Neutral Citation number: [2021] EWCA Crim 1999
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2020/00451/B1

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 9th December 2021

LADY JUSTICE MACUR DBE

MR JUSTICE PICKEN

THE RECORDER OF MANCHESTER
(His Honour Judge Dean QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v –

PATRICK CURRAN

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Mr J Bennathan QC appeared on behalf of the Applicant

Mr S Laws QC appeared on behalf of the Crown

J U D G M E N T

Thursday 9th December 2021

LADY JUSTICE MACUR:

1. On 23rd January 2015, following a trial in the Crown Court at Truro, the applicant was convicted in his absence of murder. He was subsequently sentenced to life imprisonment, with a minimum specified term of 18 years (less 315 days already spent on remand).

2. The applicant refused to attend or engage in the trial, despite the best efforts of the court at first instance to obtain his attendance. He was unrepresented by choice. He indicated to a psychiatrist at the time that this was in protest, as was his non-attendance, against his continuing incarceration.

3. The applicant now renews his application for an extension of time (1810 days) in which to apply for leave to appeal against conviction following refusal by the single judge.

4. Mr Bennathan QC, who represents the applicant before us, submits that the conviction for murder should be quashed and substituted with a conviction for manslaughter by reason of diminished responsibility. For reasons that will become obvious, he does not submit that the conviction should be quashed, and a retrial ordered. Mr Laws QC, who represents the respondent, resists the application.

5. There is no suggestion that the applicant lacks capacity to instruct his legal team, although Dr Mohandas' most recent psychiatric report, dated 15th October 2021, opines that his mental disorders, at least partially, if not fully, affect his decision-making process. However, we remind ourselves of section 1(4) of the Mental Capacity Act 2005: that a person must be assumed to have capacity, unless it is established that they lack capacity; a person is not to be treated as unable to make a decision merely because he makes an unwise decision.

6. The central issue in the appeal is whether the applicant's legal advisors can argue matters which depend upon the partial defence of diminished responsibility when the applicant continues to deny the *actus reus* of killing or seriously injuring the victim. The respondent says that such arguments cannot be advanced.

7. We assume that the Notice of Abandonment, which was received by the Court Office on 7th December 2020 and apparently signed by the applicant, is not of his doing or on his instructions. The applicant continues to deny the *actus reus* and only permits this application to be made on the basis that he is ‘not guilty’.

8. In a further witness statement filed by his solicitor, Miss Todner, it is recorded that, following a video conference with him on 2nd December 2021, the applicant confirmed that he was happy for the appeal to go ahead, so long as the appeal did not involve any admission of guilt on his behalf. Miss Todner says:

> "I explained to him that we understood his instructions on that issue and that we would not be seeking any admissions of guilt on his behalf during the course of the appeal. On this basis he was happy for the appeal to proceed in his absence."

The applicant has waived his right to appear via video-link during this renewed application.

9. There is an application for leave to adduce fresh evidence, pursuant to section 23 of the

Criminal Appeal Act 1968, from Dr Mohandas and from Dr Cumming, psychiatrists on behalf of the applicant and the respondent respectively. There is no application to admit fresh evidence from the applicant or any other witness of fact.

10. A joint expert statement has been prepared. It is dated 28th and 29th October 2021. There is no professional disagreement regarding the applicant's mental health now, nor, in retrospect, likely at the time of the killing. Both psychiatrists diagnosed the applicant as suffering from schizophrenia and accept that it is more likely than not that the applicant was psychotic at the time that the offence was committed.

11. The respondent submits that there is no reasonable explanation for the failure to adduce this evidence at trial. At the time of trial there was no evidence that the applicant was unfitted to stand trial; nor was there any significant evidence of mental illness. The applicant simply refused to engage in the proceedings and was fully aware of the perils of such a course. However, the sole question for this court is whether it is necessary and expedient in the interests of justice to admit this evidence. The question for us is: does it form the basis of a defence of diminished responsibility and therefore render the conviction unsafe – that is, does it afford any ground for allowing the appeal?

The Facts (in brief)

12. The case concerned the murder of 74-year-old Mrs Joan Roddam on Saturday 8th November 2003. Her body was found by police officers in the field behind her house. It was covered by a blanket and a wheelbarrow. Her body was cold to the touch and there was a visible head injury. The post-mortem examination identified several injuries, and it was concluded that the cause of death was strangling.

13. The applicant was arrested and interviewed in 2004. He was unrepresented during the interview but gave an account of his movements at the time. No further action was taken due to lack of evidence.

14. In 2013, a case review and fresh forensic analysis were undertaken, following developments in forensic science. The applicant was re-arrested in March 2014 and charged with murder.

15. Thereafter, the applicant sacked his legal team. A pre-trial psychiatric report was obtained at the direction of the trial judge due to the applicant's refusal to attend hearings or to engage in the process. In this respect, Dr Brink reported on 9th December 2014 that, having met with the applicant, he did not find any clear evidence of mental impairment. There was no triable issue of fitness to plead identified by him or by Dr Brown, another psychiatrist who saw the applicant whilst on remand.

16. Mr Bennathan QC submits that these reports were based upon inadequate information, not least because of the applicant's difficulty in engagement with the psychiatrists at the time; they would have been unable to obtain sufficient information upon which to make an assessment regarding his mental health and also to form a view as to his fitness to plead or to stand trial.

17. The prosecution case relied upon circumstantial evidence, which included the following:

> (1) The applicant was one of the few people who was seen out in the village early on the morning that the body was discovered. He said that he was looking for his dog.

(2) He was experiencing psychiatric difficulties in 2003. He had a strong sexual interest in much older women. The day before the killing, he told a doctor that he was experiencing raised sexual urges. The doctor's view on that day was that he may have schizophrenia.

(3) On the night following the killing, he lit a bonfire in the back garden of his home. He burnt the hard drive from his computer and clothing, including a pair of jeans.

(3) Fibres matching two items of the applicant's clothing were found at the scene – on the deceased's dressing gown and on a blanket that partially covered her body. A bloodstain on the blanket was found to contain a mixture of DNA containing contributions from the deceased and from the applicant.

(4) Some relevant evidence concerning the applicant's odd behaviour and erratic hours and movements, including being seen more than once walking near the deceased's property, was obtained from witnesses who encountered the applicant in the days before the killing.

(5) On 7th November, his father called the doctor expressing concerns about his son's mental state. That day the applicant was seen by a doctor who formed the view that the applicant had schizophrenia.

18. The defence case at trial was outright denial. As indicated previously, the applicant refused to attend trial, or to instruct counsel to represent him at trial, or to engage with the trial process. The jury were given appropriate directions about his refusal to participate in the trial process.

19. There is and can be no legitimate complaint made of the conduct of prosecution counsel, of the applicant's former legal teams, of the trial, or of the judge's summing-up.

20. Leave is sought, as indicated, to adduce fresh evidence from Dr Mohandas, a consultant forensic psychiatrist, who is the applicant's recent and present treating clinician. He has filed several reports. They are dated variously 22nd July 2019, 17th September 2019, 8th June 2020, 31st March 2021, and 15th October 2021. We have had regard to all of them during the course of pre-reading for this application and have been directed to them by Mr Bennathan QC during the course of his submissions to us.

21. In an interview on 10th July 2019, the applicant appeared to admit to Dr Mohandas that he was responsible for the killing. He told Dr Mohandas that builders had “set him up”. He did not know why they did that. They had been building a house next door to his parents' house and during the course of that time one of the builders had been "waving his backside" at them. This started when the applicant was 14 years old and appeared to have been occasioned by a perceived slight against the builder's mother. He could not explain how the builders made him commit the index offence. He went on to say that he was "not with it at all" at the time of the index offence and that voices had intensified so much that "it was like swimming in the voices". He said that "someone in the village" ordered him and he felt pressured to get out of the house and go to the victim's house to make a fool out of himself. He said that someone was waiting outside the house and then went inside. He then clarified that it was he himself who was waiting outside the house and who went inside. He said that he "gently" punched the victim to her face and that the victim fell down to the floor. He then kept pressing her windpipe using his hands. He dragged her outside to the field near the wheelbarrow and then he left. He said that she had not lost consciousness when he left.

When probed, he denied any sexual motive to the assault and denied sexual attraction or ill-feelings towards the victim. When asked whether he had any comments to make regarding the reports from the victim that someone used to knock on her windows, he said that he had none.

22. Two days later, when conducting a further interview, Dr Mohandas asked the applicant whether he was feeling anxious and stressed, or whether he was relieved following the disclosure he had made two days earlier. The applicant said that he was relieved. However, he said that he wanted to retract what he had said and denied that he had committed the index offence. He said that he had wanted to see how Dr Mohandas would react if he told him that he, the applicant, had committed the offence. Since that time the applicant has not sought to make any further admission.

23. Dr Mohandas concludes that the applicant suffers from long-standing paranoid schizophrenia. Despite the retraction, the evidence suggests that he was suffering from such illness at the time of the killing; that in all probability, he was suffering from an abnormality of mental functioning at the time which arose from his paranoid schizophrenia; that this substantially impaired his ability to form a rational judgment; and that therefore the partial defence of diminished responsibility would apply.

24. The respondent applies for leave to adduce fresh evidence from Dr Cumming, consultant psychiatrist. His reports dated 1st September 2020 and 15th October 2021 are also before the court. We have had regard to them.

25. There is also a joint statement from the experts, dated 29th October 2021. As we have already made clear, there is no professional disagreement regarding diagnosis of the applicant's present, and likely past mental state, the issue between the experts is as regards a legal matter. Dr Cumming holds the view that a successful defence of diminished responsibility requires the applicant to plead guilty to manslaughter. The technical nature of the defence goes beyond a simple plea and requires some form of account of the offence from the applicant.

26. Dr Mohandas' view is that the applicant's ability or willingness to enter a plea on the question of diminished responsibility is a matter of law, which is not a matter within his expertise. Hence, he does not wish to comment on it. However, we note that in another report Dr Mohandas has made clear that in his view it is the partially treated psychosis and the applicant's lack of insight, which is partly, if not wholly, responsible for his state of denial and unwillingness or inability to plead guilty to the lesser offence of manslaughter, as advised by his lawyers.

27. In summary, the submissions advanced on behalf of the applicant are that we should not be constrained from finding that the conviction is unsafe by any rule of law that may otherwise be deemed contra in accordance with the submissions of the respondent. It is perhaps put with far greater clarity in the skeleton argument prepared by Mr Bennathan QC in this way:

> "It is submitted that the court ought not create rigid rules that constrain or frustrate the central task of considering whether a conviction is safe, regardless of whether an applicant is so ill he fails to act in his own best interests."

28. Mr Bennathan has referred us at some length to the remarks of Lord Bingham in *R v Criminal Cases Review Commission, ex parte Pearson* [2000] 1 Cr App R 141, that if on consideration of all the facts and circumstances of the case before it, the court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe.

29. In giving the judgment of the court in *R v Erskine* [2009] Cr App R 29, at [95] Lord Judge CJ said that in the factual circumstances in *Erskine*, where there was contemporaneous evidence which suggested that as a result of reduced mental acuity not amounting to unfitness to plead, but part and parcel of the offender's illness, the decision not to advance the defence at trial was irredeemably flawed. The interests of justice required the court to admit the fresh evidence, to examine it with care and, if satisfied that the convictions for murder were unsafe, to substitute convictions for manslaughter on the ground of diminished responsibility.

30. Mr Bennathan QC submits that, on the basis of the admission by the applicant to Dr Mohandas in July 2019, this court should find that there is a clear indication that the applicant's abnormality of mind substantially impaired not only his mental responsibility for the acts in carrying out the killing, corroborated by other evidence contemporaneous to the trigger offence which confirms his abnormal behaviour, but also the fact that he is presently unable, by reason of mental illness, to make that admission. He submits that we should ignore the applicant's retraction of the admission. In paragraph 21 of his skeleton argument, he argues that Dr Cumming's advice to the applicant that he would have to enter a guilty plea to manslaughter before any appeal could be mounted on the basis of diminished responsibility is incorrect and may have contributed to the applicant's unwillingness and/or inability to make necessary concessions on the issue of the *actus reus*.

31. The respondent's submission, in short, is that the applicant still does not admit the *actus reus*; and that the authorities are against the court quashing a conviction for murder and substituting a conviction for manslaughter based on diminished responsibility in a case such as this in which the applicant denies his guilt on the basis of *non-actus reus*.

Discussion

32. We have had regard to the provisions of section 23 of the Criminal Appeal Act 1968. The sole question for this court is whether it is necessary and expedient in the interests of justice to admit the evidence of Dr Mohandas and also that of Dr Cumming. Necessarily we consider, as we are required to do, the provisions of section 23(2) of the Act. The matters referred to therein are not determinative of the application. Nevertheless, we make clear that we have no reason to regard the evidence of Dr Mohandas or of Dr Cumming to be anything other than evidence that is capable of belief. There is no question but that their evidence would be admissible in proceedings from which the appeal lies on an issue which is the subject of the appeal. We are prepared, for the sake of argument, to accept that there is a reasonable explanation related to the applicant's mental illness for failure to adduce the evidence at trial.

33. As the authorities such as *Erskine* make clear, every case will be fact specific in regard to the reason why there was a failure to adduce previously available evidence upon which the applicant later relies. We have no wish, by reason of this judgment, to suggest that any defendant suffering from a mental illness at the time of trial will be able to provide a reasonable explanation for the failure to adduce relevant evidence in the proceedings.

34. However, whether or not the evidence affords a ground for allowing the appeal remains in issue. The question for this court is whether or not the applicant's lack of co-operation in providing a narrative account of the index offence should be disregarded on the basis that

effectively this court needs to protect the applicant from himself. Can his abnormality of mind be assessed in a context which he refuses to describe?

35. Mr Laws QC argues that *R v Blackman* [2017] EWCA Crim 190 puts the question of the availability of the partial defence in the context of the applicant's refusal to admit the killing beyond doubt. He takes issue with Mr Bennathan QC 's categorisation of an unnatural restriction or constraint being placed upon this court in considering the safety of the conviction by reason of "some rule of law". It is section 2 of the Homicide Act 1957, which specifies precisely what is necessary in terms of the burden and standard of proof to base the elements of the partial defence of diminished responsibility.

36. The provisions of section 2 of the Homicide Act 1957 which was applicable at the time of trial states as follows:

> "**Persons suffering from diminished responsibility**
>
> (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> …"

37. Mr Laws QC submits that [9(iii)] and [10] of *Blackman* make clear that in order for any court to consider the partial defence of diminished responsibility, it should be on the basis that the applicant has accepted that he intended to kill or to cause serious bodily harm. This was the basis upon which the court in *Blackman* proceeded. That decision follows the decision in *R v Anthony* (CA, unreported, 29th June 2000). No authority is cited on behalf of the applicant which undermines that point.

38. In response, Mr Bennathan QC submits us that we must read paragraphs [9] and [10] in the context of the factual circumstances of *Blackman*, not least the process of his several applications in the appeal. He points out the factual difference between an adjustment disorder and the paranoid schizophrenia which has been diagnosed by Dr Mohandas in this case. He also prays in aid the fact that there was a verdict in this case which provides the context upon which the psychiatric opinion may form the link between the abnormality of mind and the act which led to Mrs Roddam's death.

39. We do not go so far as to say that a defendant will only be able to pursue a partial defence of diminished responsibility in circumstances where he or she personally admits the *actus reus* and also an intention to kill or commit grievous bodily harm. There will be circumstances – and Mr Bennathan QC has reminded us of them – where defendants do rely

upon the partial defence, and yet do not themselves give evidence at trial. We are aware of the same. However, in such cases we note that there is necessarily an evidential basis upon which the partial defence is mounted. Be that an account by the defendant in interview with police or psychiatrists, or a contemporaneous narrative eyewitness account of the assault leading to death, and which provides the context for a psychiatric opinion as to the impact of or link between the likely abnormality of mind and the assault. That is not present here. The jury's verdict was based upon circumstantial evidence, as we have described.

40. We have carefully considered the points raised by Dr Mohandas' opinion of the applicant's inability to make such narrative foundation, but we accept Mr Laws QC's argument that if the applicant gave a narrative account in July 2019, and if he is sufficiently capacitous to give instructions to proceed with this appeal, then there is no good explanation for his inability or unwillingness to provide to someone an account of the assault and his reasons for it.

41. We are satisfied that it is not a case in which the applicant's circumstances do permit this court to make so many assumptions as to his mental state to determine that his retraction of the admission to Dr Mohandas should be ignored. We therefore conclude that there is no basis upon which the psychiatric evidence may find purchase, that is, to determine that it was his abnormality of mind that substantially impaired his mental responsibility for the assault/killing, and no basis, therefore, upon which that evidence would give rise to a successful appeal.

42. In these circumstances, we find that the conviction is safe. There is no new evidence to the contrary. We decline to admit the fresh evidence on the basis that it does not provide a ground of appeal.

43. Accordingly, the renewed application is refused.
