Neutral Citation Number: [2019] EWCA Crim 2419
No: 201805128/C3
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 19 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

R E G I N A
v

MAJHARUL ISLAM

Computer Aided Transcript of the Stenograph Notes of Epiq Europe Ltd, Lower Ground, 18-22 Furnival Street, London EC4A 1JS, Tel No: 020 7404 1400 Email: rcj@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

This transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

WARNING: Reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

Mr N Mian QC & Ms S Tafadar appeared on behalf of the **Applicant**

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 27 November 2018, after a trial in the Crown Court at Luton before His Honour Judges Foster and a jury, this applicant was convicted of murder. He was later sentenced to custody for life with a minimum term of 22 years. His application for leave to appeal against conviction was refused by the single judge (Lambert J DBE). It is now renewed to the Full Court. The single ground of appeal is that the judge was wrong not to leave to the jury the partial defence of loss of control.

2. The applicant was aged 20 at the time of the killing on 6 May 2018 and so too was his victim, Waryam Hussain. They had known each other for about 18 months.

3. The cause of death was a single stab wound which entered the right chest of the deceased near his armpit, passed between the ribs and pierced through a lung, causing it to collapse with resultant internal bleeding. The evidence of the pathologist was that at least "moderate" force would have been required to inflict that injury. The applicant accepted that it was he who inflicted the fatal stab wound.

4. As to the circumstances in which he did so, the prosecution relied on the evidence of an eyewitness who said that she saw the two men standing near one another. They were not talking or arguing. She did not see any altercation or hear raised voices. She saw a sudden movement by the applicant which she described and demonstrated to the jury as a thrusting movement of his right hand from the area of his waistline. It was a quick movement and the witness did not see anything in his hand. The applicant then immediately ran off, his body position suggesting to her that he was carrying something. Mr Hussain crossed the road towards the witness but then collapsed to the ground.

5. Having left the scene the applicant travelled later that day to the North East. He stayed overnight in a hotel in or near Newcastle-upon-Tyne. He then returned south on the following day and flew from Heathrow Airport to Bangladesh. He later returned to this country voluntarily.

6. The applicant gave evidence at trial. We understand that he had the assistance of an intermediary during the proceedings. He told the jury that he was a user of cannabis and said that he had been in the relevant area, at the relevant time, in connection with cannabis. He said he did not know that the deceased's home was nearby. He denied the prosecution allegation that he had been waiting for the deceased armed with a knife.

7. He said he had known the deceased for some 18 months, having initially met him through mutual friends. The applicant described two occasions when he said Mr Hussain had mugged him. First, on an occasion about 18 months before the stabbing, he said that Mr Hussain had pulled out a knife, threatened to stab the applicant and robbed him of his phone and some cannabis. The second, about 6 months later, was an occasion when the

applicant had gone to a park to buy cannabis. He encountered Mr Hussain who was again carrying a knife. The applicant gave him £20 and his phone. He had not reported either of these incidents to the police or to his parents.

8. Describing the events of the day of the killing, the applicant told the jury that he had been standing on a street corner when he saw the deceased on the other side of the road. Mr Hussain called to him and the applicant walked over, his evidence being that his legs felt like jelly as he did so. He said that Mr Hussain felt the applicant's pockets. The applicant was in fact carrying a phone and about £40 in cash but told Mr Hussain that he had nothing on him. The applicant said that he saw Mr Hussain reaching for a knife which was in the waistband of his trousers. The applicant managed to grab the knife from him and it fell to the ground. The applicant picked it up and stabbed the deceased. He said he thought the stab wound went into the shoulder. It happened very quickly and he was not thinking. He said: "I was in survival mode. I thought he was going to stab me". The applicant ran away. He said that as he did so he thought that Mr Hussain would only have been slightly injured. He had had no intention of killing him or causing him serious injury and had thought that he himself was in danger from Mr Hussain. Although Mr Hussain had not actually used the knife which he was carrying on either of the two earlier occasions, the applicant told the jury that he felt more scared this time because he had heard of the deceased having stabbed other people. He said that he panicked and he ran away because of a fear of reprisals from Mr Hussain or his friends, not because he knew he had done wrong and feared arrest. He said that he returned from Bangladesh when he learned that he was wanted by the police.

9. In cross-examination, in a passage on which reliance is placed, the applicant reiterated that he did not want to kill Mr Hussain. There was then the following sequence of questions and answers:

    i. "Q. But you wanted to hurt him?

  B. No, it happened so quickly, it's like [something] was controlling my body, it was weird.

    i. Q. What do you mean?

  A. I don't know, I wasn't thinking.

    ii. Q. What do you mean when you say it was like [something] was controlling your body?

  A. When it happened I didn't think I'm going to do this, it just happened in the moment.

    iii. Q. Has that ever happened to you before?

  A. Yeah it has.

    iv. Q. What happened then? When it happened before?

  A. Someone was messing around with me and I threw a chair at a window."

10. Reliance is also placed on a matter mentioned in the report of Dr Philip Joseph, the consultant forensic psychiatrist who had been instructed by the prosecution to prepare a report primarily directed to the issue of diminished responsibility. Dr Joseph had

recorded the applicant giving to him a description of what had happened, which included the applicant saying (in relation to the time when he stabbed Mr Hussain) "scared, if I did not, he would do it to me, panicked, not in control of himself".

11. Dr Joseph and a psychiatrist instructed by the defence gave evidence to the jury directed to the issue of whether the applicant could rely on the partial defence of diminished responsibility.

12. Thus, at trial the applicant was relying on defences of self-defence and lack of intent and the partial defence of diminished responsibility. He also wished to rely on the partial defence of loss of control. The judge heard submissions about this after the evidence but before closing speeches. He ruled that loss of control should not be left to the jury.

13. In his ruling the judge rightly assumed the view of the evidence which would be most favourable to the applicant, namely that:

    i. "... he was mugged on two previous occasions and was fearful of the deceased; that the deceased was armed with a knife; and it was the defendant who knocked the knife out of his hand in some way and then took hold of that knife, at least initially in self-defence."

14. Even on that assumed basis the judge held the evidence was not sufficient for him to leave this partial defence of loss of control to the jury. The judge gave the following reasons. First, he said:

    i. "Well, first of all, this was not a frenzied attack. Loss of control is indicative, it seems to me, of a frenzied attack. It was a single stab wound, followed by an immediate decision by the defendant to run off. And indeed to dispose of the weapon whilst running off, on his evidence."

15. Secondly, the judge referred to the evidence of the applicant that he was scared and tried to grab the knife. When asked in-chief why he had stabbed Mr Hussain he replied:

    i. "I don't know. It was just in that moment. I was in survival mode."

16. Thirdly, the judge referred to something said by the applicant, when asked in cross-examination why he had not taken the opportunity simply to run away when he saw Mr Hussain. To that question the applicant had replied:

    i. "I don't know. I was just frightened, really scared. I was scared."

17. Having reviewed that evidence the judge concluded that it was not sufficient to amount to

evidence of a loss of control.

18. The judge went on in his ruling to say that he doubted whether the applicant's own evidence of the two previous muggings, months before the killing, could amount to a qualifying trigger for the purposes of loss of control. However, he made no specific finding in that regard and based his ruling on the absence of sufficient evidence of a loss of control.

19. We are grateful to Mr Mian QC and Ms Tafadar for their submissions on the applicant's behalf. They did not appear below but have adopted and expanded upon grounds of appeal drafted by trial counsel.

20. It is submitted that the evidence adduced by and on behalf of the applicant was sufficient to raise a case that he had panicked when confronted by Mr Hussain, who had twice previously mugged him, and that he was not in control of his actions when he stabbed Mr Hussain. It is submitted that the partial defence does not require that there be evidence of "a frenzied attack". Further, that the passage of time since the previous incidents was not conclusive against a loss of control because, it is submitted, the primary reason for the applicant to fear that he would be attacked was that Mr Hussain took hold of the knife at his waistband on this occasion. Counsel rely, as we have indicated, on the evidence of Dr Joseph and also on the evidence of a friend of the applicant, Mr Uddin, as to how the defendant appeared to him to be when he saw him a comparatively short time after the stabbing.

21. Mr Mian criticises the judge for failing properly to analyse all of the evidence before concluding, as he did, that there was insufficient to raise the issue of loss of control. Mr Mian further relies upon the fact that the applicant had the services of an intermediary at trial, as an obvious indication of problems of communication, which he argues should have led the judge to take a more careful overall view of the evidence rather than focusing upon specific words used by the applicant. Mr Mian points out that the applicant may not have been as well able to express himself as others and submits that that is not a factor which should have been held against him. Moreover, argues Mr Mian, the evidence which had been admitted before the jury in relation to the issue of diminished responsibility was also evidence which should have formed part of the judge's overall analysis before deciding whether to leave loss of control to the jury. Overall, it is submitted that the jury could reasonably have concluded that the applicant had stabbed the deceased following a loss of control which resulted from a fear of serious violence.

22. The written submissions of trial counsel have been opposed in a detailed Respondent's Notice which we have considered.

23. The legal principles applicable to this application are not controversial. By section 54(1) of the Coroners and Justice Act 2009:

    i. "Partial defence to murder: loss of control

        (1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if—

            (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control

            (b) the loss of self-control had a qualifying trigger, and

            (c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D."

24. We interpose that by section 55(3) of the Act, one of the qualifying triggers in this regard is a fear of serious violence.

25. Sub-sections (5) and (6) of section 54 provide:

    i. "(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

    ii. (6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply."

26. In R v Goodwin [2018] EWCA Crim 2287, the court considered the kind of points which a trial judge should have in mind when deciding whether to leave the partial defence of loss of control to a jury. At paragraph 35 Davis LJ offered the following non-exhaustive list:

    i. "(1) The required opinion is to be formed as a common sense judgment based on an analysis of all the evidence.

    ii. (2) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, then it is to be left the jury whether

or not the issue had been expressly advanced as part of the defence case at trial.

iii. (3) The appellate court will give due weight to the evaluation ('the opinion') of the trial judge, who will have had the considerable advantage of conducting the trial and hearing all the evidence and having the feel of the case. As has been said, the appellate court 'will not readily interfere with that judgment'.

iv. (4) However, that evaluation is not to be equated with an exercise of discretion such that the appellant court is only concerned with whether the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as either being right or wrong: it is a 'yes' or 'no' matter.

v. (5) The 2009 Act is specific by section 54(5) and (6) that the evidence must be 'sufficient' to raise an issue. It is not enough if there is simply some evidence falling short of sufficient evidence.

vi. (6) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.

vii. (7) For the purpose of forming his or her opinion, the trial judge, whilst of course entitled to assess the quality and weight of the evidence, ordinarily should not reject evidence which the jury could reasonably accept. It must be recognised that a jury may accept the evidence which is most favourable to a defendant.

viii. (8) The statutory defence of loss of control is significantly different from and more restrictive than the previous defence of provocation which it has entirely superseded.

ix. (9) Perhaps in consequence of all the foregoing, 'a much more rigorous evaluation' on the part of the trial judge is called for than might have been the case under the previous law of provocation.

x. (10) The statutory components of the defence are to be appraised sequentially and separately;

xi. (11) And not least, each case is to be assessed by reference to its own particular facts and circumstances."

27. One of the matters mentioned in that list is that the appellate court will give due weight to the opinion of the trial judge and will not readily interfere with the trial judge's judgment.

28. We agree with Mr Mian that the statutory requirement for "sufficient" evidence to be adduced does not import a requirement that there be evidence of a frenzied attack. Whilst killings done following a loss of control do sometimes involve a frenzied or sustained attack, that is not to be equated with loss of control and the statute does not require evidence of a frenzied attack. If in the observation which we have quoted the judge was suggesting that evidence of a frenzied attack was necessary, he would have been in error. We think however, reading that observation, that the judge was making a different point: namely, that the single stab was not suggestive of a loss of control in the way in which a frenzied attack might have been.

29. Be that as it may it is, in our view, clear beyond argument that the judge was correct not to leave the partial defence to the jury. The applicant's evidence was that he was in fear and that he acted in self-defence. Although he gave evidence that he was panicking, he acted purposefully in knocking the knife from the hand of Mr Hussain, picking it up, stabbing Mr Hussain and running away, discarding the knife as he ran. All of that was very relevant to the issue of self-defence, though it must be said that that line of defence was contradicted by the evidence of the eyewitness and significantly undermined by the applicant's own subsequent actions. But it was not evidence of a loss of control.

30. We have considered carefully the submissions made to us this morning by Mr Mian, but we are bound to say that the assistance of an intermediary is an aid to communication to the jury not an impediment to it. If it was felt by the intermediary - or by leading and junior trial counsel, who had no doubt spent time in consultation with the applicant - that the applicant was not succeeding in conveying to the jury what counsel understood to be his case, then there was opportunity for that problem or difficulty to be addressed either in examination in chief or in re-examination. There is nothing in the advice of trial counsel to suggest that any such difficulty arose.

31. We agree with Mr Mian that in determining whether there is sufficient evidence of a loss of control, it is important not to reduce the issue to one of semantics. We readily accept that a judge should not be too quick to ascribe a precise meaning to a word which may not have been used in a precise sense by the witness. But there must be sufficient evidence of a loss of control. In this case, in our judgment, there was none. The applicant's statement that "something was controlling my body", and his account to Dr Joseph of not being in control of himself, whether viewed individually or collectively, could not amount to evidence of loss of control sufficient to leave the issue to the jury. A judge is not bound to leave the partial defence to the jury simply because a defendant makes a bare assertion of that nature. The judge in discharging the duty which the statute lays upon him must consider assertions of that nature in the light of the other evidence. Here, in our view, the other evidence contained nothing suggestive of a loss of control. We cannot see that the evidence of Mr Uddin, as to how the applicant seemed to him after the event, could be regarded as providing or contributing to sufficient evidence of a loss of self-control immediately preceding the stabbing.

32. It is often difficult for a defendant charged with murder to rely both on the defence of self-defence and on the partial defence of a loss of control. In this case, the evidence was simply insufficient to raise the latter issue.

33. We would add that, like the judge, and indeed like the single judge, we doubt whether there was sufficient evidence of a qualifying trigger. We do not however need to consider this in detail and we do not do so, because an appeal is bound to fail on the primary issue which we have discussed.

34. As Davis LJ made clear in the tenth of the points which we have quoted, the statutory elements of the defence are required to be considered sequentially. The judge, in our judgment, was unarguably correct to conclude that the applicant was simply unable to adduce sufficient evidence of a loss of control.

35. For those reasons, which are essentially the same as those given by the single judge in her very clear written reasons, we can see no arguable ground on which the conviction can be said to be unsafe.

36. Accordingly, grateful though we are to Mr Mian and Ms Tafadar, the renewed application fails and must be refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: rcj@epiqglobal.co.uk