Neutral Citation Number: [2019] EWCA Crim 1156

Case No: 201802368/C3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2019

Before :

LORD JUSTICE HOLROYDE
MR JUSTICE WARBY
MR JUSTICE JULIAN KNOWLES

- -

Between :

NICHOLAS FOY	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Orlando Pownall QC (instructed by **Bark & Co**) for the **Appellant**
The Respondent did not appear and was not represented

Hearing dates: 27 June 2019

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Approved Judgment

Mr Justice Julian Knowles:

Introduction

1. This is a renewed application for leave to appeal against conviction by the Appellant, Nicholas Foy, following refusal by the single judge. He was convicted of murder at the Central Criminal Court on 12.2.18 and sentenced to life imprisonment with a minimum term of 17 years.

2. The basis of the renewed application presented by Mr Pownall QC is a psychiatric report from Dr Joseph obtained after the Appellant's conviction. Leave is sought to rely upon this as fresh evidence. It is said this shows that the Appellant was entitled to rely upon the defence of diminished responsibility pursuant to s 52 of the Coroners and Justice Act 2009. At the trial the Appellant did not rely on this defence. His defence at trial was lack of intent due to voluntary cocaine and alcohol intoxication.

3. At the conclusion of the hearing we announced our decision to grant leave to appeal and we gave directions for the conduct of the appeal. We said we would give brief reasons in writing for our decision, and this we now do.

The facts

4. The deceased man was a French national, Laurent Volpe, who was on holiday in London with his family. On 11 August 2017 they spent the day sightseeing, and then returned home to the address in south east London where they were staying. Mr Volpe went out to a supermarket to purchase food for their evening meal. On the way back he tragically encountered the Appellant in the street, who fatally stabbed him with a knife. They were total strangers to each other.

5. The Appellant lived locally and ran a courier company. His evidence at trial was that he had spent the 10 and 11 August drinking and taking cocaine, more or less continuously. He said that by the afternoon of 11 August he was extremely paranoid and was having visual and auditory hallucinations as a consequence. In particular, he said that he saw a big lump in his foot. He therefore went to a kitchen drawer and took out a knife. He then went out into the road and 'started digging out what I thought was a bomb in my foot'.

6. A neighbour witnessed the attack. She saw the Appellant sitting on a wall in Greenvale Rd, gouging at his foot with the knife. The neighbour shouted at him, but he did not respond. He then ran at Mr Volpe, who was walking along carrying his shopping. The Appellant stabbed him once in the stomach. Despite emergency treatment and a liver transplant, Mr Volpe sadly died three days later.

7. The judge described the neighbour's description of the attack in her summing-up as follows:

   > "He ran very quickly towards Mr Volpe with the knife in his right hand and pointing outwards from his side towards the man he was running at. He ran very quickly, and it was obvious to me that he was going to stab the victim. He then did just that."

8. The Appellant's account was as follows:

> "I do not remember seeing the victim at all. I expect I ran towards him and was holding the knife in a running movement in my right hand. I cannot remember what I did when I made contact. I accept that the knife was in the position to cause the injury which it did.
>
> I did not know that I had injured someone seriously with the knife. I cannot remember looking back or hearing sounds from the victim or seeing blood on the knife …
>
> I accept that I used a deliberate stabbing motion, knowing that there was a human being in front of me and knowing that I had a knife in my hand and I understand that knives can cause serious and even fatal injuries and stabbing in front of someone is dangerous because you may hit vital organs."

The medical issue

Dr Isaac's report

9. Dr Isaac prepared a medical psychiatric report on the Appellant. It is dated 14 December 2017. He thought the Appellant was floridly psychotic at the time of the offence. He considered both (a) substance-induced psychotic disorder with severe cocaine and concurrent moderate alcohol use disorder, and (b) schizophreniform disorder. In his initial report he offered both of these as alternative diagnoses but favoured the former as he did not think that the Appellant's symptoms had persisted for long enough for a diagnosis of schizophreniform disorder (see at [105]). Dr Isaac commented that it would be 'helpful' to read the Appellant's prison medical record.

10. Shortly before the hearing we were supplied with junior counsel's Second Advice on Psychiatric Evidence dated 3 January 2018. That recorded that Dr Isaac had seen notes from HMP Belmarsh about the Appellant and had also been supplied with information from his partner and son about his paranoid behaviour on holiday in Spain shortly before the killing.

11. In an email appended to this Advice it was Dr Isaac's view that the psychosis which caused an abnormality of mind resulted from a combination of alcohol and cocaine. He later said:

> "It is therefore conceivable (and I cannot go to more likely than not) that at the time of the killing Mr Foy was suffering from an abnormality of mental function which arose from a recognised medical condition – paranoid psychosis – that (substantially ? not sure) impaired his ability to form a rational judgment or, as he had apparently shown in the past, to exercise self-control, but without the cocaine and alcohol he had been voluntarily ingesting pretty well continuously for many hours, I cannot see that in itself would have substantially impaired his responsibility."

12. In other words, it was Dr Isaac's view that it was the voluntary ingestion of drugs and alcohol which had produced the psychosis. In light of that, Mr Pownall's Advice on

Appeal rightly accepted that the defence of diminished responsibility was not open to the Appellant: see *R v Kay; R v Joyce* [2017] 2 Cr App R 16, [16].

13. For these reasons the Appellant did not rely on Dr Isaac's report and did not advance a defence of diminished responsibility. The defence was that, due to his voluntary drug and alcohol intoxication, he was incapable of forming the necessary specific intent for the crime of murder and he gave evidence to that effect. The judge so directed the jury: see her directions of law at p6 ('If you think that the Defendant was or may have been so intoxicated that he did not form an intention to kill, or cause really serious injury, then you must find him Not Guilty')

Dr Joseph's report

14. Within weeks of the Appellant's conviction Dr Joseph was instructed on a private basis to prepare a report for the purposes of an application for leave to appeal. He interviewed the Appellant and also the Appellant's partner and their son.

15. The Appellant told Dr Joseph that he drank alcohol and took cocaine all day on the 10 and 11 August. He described thinking there was a bomb in his foot and trying to hack at it with the kitchen knife. He then gave an account of the killing, the relevant part of which was as follows:

> "I then ran from the opposite side of the road to the side where my house was but I was not going into my house. As I ran past my house and then the dry cleaners, he was suddenly in front of me and I stabbed him as an automatic reaction. It was an instinctive reaction. I was feeling panic, terror and fear. Everyone was out to get me. He was out to kill me. I was hallucinating and did not know what was real. I did not think he was going to go into my house. I did not say anything to him …"

16. Dr Joseph's report is dated 19 April 2018. He disagrees with Dr Isaac and considers that the Appellant suffers from a different disorder. He noted a deterioration in the Appellant's mental state, and that on 18 December 2017 he was diagnosed by Dr Daley in prison as suffering from an acute transient psychotic disorder. He was reported as hallucinating in March 2018, following his conviction and his medication was increased.

17. Dr Joseph's conclusion at [34] was that as a result of adverse childhood experiences, the Appellant developed into an anxious, insecure, nervous, depressed and paranoid individual. As a result of his abnormal personality structure, he has suffered transient psychotic episodes, when not under the influence of alcohol or drugs, in which he has felt very paranoid and anxious about the intentions of others.

18. Dr Joseph said at [37] that at the time of the killing the Appellant was clearly psychotic. He said that the Appellant's account of consuming copious amounts of cocaine and alcohol on the 10 and 11 August was not borne out by the toxicology evidence and that 'his account may not be reliable'.

19. Overall, Dr Joseph said at [39] and [41] that, taking all matters into account:

> "39. I conclude that at the time of the killing the defendant was suffering from an abnormality of mental functioning caused by recognised medical condition of an acute transient psychotic episode, possibly exacerbated by the abuse of cocaine. His abnormality of mental functioning was extremely severe and I am confident that it substantially impaired his ability to form a rational judgment and exercise self-control. It may also have impaired his ability to understand the nature of his conduct. The abnormality of mental functioning provides an explanation for his conduct at the time of the killing. If the effects of alcohol and cocaine are discounted, the remaining abnormality of mental functioning was in my opinion a significant contributory factor causing the appellant to carry out the killing.
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> …
>
> 41. In conclusion, I am of the opinion that despite probable intoxication with cocaine and to a lesser extent alcohol at the time of the killing, the defendant was suffering from an acute transient psychotic episode, independent of drug and alcohol abuse, which substantially impaired his mental responsibility for the killing. I conclude therefore that he has a defence to murder of manslaughter on the grounds of diminished responsibility"

Discussion

20. Section 23(1) of the Criminal Appeal 1968 allows this court to receive what is often referred to as 'fresh evidence' if we think it necessary or expedient in the interests of justice to do so. In making that determination, we must have regard to the criteria in s 23(2).

21. Many of the decisions relating to the admissibility of expert evidence on appeal relate to attempts to raise the issue of diminished responsibility on an appeal where it was not raised at trial. Many of these decisions were considered in *Erskine* [2009] 2 Cr App R 29. We have borne this decision in mind and especially the point made at [39] that it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, the trial process would be subverted.

22. We are conscious of the criticism that could be made that Dr Joseph has failed to take account of the differences in the account of the killing given to him by the Appellant, as compared with the Appellant's evidence at trial. This was a point made by the single judge in refusing leave, and we see the force of it. We are also conscious that some of Dr Joseph's reasoning appears to diverge from the Appellant's case at trial. This was that having ingested copious amounts of drink and drugs he was so intoxicated that he could not form an intent. Dr Joseph suggests that the Appellant may not have been as intoxicated as he said that he was.

23. Nonetheless, it seems to us arguable that there was, prior to the Appellant's trial, a diagnosis of a mental health condition which was not alcohol or drug related which, in Dr Joseph's view, substantially impaired the Appellant's responsibility in a way which raised the defence of diminished responsibility. We acknowledge that the prison diagnosis was made some four months after the killing. However, it is arguable that Dr Isaac never considered this diagnosis, or the question whether it might have been operative at the time of the killing.

24. It also seems to us arguable that this was not a case where there was a deliberate decision by a defendant whose decision-making faculties were unimpaired not to advance before the trial jury a defence known to be available.

25. It was for these reasons that we granted leave. We consider it arguable that there is a diagnosis of a mental condition which may arguably have given rise to the defence of diminished responsibility had it been considered prior to trial. It will be for the court hearing the appeal to determine, having heard from Dr Joseph and any other witnesses called by the parties, whether to admit their evidence. We make clear that the effect of our decision is simply that the arguability threshold is passed. The Appellant will have much ground to cover before he will be in a position to persuade the Full Court that his conviction is unsafe.

26. We also wish to make clear we are not giving a general licence to defendants to come to this court after conviction with 'better' psychiatric evidence advancing a different defence, or evidence that is an improved version of a failed diminished responsibility defence. For the reasons we have given they are likely to be given short shrift. Our decision is specific to the facts of this case; the decision whether to permit an appeal to go forward on the basis of fresh evidence is always fact dependent. This case has very particular facts which have led us to the conclusion we have reached.

Directions

27. We make the following orders and directions:

    (1) Leave to appeal against conviction is granted.
    .
    (2) The decision whether to receive any further evidence is reserved to the Full Court hearing the appeal.

    (3) Dr Joseph is to provide by 26 July 2019 a supplemental report, addressing:

        (i) The evidence, in fact, given at trial, including by the Appellant, as to the extent of his intoxication by drink and drugs at the time of the killing.

        (ii) The significance, if any, of that evidence for a diagnosis relying on past psychotic episodes when sober.

        (iii) The significance, if any, of the differences between the account given by Appellant at trial of the circumstances of the killing and (a) what he told Dr Isaac (b) what he told Dr Joseph in that regard.

    (4) The prosecution, if so advised, must respond to Dr Joseph's evidence and serve any proposed fresh evidence by 13 September 2019.

(5) Forms W and *Gogana* affidavits in respect of any witness on whose fresh evidence either party seeks to rely are to be filed and served by 27 September 2019.

(6) The hearing is to be listed thereafter with a time estimate of 1 day.

(7) The parties are to liaise to ensure the attendance at the hearing of any witness whom either side wishes to call and whose proposed evidence is not agreed.

(8) The Appellant is to serve a Skeleton Argument not later than 14 days before the substantive hearing.

(9) The prosecution is to respond within 7 days thereafter.

(10) Agreed paginated bundles of any relevant documents and of authorities are to be lodged not later than 5 days before the hearing.

(11) If either party seeks to vary this timetable they must apply in writing to Holroyde LJ.

(12) A Representation Order is granted for Leading Counsel for the preparation and conduct of the appeal on behalf of the Appellant, and for a solicitor to the extent necessary to obtain and serve any further evidence.