IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2020] EWCA Crim 1829

CASE NO 201904641/B5

Royal Courts of Justice

Strand

London

WC2A 2LL

Friday 16 October 2020

LORD JUSTICE BEAN

MR JUSTICE KNOWLES

HIS HONOUR JUDGE AUBREY QC

(Sitting as a Judge of the CACD)

REGINA

V

SAMANTHA LEIGH GREGSON

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MR B COX QC & MR D GODFREY appeared on behalf of the Appellant.

MR R SMITH QC appeared on behalf of the Crown.

J U D G M E N T

LORD JUSTICE BEAN:

1. On 13 February 2014 Mia Gregson, who was then just under 2 years old, was smothered to death at her home. The appellant, Samantha Gregson, was Mia's mother. Mia had been killed by the appellant's partner, Jonathan Garner, who was not the father of Mia.

2. Garner and the appellant stood trial in the Crown Court at Sheffield in 2019 before Goss J and a jury. Garner was charged with murder with an alternative charge of causing or allowing the death of a child contrary to section 5 of the Domestic Violence Crime and Victims Act 2004. Ms Gregson was charged with the latter offence alone. The jury convicted Garner of Mia's murder and consequently the alternative verdict in respect of him was not taken. The appellant was convicted of causing or allowing Mia's death.

3. She appeals against conviction by leave of the single judge, who said in respect of the principal ground of appeal that he was "just persuaded" that he should grant leave to appeal.

4. The appellant's relationship with Garner had begun in August 2013. By the time they had moved from their first place of residence together to the second (in January 2014) she was pregnant with Garner's child. They were both 20 years old at the time.

5. On 13 February 2014 Ms Gregson ran out into the street and sought help from her neighbours. Garner was also present. They said Mia had stopped breathing. A neighbour ran into their home and found Mia lying on a sofa not breathing and with blue lips. The neighbour attempted to resuscitate her. Paramedics arrived 2 minutes later. But when Mia was taken to a local hospital it was found that she had suffered a cardiac arrest and brain damage as a result of oxygen deprivation. She died later that day. The evidence was that she had been smothered. The prosecution case was that Garner had smothered Mia intending, at the very least, to cause her serious harm.

6. The case against the appellant as opened by the prosecution was that she was aware of the serious risk of physical injury that Garner posed to Mia but did nothing about it and took no action to protect her. It was clear that Mia had been subjected to violence and abuse over a number of weeks prior to her death. The appellant must have been aware of this, said the prosecution, but there was no evidence that she had taken any steps to try to prevent him. As the evidence proceeded, the prosecution case became more specific, namely that the appellant was present on the fatal day but did nothing to intervene.

7. The prosecution called evidence from a social worker, Sandra Thompson. This witness said that, on her first meeting with the appellant, she had advised that it was important for Garner to complete an anger management course and not to have access to Mia while he was doing that course. At their second meeting, which was on 23 October 2013,

Ms Thompson recorded that "it was agreed that Jonathan would not have contact with Mia until he had engaged with services to address the issues of domestic violence". Further contact resulted in the preparation of an assessment report and family plan which confirmed that Mia should not have contact with Garner and that the appellant would not allow Garner to live at her home until he had completed work to address his difficulties.

8. Other evidence adduced by the prosecution included that of the appellant's sister, Courtney Gregson, who recalled Garner being verbally abusive towards the appellant and the appellant having told her sister that Garner had head-butted her. This witness had noticed bruises on Mia in the weeks before her death. The explanation for the bruises given by the appellant was that a fire guard had fallen on Mia.

9. There was also evidence from two neighbours who lived either side of the appellant's home. One of these, Ms Hills, heard a man shouting: "If you don't shut up I'll slap your arse" on one occasion and on three or four other occasions this witness heard a child crying for 15 - 30 minutes followed by a man shouting. The other neighbour, Ms Found, heard a child screaming and crying and a man shouting at the child every day.

10. Ms Found had previously called the police because of her concern on the day after the appellant and Garner had moved into their new address. She had heard a man banging and screaming, a child crying all day, with the man becoming increasingly irate and losing his temper.

11. There were other witnesses who attended the premises on the day of Mia's death. We do not think it necessary to set out that evidence. Nor the expert medical evidence which can be summarised as we have done earlier in this judgment.

12. The appellant was interviewed by the police. She told various lies about Garner staying with her, about Garner not being violent towards her and about him not having shouted at Mia. As to the facts of the fatal day, she said she had been woken by Garner who was shouting that Mia was not breathing. Subsequently in interview she alleged that Garner had abused her from December onwards. He had grabbed her by the hair and throat and pinned her down. She felt trapped in an abusive relationship. She was pregnant with Garner's child and afraid of him and did not believe that he would hurt Mia. She had lied in previous interviews, she said, as he was afraid of Garner and afraid also that her unborn child would be taken away from her.

13. Garner gave evidence at trial denying that he had used any force on Mia and denying that he had anything to do with her death. He said that he had been asleep and the appellant had shouted at him to wake up and saying that Mia was not breathing. He did not expressly allege that the appellant had killed Mia.

14. The appellant herself did not give evidence at trial.

15. The principal ground of appeal against conviction argued by Mr Bryan Cox QC relates to an application by the defence to adduce bad character evidence relating to Garner, namely the fact that he had repeatedly been convicted of offences of violence towards or harassment of previous partners together with some details of those previous convictions and the facts underlying them. An application to this effect was lodged before the start of the trial and dealt with by Goss J before evidence was called. He gave a careful written ruling rejecting it. We need quote only the last four paragraphs:

> "7. The application on behalf of Samantha Gregson that the evidence of Jonathan Garner's violence towards other partners is admissible is put on the basis that it supports her account that he was violent towards her and is relevant and admissible for the purposes of establishing that, of the two defendants, it is more likely that Jonathan Garner was responsible for inflicting the fatal injury to Mia.
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> 8. On behalf of Jonathan Garner, although it is accepted, rightly, that the defendants are running 'cut-throat' defences, it is submitted that
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> > a. the evidence sought to be adduced of allegations of harassment of and using or threatening violence towards partners and one conviction for common assault in 2016 is not material that is substantially probative of the important matter in issue, namely, who smothered Mia, and
> >
> > b. although whether Jonathan Garner was violent to Samantha Gregson is a matter in issue, it is not an important issue in the context of the case and, even it if it is, having regard to its nature, this material relating to behaviour towards other parents is not substantially probative of it.
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> 9. The evidence of violent behaviour by Jonathan Garner towards former partners is evidence of a tendency to behave violently towards and harass and threaten female partners. Those matters which it is sought to adduce are set out in paragraph 3 of Samantha Gregson's application. They comprise an offence of harassment of a partner in 2012, breaching a restraining order in 2012, common assault of a partner in 2016, being made the subject of Domestic Violence Restraining Order in relation to a woman with whom he was in a relationship in 2017 and a conviction for harassment in December 2017. None of the allegations involved acts of violence towards the children of these partners. Although the majority of these events post-date Mia's death, the evidence is relevant to a discrete aspect of Samantha Gregson's defence, being capable of supporting her truthfulness in making assertions that she was treated violently by Jonathan Garner and, therefore, relevant to her defence that she could not

> have taken any step to protect Mia from the risk of violence at Jonathan Garner's hands. It does not have substantial probative value in relation to the primary issue of which defendant is more likely to have caused Mia's death. It is not, in my judgment, evidence of substantial probative value in relation to a matter of substantial importance that is in issue between the defendants. The subjective element of Samantha Gregson's defence is not a matter of substantial importance in the context of the case as a whole. The evidence does not, therefore, satisfy the test for admissibility.
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> 10. Accordingly, I refuse the application to explore the detail of the alleged abusive behaviour of Jonathan Garner towards partners or to adduce evidence in relation to it."

16. However, the issue did not rest there. We have already noted that in the course of the prosecution evidence the social worker Ms Thompson had said that it had been agreed at a meeting on 23 October 2013 that Jonathan Garner would not have contact with Mia until he had engaged with services to address the issues of domestic violence and also that an assessment report and family plan had confirmed that he should not have contact with Mia or be allowed to live at Ms Gregson's home until he had completed work to address "his difficulties".

17. In the course of his evidence-in-chief Garner denied that Ms Thompson was concerned about his anger or that there was cause for her to be so concerned. Counsel for the appellant then renewed the application to the judge to adduce the details of Garner's history of violence towards former partners.

18. The prosecution accepted, and the judge apparently ruled, though this time we do not have a written ruling or transcript, that s 101(1)(b) of the 2003 Act was applicable, since counsel for Garner had adduced evidence on the same topic in cross-examining Ms Thompson, and accordingly he could be asked by counsel for Ms Gregson whether he had a history of violence against other partners. The judge ruled that if Garner did indeed make this admission, he could not then be cross-examined about the detail of that history of violence towards other partners. It is not necessary to explore what the ruling said about what might be said if he did not admit it, because he did.

19. Accordingly, when the jury came to deliberate on the case, they were aware that Garner had admitted having a history of violence towards partners other than the appellant. Nevertheless, it is submitted by Mr Cox that the judge was bound to allow the details of that previous violence to be explored with Garner before the jury and that his refusal to permit for that to be done renders the conviction unsafe.

20. The leading case on applications to admit bad character made by a co-defendant is the decision of this court in R v Phillips [2012] 1 Cr App R(S) 25. This emphasises that

sections 101(1)(e) and 112 of the Criminal Justice Act 2003 require separate considerations of the questions: first, whether the evidence that the defendant wishes to adduce has substantial probative value, and secondly, whether the matter in respect of which the evidence was substantially probative was a matter of substantial importance in the context of a case as a whole.

21. While there is an element of overlap in those two questions it is necessary to address them in turn. It is important, the Court said, that sight is not lost of the rigour of the statutory test of *substantial* probative value upon a matter in issue between the defendants which is of *substantial* importance in the context of the trial as a whole. The first question for the judge is: whether the proposed evidence is substantially probative of the fact in issue between the defendants The judge is then required to make a fact-sensitive assessment of the importance of that issue between the defendants in the context of the case as a whole. Where there is already before the jury evidence which has the same probative effect, the judge is entitled to assess whether further evidence has substantial probative value in relation to the same issue.

22. The Court accepted that once a defendant has established the statutory criteria for the admission of bad character evidence against a co-defendant, the judge does not enjoy a discretionary power to exclude it. However, the judge is entitled to take steps to minimise the risk that by the reason of the admission of bad character evidence the focus of the trial is lost. First, the judge can control the scope of the evidence and the manner in which it is introduced to the jury. Secondly, he can impose a timetable on deployment of the evidence. Thirdly, he has a responsibility to explain to the jury the issues on which the evidence is relevant and the appropriate approach.

23. Despite Mr Cox's best efforts, we are quite unable to see that the *detail* of Garner's previous violence against or harassment of his partners, or violence or harassment of partners subsequent to the killing of Mia, was material of substantial probative value in relation to an issue between Garner and Ms Gregson which was of substantial importance in the context of the case. The appellant was not charged with murder, although the charge against her under section 5 of the 2004 Act was in the usual form of causing or allowing Mia's death. It was plainly not suggested by the prosecution that the appellant had killed Mia, and only implicitly suggested by Garner in his bare denials. In a case on different facts such previous violence or violence against other partners might be relevant if the real issue is foresight. For example, if Garner had smothered Mia at a time when the evidence showed that the appellant was out shopping, there would be an important issue for the jury as to whether she should have foreseen that he might kill her. But the present case was far more simple: Garner plainly killed Mia when the appellant was present in their home. Her case as advanced to the police in interview, although she did not give evidence of it before the jury, is that she was asleep when it happened.

24. On these facts questions of foresight, or whether the appellant had been at fault in allowing Garner to live at the flat, become academic. If the jury were satisfied so that

they were sure she was lying when she said she was asleep when the incident occurred then a conviction, as we see it, was inevitable. Again, the case might be more complicated if her defence had been that she tried valiantly to fight Garner off and prevent him from smothering Mia and failed. But that is not the present case.

25. We also note that given the admissions that Garner had made about his violence against other partners, the question for the judge was whether the further details of Garner's history of violence which the defence sought to adduce were of substantial probative value on an issue of substantial importance. Plainly they were not (see paragraph 44 of Phillips and the passage cited there from the previous judgment of this Court in R v Braithwaite).

26. The only issue between Garner and Ms Gregson, to which the details of Garner's history of violence towards ex-partners might have been arguably relevant, was to establish that she was in fear of him and thus to explain her lies in interview. But none of these issues comes close to satisfying the Phillips test. For these reasons we reject ground 1 of the appeal.

27. We turn to ground 2. This complains that the judge erred in directing the jury that the sole relevance of Garner's history of domestic violence referred to in Ms Thompson's evidence was in relation to the prosecution case against the appellant in relation to her state of knowledge about Garner. This is with respect an inaccurate representation of what the judge said at page 13H of the summing-up:

> "You have only heard about this communication of information to Samantha Gregson [by Sandra Thompson], because it is evidence relevant to the case against her and what she was told about her partner and co accused. It is not evidence against him, and you must ignore it when assessing the case against him that he had this history."

28. This was an impeccable direction of law. The judge was not saying that the jury had to ignore what Sandra Thompson had said about Garner's history for all purposes, only that it was not evidence against him given the form in which it had been adduced. The judge emphasised a page later in summing-up that Garner did accept in his evidence that he had a history of violence in domestic relationships. So that element of the evidence was fairly and squarely before the jury for them to take into account, if they thought it was somehow relevant to the case brought against this appellant, though for the reasons we have given rejecting ground 1, we doubt whether it was of any relevance at all.

29. Ground 3 complains that the judge misdirected the jury as to the subjective element of the section 5 offence and ought to have directed the jury to consider all of the applicant's circumstances at the time including her age, her lack of support and the fact that she was in an abusive relationship, if they so found.

30. In the judgment of this court in R v Khan [2009] 1 WLR 2036, on which Mr Cox placed reliance, Lord Judge CJ emphasised that cases of this kind are fact specific. At paragraph 33, he noted that section 5(1)(d)(ii) of the Domestic Violence, Crime and Victims Act 2004 makes it clear that the protective steps which could have been expected of the defendant will depend on what reasonably could have been expected of him or her on the facts. At paragraph 35 he said that:

> "Naturally, in the case of any defendant who had suggested that she had taken some steps, or that her ability to take any or any steps had been circumscribed by the situation in which she found herself, the judge would have given different supplementary directions to the jury. On the evidence none of these questions arose. Nothing could have been gained by judicial speculation on the topic."

31. In the present case the critical issue of fact for the jury in the appellant's case was whether she had been asleep or awake at the time of Mia's murder; and, moreover, she had given no evidence. In those circumstances we do not think that the brief reference to the circumstances of the appellant in the judge's directions of law was in any way defective.

32. The case against the appellant was overwhelming and it cannot have come as a surprise to anyone when she was convicted. In our view, none of the grounds of people has any substance and the appeal is accordingly dismissed.