A Bell appeared on behalf of the **Appellant Sidhu**
Mr S M Cobley appeared on behalf of the **Appellant Kemp-Francis**
Mr S Poulier appeared on behalf of the **Applicant Andrew**
Mr M Burrows QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

Lord Justice Green :

A. Introduction

1. On 1 August 2018, in the Crown Court at Birmingham, Sidhu, Kemp-Francis and Andrew were convicted by a jury. Sidhu was convicted of perverting the course of justice and sentenced to a term of imprisonment of 2 years and 6 months. Kemp-Francis was also convicted of perverting the course of justice and sentenced to a term of imprisonment of 2 years and 6 months. Andrew was acquitted of murder but convicted of the alternative offence of manslaughter and sentenced to a term of imprisonment of 14 years. The single judge granted permission to appeal to Sidhu and Kemp-Francis in relation to their sentences for perverting the course of justice. However, he refused permission to Andrew, who now renews his application before this court.

B. The facts

2. The facts may be summarised as follows. On Saturday, 14 October 2017, a boxing match occurred at Walsall town hall. The principal fight was between Luke Paddock and Myron Mills, who were competing for the IBF Youth World Lightweight Title. The three defendants attended in order to support Mills. In the course of the fight, groups of rival supporters became increasingly hostile towards each other. Chairs were thrown between tables. The announcement that Mills had won the contest was delayed due to the disruption. One supporter of Paddock, Lee Hickinbottom, was considered to be particularly aggressive towards the supporters of Mills throughout the evening.

3. Due to the poor behaviour of all the fans, security staff ushered people towards the exit to depart. The events that occurred outside the town hall were then captured on CCTV. The Mills supporters left the hall first. Andrew remained near the entrance watching the supporters of Paddock. Both sides were prepared for a fight. Someone rugby tackled Andrew to the ground, where he was kicked and punched by a number of people, including by a man named Phillip Smith and Hickinbottom. During the fight Andrew stabbed Smith in the stomach and back. Smith realised that he had been injured only later. As Andrew got to his feet he retrieved a knife from the floor.

4. CCTV tracked Andrew's movements. In the ensuing 20 seconds or so, Andrew attempted to stab the men around him. He missed the first, then he stabbed Hickinbottom and then he stabbed the victim, Reagan Asbury, in the neck. We have seen the CCTV of this attack. Andrew runs up from about 5 to 10 metres away to Asbury and, from behind him, slashes his throat with his knife-wielding right arm curving around Asbury's neck in order to inflict the wound on Asbury’s throat. We observe that Kemp-Francis was at that point in time standing directly in front of Asbury. Indeed, it

appears from the CCTV that he used his hand in an aggressive manner towards Asbury, though we were told during the appeal hearing that it was accepted at trial that he was not attempting to punch Asbury. It is quite clear from the CCTV that at the time of the attack Asbury posed no threat whatsoever to Andrew.

5. Following the attack, Andrew, Kemp-Francis and another man, Patrice, proceeded to Lichfield Street some way from the town hall, where Andrew approached Sidhu, who was standing in proximity to the driver's door of his BMW. Andrew handed Sidhu the knife.

6. At about this time, badly injured, Asbury had made his way back to the town hall where medical staff who had been present for the event applied pressure to the wound and gave him oxygen. Asbury stopped breathing and medical staff attempted resuscitation. One of the doctors observed a deep stab wound to the right of Asbury's neck which had gone through to the back of the throat.

7. Reagan Asbury was taken to the Queen Elizabeth Hospital in Birmingham. The wound had severed the carotid artery and cut almost through the jugular vein. It was 5 centimetres long, 1 centimetre wide and 6 centimetres deep. Reagan Asbury was treated in theatre for between 2 and 3 hours and he received a blood transfusion. He was transferred to intensive care, but he was declared dead at 8.00 pm on Sunday, 15 October. The post-mortem confirmed that death was caused by a stab wound to the neck.

8. We return to the aftermath of the stabbing. Shortly after the attack, Kemp-Francis drove Andrew to Derby where he lived. CCTV showed Andrew walking into his block of flats at 1.30 am dressed only in boxer shorts and socks. He emerged about 10 minutes later fully dressed. He met with a woman. At 3.21 am he telephoned for a taxi to take him to Birmingham Airport. The taxi driver recalled that he had no luggage with him. He arrived at the airport at 4.30 am. There is some confusion in the evidence as to how many tickets he purchased and when. It seems that he purchased a ticket for Amsterdam on a flight due to leave at 7.10 am for £90. At 8.00 am he went to the ticket desk and said that he had missed his flight because he had fallen asleep. He acquired a further ticket for Amsterdam to depart at 11.15 am and departed upon that flight. From Amsterdam he made his way to Barcelona. He was arrested there in December 2017 and extradited to the United Kingdom in January 2018. In accordance with normal extradition procedures he was not interviewed by police upon his return to the United Kingdom.

9. Kemp-Francis was arrested on 2 November 2017 and denied being guilty of any offence. He answered no comment to questions in interview.

10. Sidhu was arrested on 17 October 2017. In interview he said he left the town hall when the disturbance broke out. He described two men going over to his car, one covered in

blood, and asking for a lift. Sidhu claimed that the man had a knife in his hand and threatened to stab him. He denied having seen the man before. Sidhu claimed that the man dropped the knife into his car. He said the man then got into his car. When asked where the knife was, Sidhu said that it was not in his vehicle when he drove away. He insinuated that the man must have retrieved the knife and taken it away. Sidhu was interviewed again in November 2017 and shown CCTV footage, which did not show any man trying to get into his car. He nonetheless maintained that he had been threatened.

C. Issue I: The implications of the phrase "*intended to cause serious injury*" in the context of manslaughter

11. We turn now to the issues before this court. It is convenient to start with the challenge to the sentence imposed upon Andrew of 14 years' imprisonment. The grounds advanced can be grouped under two headings but Mr Poulier for Andrew has focused upon one point as the centrepiece of his argument.

12. As to this, it is argued that the judge erred when he took into account in his sentencing remarks that Andrew had "*intended to cause serious injury*" when he stabbed Reagan Asbury in the neck. It is said that such a finding was not open to the judge given that the jury had rejected the charge of murder thereby refuting any suggestion that Andrew intended either "*really serious*" or "*serious*" harm to Asbury. In consequence when the judge took into account that Andrew had intended to inflict "*serious*" harm and sentence accordingly, he erred in law and acted inconsistently with the verdict of the jury. If there had been an intention to cause "*serious*" injury the verdict would have been murder, not manslaughter. Second, and as a subsidiary matter, it is said that in any event the sentence of 14 years' imprisonment was manifestly excessive. It seems to us that we need to address three issues. First, to decide whether as a matter of common sense and ordinary use of language the actions of the Andrew could be said to evidence an intent to perpetrate "*serious*" injury. Second, to consider whether the judge distinguished properly between murder and manslaughter in his analysis. Third, to consider how the notion of an intent to cause "*serious*" harm is treated by the law. As we explain below each of these considerations supports the approach taken by the judge.

13. We start therefore by considering whether, on the facts, there was a sound basis for the conclusion of the judge that the applicants actions evidenced an intent to cause serious injury. In this regard, it is important to read and construe what the judge actually said about intention. At page 3B to D of the transcript of the sentencing remarks the judge is recorded as having stated as follows:

> "I take the view that had this been a deliberate attack on Reagan by you in revenge for what had happened in the incidents shortly before the fatal blow was struck, the jury would almost certainly have concluded that you intended to cause Reagan Asbury at least really serious harm.

> As I cannot be sure that this was a revenge attack it seems to me I must proceed on the basis that it was not. Nevertheless I do find that you intended to cause serious injury in the way that you acted. I base that having viewed the CCTV footage of the manner of the way you ran up behind a man who was facing away from you and deliberately stabbed him in the neck."

14. Thus the categorisation by the judge of the applicant's intent as "*to cause serious injury*" was based (he says) upon the "*manner*" of the applicant in running up behind Asbury, who was facing the other way and "*deliberately stabbing him in the neck*". In our judgment, the facts relied upon by the judge were evident from the CCTV. His description of the events which can be seen on the CCTV, cannot sensibly be challenged. It encapsulates four elements. First, the running up to the victim. Second, the position of the victim at the time, who was facing away from the applicant (and not therefore any threat to the applicant). Third, the deliberate stabbing of the victim in the neck. Fourth, the fact that this was not a revenge attack.

15. When determining a proper sentence, a judge must form his or her own conclusion as to the facts applying the criminal standard of proof and in so doing giving the benefit of the doubt to the defendant where so appropriate. The judge should not of course sentence in a manner inconsistent with the jury's verdict. Based upon the CCTV evidence it seems to us to defy logic to challenge the judge's labelling of this conduct as anything other than an intent to cause "*serious*" injury. It was an inevitable inference to draw from the graphic events portrayed on the CCTV. The four features referred to above do amount to an intention to cause serious injury. In short, the judge was, upon the bare facts and by reference to common sense, entitled to describe the intention in those terms.

16. Second, we consider whether, by reference to his sentencing remarks, the judge was confused in his own mind as to the difference between murder and manslaughter and as to the implications of the verdict of the jury. In our judgment he was not. We accept that it might have been better if the judge had said in the relevant paragraph in his sentencing remarks that in his view the applicant intended to cause "*serious injury but falling short of that required for murder*". Indeed, judges might well, to avoid the risk of confusion such as has arisen in this case, be better either using the expression "*really serious*" or, if they do use the expression "*serious*" in a manslaughter case making it expressly clear that the intent to cause "*serious*" injury was one, falling short of the intent required for murder. In this case the judge, in the text quoted at paragraph [13] above, taken from the transcript the judge does draw a distinction between "*really serious harm*" and an intention to cause "*serious*" injury and he was thereby differentiating in his own between murder and manslaughter. And, on page 4 at D, the judge reiterated:

> "As I say, I take the view that you intended to cause serious albeit not really serious harm by your actions."

In our judgment, the judge did not err when he described the intention in the terms that he did. He simply, and correctly, described the facts as he saw them, and he was not thereby confusing murder and manslaughter.

17. Third, we turn to the legal implications of the phrase "*serious*". As to this there is no inevitable or necessary legal inconsistency in the categorisation of the applicant's intent by the judge as to cause "*serious*" injury and the fact that the jury acquitted the applicant of murder. Mr Poulier, who appears for the applicant, contends that there is no meaningful distinction between "*serious*" harm and "*really serious*" harm and both constitute the *mens rea* for murder. In written submissions, which we have read with care, the applicant cites in this respect *R v Janjua and Choudhury* [1999] 1 Cr App R 91. In Archbold (2019) at page [2199], paragraphs [19] – [18], it is inferred that an intention to cause "*serious*" harm might suffice for murder. The written submissions also cite in advance of this argument section 1(2)(a) of the Road Traffic Act 1988. In that section serious injury is stated as being equivalent to "*grievous bodily harm*". The gravamen of the argument is thus that when the judge found an intent to cause "*serious*" injury he was necessarily acting in a manner inconsistent with the decision of the jury rejecting the count of murder and hence unlawfully.

18. Harm and intent are both relative. At one extreme there is an intention to cause trivial, insignificant or *de minimis* harm or injury. Beyond that there are multiple degrees of seriousness and intent which lead up to the intention which the law then treats as the minimum threshold to amount to the *mens rea* for murder. Traditionally, judges use the expression "*really serious*", and occasionally "*serious*", to articulate the threshold. But when judges use such language they mean in effect "*an intention to cause serious harm or really serious harm sufficient to amount in law to murder*".

19. It cannot however be argued that *in law* the *mens rea* for murder is anything and everything above and beyond an intention to cause *de minimis*, trivial or insignificant harm even where that non-trivial harm can be said to be "*serious*". The law places the threshold for murderous intent at a higher level. It follows that there will necessary be some daylight between the intent to cause *de minimis* harm and the intention required in law to establish a murder charge. And in this daylight zone there will be a wide range of actions and conduct which, at least in everyday parlance, would be described as an intention to cause "*serious*" injury. The judge used the expression "*serious*" as descriptive of this middle ground and as reflecting what he saw on the CCTV. In this he did no err.

20. In support of our conclusion Mr Burrows QC, for the Crown, drew our attention to the recent sentencing guidelines for manslaughter where under step 1, determining the offence category, there is a clear reflection that in a manslaughter case there may, in substance, be an intention to cause serious injury. We see the force in this argument. The Sentencing Council in that guideline does not expressly use the word "*serious*" but

an analysis of the factors indicating high culpability makes plain that manslaughter can involve an intent to cause "*serious*" injury. For example, two of the factors recited in the definitive guideline as indicating high culpability are as follows. First:

> "Death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling just short of GBH."

Second:

> "Death was caused in the course of an unlawful act which carried a high risk of death or GBH which was or ought to have been obvious to the offender."

D. Issue II: Was the sentence manifestly excessive?

21. We turn to the second ground of appeal. Mr Poulier clarified before us that this was very much a subsidiary point. We nonetheless deal with it, albeit briefly. It was advanced in writing that the sentence was excessive in all the circumstances. We do not agree with this criticism. The gravamen of the complaint so advanced was that the judge failed adequately to take account of context and that he undertook no proper analysis of the facts. In particular, it was highlighted that the judge failed to take account of mitigating factors, which it is said are self-evidently present, including the fact that the applicant was himself the victim of unprovoked violence shortly before he attached Andrew.

22. In our judgment, the judge was manifestly best placed to form a view about the facts. He heard the trial and it is plain from his detailed sentencing remarks that his conclusions on the relevant aggravating and mitigating factors were borne out of careful consideration and a thoughtful weighing exercise. He took into account all relevant aggravating factors, including the serious antecedent record of the applicant, which included a previous stabbing, and all relevant mitigating factors, of which there were many. Standing back, we conclude that the sentence imposed in all the circumstances was neither excessive nor manifestly so.

23. Finally, in relation to Andrew, the Crown has brought to the attention of the applicant and the court that credit was not accorded to the applicant for the period spent in custody in Spain awaiting extradition. We are grateful to Mr Heptonstall, in attendance in court for the Crown, for performing his professional duty in this manner and bringing the point to the attention of the court and the parties.

24. Under section 243(2) of the Criminal Justice Act 2003 the court much specify in open court the number of days which an accused was detained in custody awaiting extradition. Such days are then counted as days served. There is no power to disallow such days.

The judge was silent on this, wrongly assuming that the automatic position applicable to non-extradition cases under section 240ZA of the Criminal Justice Act 2003 applied. The duty specifically to identify the days to be served was not brought to the attention of the judge. In fact, the applicant spent 22 days on remand. We direct that those days are to stand as time served for the purposes of calculating sentence. We grant permission for this ground to be raised. We permit the appeal to this limited extent only. Save for this, all other applications are dismissed.

E. Issue III: Sentences for perverting the course of justice - the relevance of deterrence

25. We turn now to consider the appeals of Kemp-Francis and Sidhu against the sentence imposed upon both of 2 years and 6 months' imprisonment for perverting the course of justice.

26. In the case of Kemp-Francis, the basic facts are as follows. First, he was present, as we have already described, when Andrew delivered the fatal blow. Second, he drove Andrew away from Walsall in order to avoid him being arrested. Third, he knew that he (Andrew) had handed the knife over to Sidhu. Fourth, he took Andrew a long way from the scene of the crime to Derby, enabling Andrew to dispose of the knife and make arrangements to flee the country. Fifth, although Kemp-Francis was not involved in these subsequent arrangements, he nonetheless facilitated them. Sixth, he offered no co-operation to the police.

27. In relation to Sidhu, the basic facts are as follows. First, he took the knife and agreed to remove it from the scene. Second, even on a version of events most favourable to him, he must have realised in broad terms what the context was because he was handed a knife by a bloodied man following serious public disorder. Third, he participated in the disposal of the knife. Fourth, he did not co-operate with the police and he lied in interview.

28. We have had referred to us various authorities in which courts have imposed materially lower sentences than those imposed in the present case. It is said that these indicate that the starting point applied by the judge was manifestly excessive. We have obtained some, albeit really quite limited, benefit from a review of these authorities. They are based upon materially different facts. They do, however, demonstrate that in sentencing for this offence a court should take into account a number of key matters and in particular: (1) the seriousness of the substantive index offence; (2) the degree of persistence engaged in by the defendant in the conduct amounting to perverting the course of justice; and (3), the actual effect on the course of justice.

29. Turning to the analysis of the judge, he conducted a detailed analysis of the conduct in question. He took into consideration the seriousness of the offence charged which was the index offence for the perverting charge, namely murder ultimately leading to a conviction for manslaughter. He considered the degrees of persistence, including the

length of deception, on the part of each defendant. In the case of Kemp-Francis, this persisted over a number of hours until Andrew had been delivered safely to Derby. In the case of Sidhu, this extended until at the very least the disposal of the knife.

30. The judge considered the role played by both defendants in interfering with the investigation which thereby helped Andrew avoid detection and flee justice. The judge considered the impact on the modalities of the investigation and the lack of co-operation provided by both of the defendants. This involved Andrew not being immediately detained. The knife was never found. Clothing belonging to Andrew was never found. Neither the knife nor the clothing could be subjected to forensic testing. Andrew was not interviewed.

31. The judge stated that a sentence which reflected the need to impose deterrence was relevant. He nonetheless took account of relevant mitigation, including the age of the two defendants, their previous convictions or lack of them and good character, their work backgrounds, their business and personal circumstances, and references provided on their behalves. The judge considered whether there was any real distinction to be drawn between them and concluded that there was not.

32. We turn to our analysis. Perverting the course of justice is always treated as a serious offence and will commonly result in a custodial sentence. It strikes at the essence of the rule of law and a custodial sentence marks the seriousness of the offending and sends a message to others who would or might consider similar conduct. In this sense, a sentence will always import some degree of deterrence. Nonetheless, the determination of the proper sentence involves a principled approach and the court should consider the seriousness of the substantive offence, the degree of persistence engaged in by the defendant and the effect on the course of justice.

33. In relation to Kemp-Francis, in our judgment, the judge had the advantage of hearing all of the evidence over a lengthy period of time, including evidence as to his involvement in the substantive events and the events which followed the stabbing. The analysis of the judge reflects a careful and detailed focusing upon the factors relevant to assessment. Given the involvement of Kemp-Francis in the substantive offence and its aftermath, we consider the sentence imposed to be perfectly proper.

34. The reference on the part of the judge to deterrence is not an error on his part. Authorities cited by counsel in their helpful written submissions which seek to suggest that this was an error relate to courts which treat prevalence of a particular type of offence as an aggravating factor. But in this case the judge did not rely upon prevalence. Deterrence and prevalence overlap but they are not the same. A deterrent sentence might be imposed to suppress prevalent criminality; but a deterrent sentence may be proper even absent prevalence. Under section 142(1B) of the Criminal Justice Act 2003 a court is bound to have regard to the need to reduce crime. A sentence reflecting, to some

degree, a deterrent element as a warning to others may simply reflect the need to reduce crime. The real issue in this case is whether, in terms of totality, the sentence was manifestly excessive and/or whether undue weight was attributed to deterrence. The reference to the need to impose a sentence which was deterrent played, in reality, a relatively insignificant part in the analysis of the judge. He did not give it undue weight, but it seems to us quite right that it should play at least some modest role in the analysis, most certainly in a case such as the present where the defendant assisted a killer in fleeing justice. It follows that we identify no error in the approach adopted by the judge in relation to Kemp-Francis. We must nonetheless decide whether, standing back, the sentence imposed was manifestly excessive in all the circumstances. We conclude, as observed, that the sentence was within the legitimate discretion of the judge to fix. He heard the trial. He was far better placed than we are to attribute culpability. It is not our function to substitute our view for that of the judge.

35. We reject the submission that the sentence imposed was manifestly excessive.

36. In relation to Sidhu, we would take issue with the judge only in respect of his conclusion that there was no material difference between him and Kemp-Francis. Given what we have seen on the CCTV in relation to the involvement of Kemp-Francis in the attack on Reagan Asbury, we consider that some distinction should have been drawn between the two men. This is not least because it is unclear whether Sidhu was aware of precisely what Andrew had used the knife for. The judge said in this respect that Sidhu would have inferred only that Andrew had been involved in a serious public order offence. Given the proximity of Kemp-Francis to the stabbing there can be no sensible doubt about his knowledge of what Andrew had done with the knife.

37. Mr Burrows QC, for the Crown, accepted that there were two evidential differences between these two defendants: first, in relation to their involvement in the incident in question and, second, in relation to the inferences which can be drawn as to their knowledge of what happened.

38. We conclude that in this one particular respect the approach adopted by the judge was in error. For these reasons, we set aside the sentence imposed upon Sidhu and we substitute in its place a sentence of 22 months' imprisonment. We consider that this marks the proper distinction that must be drawn between Sidhu and Kemp-Francis. To this extent only the appeal by Sidhu is allowed.

F. Issue IV: Postscript - video evidence relied upon during appeals

39. We wish to add one postscript to our judgment. Two CDs of relevant CCTV footage were submitted to the court for the judges to watch. These covered the events in issue. It is commonplace for courts to be asked to view such material. It is equally commonplace for the CDs to be incompatible with the not always state-of-the-art technology used by the court. In the present case the CDs submitted were incompatible

with the court's technology. This resulted in a significant amount of to-ing and fro-ing in order to obtain a compatible version of the CD which we were then able to view. This process made the task of all three judges, in finding time to view the CD and then having an opportunity to discuss it, difficult and unduly protracted.

40. We would make two short observations. First, parties wishing the court to view video footage should make sure that they liaise with the court to ensure that it is compatible with the court's technology. Second, in relation to lengthy footage (such as that in issue in the present case), the parties should prepare some sort of a short document summarising and/or indexing what is to be found on each video and identifying the points in time when the salient events occur. Too often we are asked simply to view a video which can extend for a long period of time with no indication of what we are seeing and when the key events occurred.

41. We make these points not with a view to criticising the parties in the present case, but because regrettably what has happened in this case reflects what happens in many other cases and it would improve the smooth running of appeals if practical steps could be taken by parties to ensure that video recordings intended to be viewed by the court can in fact be viewed.

MR POULIER: My Lord, it is only thanks to Mr Heptonstall that Mr Andrew has been granted leave to appeal the 22 days. Nonetheless, would it be inappropriate to ask for a representation order to cover funding for an appeal in his case?

LORD JUSTICE GREEN: Yes, we grant a representation order. Anything else, gentlemen? No. Thank you very much indeed.

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