

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.

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.

IN THE COURT OF APPEAL
CRIMINAL DIVISION



CASE NO 202002303/A1
NCN: [2020] EWCA Crim 1727

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 4 December 2020

Before:

LORD JUSTICE DAVIS

MRS JUSTICE MCGOWAN DBE

MR JUSTICE FOXTON

**REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT
1988**

REGINA

V

“W”

Computer Aided Transcript 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)

MR D ATKINSON QC appeared on behalf of the Attorney General.

MS J KHAN QC appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE DAVIS:

Introduction

1. This is an application on behalf of the Solicitor General, seeking leave to refer a sentence on the ground that it is unduly lenient. The sentence was one of 7 years and 6 months' detention, imposed under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000, with no separate penalty imposed on a separate count of assault. The lead sentence had been imposed following the conviction of the offender for manslaughter, murder having been charged on the indictment but the jury acquitting on that particular count.
2. The offender is now 17 years old, having been born on 20 December 2002. He was 16 years old at the time of the offence. As we have indicated, the offender was convicted of manslaughter, following a trial, on 1 July 2020. The victim was likewise a young man. He may be styled "Ben". The offender was acquitted at that trial of an offence of having an article with a blade or point.
3. The judge who had the conduct of the trial and who passed sentence on the offender was Judge Lickley QC, sitting at the Central Criminal Court.

Background Facts

4. The background facts can conveniently be taken from the Reference and are these.
5. On Sunday 13 October 2019 the offender had visited a friend, JH, at his home, in the company of another friend, AW. The trio had been in Snapchat communication to arrange this. Although AW was himself only 16 years old, he was driving a VW Golf. The offender invited JH to go for a drive with them. When they left JH's home a large knife had been removed from his kitchen and placed in the VW Golf. The offender was to deny that he had taken it. He alleged that JH had taken the knife from the house. JH denied that. At all events the offender at trial was to be acquitted of possession of the knife, as we have indicated.
6. The offender had been in contact with Ben. Ben was 20 years old, having been born on 12 August 1999. The offender had sent Ben a number of text messages from shortly after 1 o'clock in the afternoon in relation to the proposed purchase of 7 grams of cannabis costing £40. They had spoken shortly before 1.30 pm. The offender arranged to meet Ben so that the offender could buy the cannabis from him. They spoke again at shortly after 2.30 pm to arrange that meeting.
7. AW then drove the VW Golf to an agreed rendezvous point. The offender and JH were in the car as his passengers. Ben was waiting in another car, a black Ford Fiesta, with his girlfriend, Chloe. The VW Golf pulled up so that its passenger window was adjacent to the driver's window of the Fiesta. Ben then handed a bag of cannabis to the offender who was seated in the front passenger seat of the VW Golf. However, the offender did not pay for the cannabis. Instead, he told AW to drive off. AW did drive off at speed. The car was then chased by Ben's Fiesta in a 3-minute chase. Chloe, who was passenger in Ben's car, was to describe Ben as in effect having "road rage". Ben was furious. He ignored her pleas to slow down. As to those in the VW Golf, JH was to refer to them as panicking during the chase. Both vehicles lost control on the same bend and crashed a few metres apart in Barnehurst Avenue in Bexley Heath. There was some suggestion that Ben's car may have been driven into the VW Golf at that stage.
8. At all events Ben then got out of his car. He went towards the passenger seat of the

other car where the offender was seated. Ben was not armed. However, he was clearly very angry and closed circuit television footage showed his arms swinging at his sides. He was not observed to be carrying any knife or any weapon of any kind at all and no weapon was later recovered that could have been associated with Ben.

9. As for the offender, he got out of the front passenger seat of the VW Golf. When he did so, he was armed with the large knife which had earlier been taken from JH's home. It seems, and as the judge in due course was to find, that he made no attempt to show the knife to Ben in order to warn him off, nor did he shout out any warning to Ben to the effect that he had a knife or to back off or anything like that. The confrontation between the offender and Ben can be seen from the footage to have lasted some 3 seconds. Witnesses from neighbouring houses were to suggest that Ben may have swung a punch at the offender or to have pushed him. At all events the offender immediately stabbed Ben twice in the chest. One wound penetrated to a depth of 13 centimetres, transecting the aorta and nicking the spine. Ben immediately fell to the floor where, tragically, he rapidly bled to death. Post-mortem examination was to show no defensive injuries.
10. The offender then threw the knife into the Golf. He clearly paid no thought to staying behind in order to render assistance to Ben lying prone on the ground. Instead he put up his hood and started to make off with the driver, AW. A passer-by, Mr McGavin, then valiantly sought to detain AW. At that the offender himself ran back and punched Mr McGavin twice to the face in order to make him release AW. The offender and AW then made off. The offender disposed of his upper clothing in an industrial bin as he did so.
11. Police officers went to the offender's mother's address in order to search for him but he was not then apprehended. However, he attended Bexleyheath police station later on 14 October in the company of his father and surrendered himself. When he was examined, there were no facial injuries or other injuries detected in connection with his previous altercation with Ben.
12. He was interviewed under caution in the presence of his solicitor. He made no comment. He did however provide a prepared statement in which he said that Ben had been aggressive towards him when the Golf and Fiesta had passed each other and he had been scared. He said that Ben continued to be aggressive after the crash of the two cars. He said that Ben had approached the Golf with his hands at his waist, he had been scared and run away. He said that he had been unaware that Ben had been stabbed and had surrendered himself as soon as he discovered this.
13. At trial his defence of self-defence was rejected by the jury. But, as evidence by the verdict, the jury clearly had not been made sure of an intent to kill or to cause really serious injury.

The sentencing process

14. The mother of Ben, among others, provided a statement seeking, in moving terms, to address the impact that the loss of a son, brother and uncle had occasioned to their family. She spoke of the trauma that the family had felt in dealing with the aftermath of his death and the loss of the promise of his life, living with his girlfriend Chloe and other such opportunities that life in future might afford him.
15. As for the offender, he had one previous conviction. That conviction was on 4 May 2018 when he was convicted at the South East London Magistrates' Court of causing actual bodily harm to a youth. That incident had been some two-and-a-half years before

the present incident when the offender was 14. He had been sentenced to a youth rehabilitation order with an activity requirement and a restraining order although in the result the orders were revoked because of his good progress. It seems that that offence had involved the offender punching the victim, who had been at school with him, during the school lunch break accusing the victim of saying something about his sister.

16. A pre-sentence report was obtained from the Youth Offending Service. That set out the background in some detail. Remorse was indicated. As to the previous assault incident, the probation officer was concerned:

"... there does appear to be an emerging pattern of [W] taking a pre-emptive strike to others using self-defence as an excuse for using a disproportionate level of violence."

17. In addition, there was before the judge a psychological report which had been obtained and also an intermediary's report: the offender having been accompanied by an intermediary, as we understand, throughout the trial. It was, amongst other things, stated that the verbal skills of the offender were in the borderline range, with his overall IQ being assessed as 79 with no major impairment in intellectual functioning.
18. Mr Atkinson QC, on behalf of the Solicitor General, identified, as were identified below, the following aggravating factors in this particular case. First, there had been the use of a large knife to inflict injury: although it was accepted that double counting had to be avoided, having regard to the categorisation under the Sentencing Guideline. Second, there was evidence that the offender had consumed cannabis at some stage before the commission of the offence. Third, the offender had taken steps to avoid detection, disposing of his upper clothing and leaving the scene. Fourth, the offender had then sought to assault a member of the public who was trying to intervene in his attempt to assist. Fifth, the surrounding circumstances of the offence had involved the purchase of a prohibited drug, the theft of that drug and a car chase at excessive speeds through a residential area, leading up to the crashing of those cars. The offender, it was said, had in effect brought those circumstances about and had in effect caused the eventual confrontation; that was advanced by Mr Atkinson as a particularly important aggravating factor. Further, Mr Atkinson sought to rely on the previous conviction for an offence of violence.
19. So far as mitigation was concerned, there were these matters to be borne in mind. First, there was the offender's age and to some extent his educational challenges. Second there was, as it was said, an element of self-defence, in that Ben was approaching the offender in an angry mood and it was reasonable to anticipate a degree of violence. Third, it was said that the offence was unplanned and unpremeditated. Finally, the offender had expressed remorse.
20. So far as the relevant Guidelines are concerned, this was, as we have said, a case of manslaughter, the jury having acquitted of murder. It was the prosecution submission at the sentencing hearing, and the judge accepted and as is not now challenged, that this, for the purposes of the Definitive Guideline on Manslaughter issued by the Sentencing Council, was to be categorised as category B: in particular in that death was caused in the course of an unlawful act which carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender.

21. That being the appropriate categorisation, the starting point set by the Guideline, in respect of an adult offender, is 12 years' custody; with the category range set by the Guideline being 8 to 16 years' custody. In addition, however, regard had to be had to the Guideline relating to Sentencing Children and Young People. Amongst other things it is said in that Guideline that by reference to the relevant adult Guideline the Court may feel it appropriate to apply a sentence broadly within the region of half to two-thirds of the adult sentence for those aged 15 to 17. Amongst other things the emotional and development age and maturity of the child or young person in question is said to be of at least equal importance as their chronological age. It is further said:

"The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range."

22. The judge's sentencing remarks had clearly been very carefully thought about and had clearly been very carefully crafted. The judge set out the background facts fully. He also identified the findings which he himself, as judge, needed to make for the purposes of sentencing. Amongst other things the judge indicated that there was no need to use the knife. The judge also noted that the offender was a trained and successful boxer. He went on to say:

"In my judgement, your actions are as close to murder as any case of manslaughter can be."

23. The judge then referred to the position of Ben and his family and the moving personal statements that had been read. The judge then dealt further with the facts in some detail. The judge further dealt in some detail with the relevant Sentencing Guidelines, taking (correctly, as we have indicated) a starting point of 12 years' custody for an adult offender. The judge then referred to the aggravating factors. In doing so he noted that the offender had the previous conviction for violence but took the view that should not be taken as aggravating this particular offence. Although Mr Atkinson criticised the judge in that regard, we think that was a course properly open to the judge, especially given that the violence had been of a totally different nature and had taken place in entirely different circumstances, and when the offender was much younger. The judge then went on to refer to the Sentencing Children and Young People Guideline and to the assessment and mental functioning of the offender. Having assessed the evidence in that regard, the judge specifically found that the offender was functioning at a level of maturity consistent with his age.

24. As to mitigation, the judge referred to the circumstances of the self-defence argument which had been propounded. The judge went on to make these findings:

"Although Ben was angry, and I accept intending to have some sort of violent confrontation with you, what is clear is that the jury rejected your assertion that the force you used was reasonable. I accept that the evidence justified the finding that you believed that some force was or might have been necessary to repel the advancing Ben. However I stress the use of the knife and the

force you used was extreme, wholly unreasonable, and unjustified given the threat he posed to you."

25. The judge went on also to accept that this was not a planned or premeditated attack in any normal sense and also went on to accept that the offender was remorseful: as, of course, he ought to have been.
26. Having dealt further with aspects of the mitigation and having rejected the idea of making a finding of "dangerousness", the judge then went on in his concluding remarks to say this:

"Taking all of the above into account and balancing the aggravating and mitigating factors, if you had been an adult the appropriate sentence would have been one of 12 and a half years' custody."

27. The judge then went on to deal with the discount appropriate to the offender by reference to his age and indicated that the reduction which he made was one of 40%. He passed sentence accordingly in the way we have indicated, imposing no separate penalty on the assault count.

Submissions

28. Mr Atkinson submits that this sentence was unduly lenient. He says that is so for two reasons taken cumulatively. First, he submits that the judge had failed to move up sufficiently from the starting point of 12 years' custody set in the Guideline for an adult offender. Mr Atkinson enumerated the various aggravating factors which we have outlined above. He suggested that the judge should, in the light of these, have gone up to close to the top of the permitted range, that is to say 16 years. Mr Atkinson necessarily had to accept that the judge would then need to come down by an amount to reflect the various mitigating factors. But even so, he submits, a figure selected by the judge of twelve-and-a-half years was simply insufficient. Second, Mr Atkinson submits that the judge gave an excessive discount of 40% to reflect the offender's age. With respect, Mr Atkinson, aside from repeating his reliance on the aggravating factors which had already been taken into account, wholly struggled to explain how the judge had been disentitled to select such a discount. It was, in effect, close to the middle of the range indicated by the Guideline as potentially available for offenders aged between 15 and 17. Mr Atkinson baldly asserted, nevertheless, that the reduction should have been no more than of one-third. That, however, in effect would have required treating the offender as being 17 and close to adulthood when he was indeed a long way short of that.
29. Ms Khan QC, for the offender, submitted that there was no basis for interfering with the judge's assessment, which had taken all factors into account and which had properly applied the various Guidelines. She in fact submitted that, given the circumstances, this sentence was not even lenient, let alone unduly so.

Conclusion

30. In our view, and whilst we acknowledge the dreadful impact on Ben's family of what happened, it cannot be said that this sentence was unduly lenient. The judge had very carefully and thoroughly weighed the competing aggravating and mitigating factors. We can see no basis for criticising the figure which he selected, had an adult had been

sentenced for this manslaughter, of twelve-and-a-half years (before allowing for the youth of the offender). Indeed, as Ms Khan pointed out, that figure was above the starting point of 12 years indicated by the Guideline. Furthermore, as we have said, there can be no further complaint about the judge then making a 40% reduction in accordance with the appropriate Guideline to reflect the offender's age at the time.

31. We do appreciate that the judge had found that the offender's actions were "as close to murder as any case of manslaughter can be". But, as was indicated in the course of argument this morning, it was the judge's judicial function to give effect to the verdict of the jury. In this particular case the jury, having considered all the evidence, decided that the offender was to be acquitted of murder and to be convicted of manslaughter. It followed that it was the judge's judicial obligation to sentence in accordance with that verdict, having appropriate regard to the Definitive Guideline on Manslaughter issued by the Sentencing Council. In our view, the judge did precisely that, and did so in a way which was wholly open to him. In fact, we consider that his sentencing remarks can be taken as a model of their kind, both as to structure and as to content.
32. Accordingly, whilst we do acknowledge the dreadful impact all this would have had on Ben's family, we can see no basis for interfering, as an appellate court, with the judge's conclusion. Accordingly, we refuse leave in this case.
33. LORD JUSTICE DAVIS: Are there any points arising?
34. Thank you both very much indeed for your excellent submissions.

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