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IN THE COURT OF APPEAL
CRIMINAL DIVISION



Case No: 2020/03107/A3, 2020/03163/A3

[2021] EWCA Crim 918

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 9th June 2021

LADY JUSTICE CARR DBE

MR JUSTICE SAINI

HIS HONOUR JUDGE MARSON QC

(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

SHAQUILLE MICHAEL CUMBERBATCH
CHRISTOPHER CONNOR CARRINGTON

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)

Miss F Gerry QC and Mr O Renton appeared on behalf of the Applicant Shaquille Cumberbatch

Mr C Henley QC and Mr Y Patel appeared on behalf of the Applicant Christopher Carrington

J U D G M E N T

Wednesday 9th June 2021

LADY JUSTICE CARR:

Introduction

1. We have before us renewed applications for leave to appeal against sentence by two 27 year old applicants, Shaquille Cumberbatch ("Cumberbatch") and Christopher Carrington ("Carrington"). Both men faced trial between 13th October and 23rd November 2020 in the Crown Court at Preston before His Honour Judge Altham ("the Judge") and a jury. Cumberbatch was acquitted of murder and manslaughter (which was left in the alternative), but convicted of robbery. Carrington was acquitted of murder, but convicted of manslaughter and robbery.
2. The robbery offences arose out of an attack in October 2019 on a young man, Robbie Harrison ("Mr Harrison"), then aged 18 years. The murder charges and manslaughter offence arose out of an attack the following day on Kristopher Kam ("Mr Kam") aged 35 years, as a result of which, sadly, Mr Kam died.
3. Cumberbatch was sentenced to seven years and six months' imprisonment. Carrington received a sentence of seven years' imprisonment on the count of robbery, ordered to run concurrently with a 23 year extended sentence on the count of manslaughter, comprising a 20 year custodial term and a three year extended licence period.
4. The applicants stood trial alongside two co-accused: Kevin Gracia ("Gracia"), who was also acquitted of murder but convicted of the manslaughter of Mr Kam and sentenced to nine years and nine months' imprisonment; and Munochismo Eriken ("Eriken"), who was acquitted of murder and of the alternative offence of the manslaughter of Mr Kam.

The Facts

The attack on Mr Harrison

5. On Friday 25th October 2019, at about 5.45pm, Mr Harrison was on his way to visit a cousin. He travelled by bus into Blackpool town centre, intending to catch another bus. That other bus was in fact on diversion and so Mr Harrison decided to walk. As he walked down Grasmere Road he was on his telephone, trying to talk to his cousin. He heard the sound of someone running. He turned and saw an unknown male a couple of yards away. That male was Cumberbatch. The next thing he remembered was being in an ambulance with police and paramedics. He later realised that his very expensive Samsung Galaxy S10 phone, valued at £900, had been stolen.
6. CCTV had captured the lead up to the incident. It showed Cumberbatch's black VW Golf ("the Golf") passing Mr Harrison and then performing a U-turn. The Golf then stopped. The applicants got out of the Golf and ran towards Mr Harrison. Cumberbatch ran up behind Mr Harrison and knocked him heavily to the ground, rendering him briefly unconscious. Cumberbatch then picked up Mr Harrison's phone from the pavement before running back to the Golf. Carrington then ran towards Mr Harrison, who was by now lying unresponsive on the pavement, reached inside his clothing, crouched down and jabbed Mr Harrison in the left buttock. He, too, then ran back towards the Golf.
7. Mr Harrison sustained cuts and abrasions, and serious facial injuries: two fractures to his cheekbones, a broken nose, and a number of chipped teeth. He also sustained a slight bleed to the brain. The injury to his buttock was a very small puncture wound.
8. Having returned to the Golf, the applicants drove towards the town centre. Four men were

later seen to exit the car, including the applicants.

9. A little later, Mr Harrison's cousin called Mr Harrison's telephone, having not heard from Mr Harrison. The telephone was answered by a male who said, "Your bro's jaw is on the floor". There was the sound of laughter and the call then ended. Mr Harrison's cousin then connected a video call to Mr Harrison's telephone. All he could see on the video was a large silver kitchen knife. The call was quickly ended and within a short time Mr Harrison's telephone was turned off.

10. At trial, Cumberbatch admitted being the first male involved in the robbery and committing the assault and theft. Indeed, he had little option to do so, given the CCTV footage to which we have referred. The issue at trial for him on the robbery count was whether or not the assault was "in order to steal". The jury was clearly sure that it was.

The attack on Mr Kam

11. At around 10.20am the following day, 26th October 2019, a police officer attended an address at 202A Central Drive following an abandoned 999 call. The officer knocked on the door, but obtained no answer. However, his arrival appeared to prompt five men to escape from the flat and run along an alleyway before getting into the Golf, which was then driven off. Police were able to establish, again from CCTV footage, that the males involved were the applicants, Gracia, Eriken and a fifth, unknown male. The Golf parked up. The unknown male left, but the other four remained in the car.

12. Just after 11am, Mr Kam was cycling along Central Drive to go to an ATM. After withdrawing some cash, he then cycled along Grasmere Road. The occupants of the Golf spotted him. They caught up with and passed him, then turned and followed him. As Mr Kam cycled along Queen Victoria Road, the Golf stopped and several of the men got out of the car.

13. A witness said that he saw four males jump out of the car and attack Mr Kam. They kicked his bicycle to get him off it, and then kicked and punched him whilst he was on the ground. One of the men, alleged by the prosecution to be Carrington, then produced a knife and stabbed Mr Kam at least twice. The men all then got back into the Golf and drove off at speed.

14. A witness who lived nearby heard someone shout, "Help, I've been stabbed". She saw Mr Kam sitting against a wall with blood gushing from his leg. She asked one of the witnesses, a young boy, to fetch a towel and she phoned 999. By this stage, Mr Kam was drifting in and out of consciousness. Police attended, but by this time Mr Kam was in peri-arrest, struggling to breathe. Sadly, his condition deteriorated as he was taken by ambulance to hospital. Despite attempts to repair the damage to a severed artery, Mr Kam died at just before 8.30pm on 27th October 2019.

15. A post-mortem examination identified that he had sustained injuries as a result of sharp force and blunt impact trauma. The sharp force injuries consisted of three separate stab wounds to the legs. There were bruises and abrasions resulting from blunt impact trauma. The fatal stab wound was to the back of Mr Kam's left thigh. An artery had been completely severed, which would have caused catastrophic blood loss. Despite transfusion and repair, that blood loss was too great. All three stab wounds were caused by the same or a similar type of bladed implement such as a knife. The pathologist was of the view that the fatal wound required at least a moderate degree of force to inflict.

16. Following police enquiries and a significant police presence in the area, the applicants were apprehended whilst trying to hide after jumping from the first floor window at 202A Central Drive. A search of that property revealed a number of mobile telephones which had

all been broken up and/or disposed of. In particular, Mr Harrison's Samsung Galaxy S10 was found smashed up inside a cardboard box. In addition, a number of knives were found at various locations in the flat, including a lock-knife, a hunting knife and a machete. A flick-knife was found down the toilet.

17. Carrington's telephone phone was apprehended and interrogated by the police. It contained further material relating to knives.

The applicants' antecedents

18. Cumberbatch had 11 convictions for 21 offences spanning from 2008 to 2019. In 2008 he had received a referral order for possession of a bladed article. Beyond that, he had convictions for Class A and B drug offences. In 2014 he had been sentenced to 56 months' detention in a young offender institution for possession of Class A drugs with intent to supply.

19. Carrington had 24 convictions for 37 offences spanning from 2009 to 2014. His earlier offences included battery, non-dwelling burglary, dwelling burglary, threatening behaviour, theft, handling stolen goods and breach of court orders. More relevantly, in 2010 he received a Youth Rehabilitation Order ("YRO") for possession of a bladed article. In January 2011, he received a YRO for possession of an imitation firearm. In April 2011 he received a YRO for two offences of robbery. In July 2011, he received a Detention and Training Order ("DTO") for attempted dwelling burglary. In September 2011, he received a DTO for common assault and criminal damage. In 2012, he received a community order for possession of a bladed article. In 2013, he was sentenced to 304 days' detention in a young offender institution for wounding, contrary to section 20 of the Offences against the Person Act 1861. In 2014, he was sentenced to four years' detention in a Young Offender Institution, again for wounding contrary to section 20 of the Offences against the Person Act 1861 and possession of a bladed article. On this occasion he had punched a male in a shopping and stabbed him in the thigh. His most recent offence was in December 2014 for battery, for which he received a sentence of four months' detention in a Young Offender Institution.

The sentence

20. The Judge placed the robbery offences in category 1A of the Sentencing Council Guideline for Robbery ("the Robbery Guideline"), with a starting point of eight years' custody. He stated, having seen the CCTV footage, that the ferocity with which Cumberbatch knocked Mr Harrison on to the ground had to be seen to be understood. He went on to find that, whilst Cumberbatch had not himself used the knife, he must have appreciated that an attack by Carrington was very likely to involve the use of a knife. Cumberbatch had endorsed that use subsequently, being the one who waved a knife in front of a camera of Mr Harrison's telephone after the attack.

21. As for the manslaughter offence, the Judge stated that he was sure that it was Carrington who suggested that Mr Kam be followed and attacked. He rejected the suggestion that Mr Kam was mistaken for Carrington's cannabis supplier. He was also sure that it was Carrington who inflicted the fatal stab to Mr Kam. He rejected the suggestion that it was Mr Kam who had brought a knife to the scene. His findings were reasoned thus:

"I am sure on the evidence called that the person who stabbed Mr Kam was Christopher Carrington. That is how the Crown put its case and the evidence on the point was absolutely clear. There is no inconsistency between the jury's verdict and this finding. As to the evidence upon which I base this conclusion, firstly, he was the one who was identified by the only eye-witness as the stabber and I have had the benefit of hearing and

seeing that witness and I accept the accuracy of his evidence on that point.

Not that it necessarily needs support; the correctness of that observation was supported by a number of other parts of the evidence. Mr Carrington has an apparent fixation with ferocious knives. A number of video clips were found on his phone in which he had carefully laid out his – and I am sure that they were his – ferocious looking knives on the floor and then videoed them whilst he made threats. Two of those knives were found in the flat from which this attack and the robbery incidentally were launched. Both of the knives found in the flat were dangerous weapons, but one of them, described as a machete, was a particularly frightening and ferocious looking knife. A third dangerous knife was found in his bag and again I am sure it was his despite his evidence to the contrary. I also note that he has a significant record for knife crime, including using a knife to stab a person in the leg and, of course, only the day before he had in a similar attack which forms the basis of the robbery rushed from the same car and stabbed a man in the buttock.

So for all of those reasons I am perfectly satisfied so that I am sure that Christopher Carrington was the knifeman on this occasion. I reject his account, as the jury did, that Mr Kam brought a knife to the scene. That account, never disclosed until the moment he gave his evidence, was plainly fabrication and the jury were right to reject it."

22. The Judge considered that the manslaughter offence committed by Carrington fell squarely within category B for unlawful act manslaughter, as set out in the Sentencing Council Guideline for Manslaughter ("the Manslaughter Guideline"). The aggravating features were the use of a weapon and some planning, and his previous convictions were a serious aggravating feature. Taken together, said the Judge, the appropriate sentence lay at the very top of the relevant bracket.

23. The Judge found Carrington to be dangerous. He made that assessment based on Carrington's previous convictions, his actions both in the robbery and in the manslaughter offences, and everything else that the Judge knew about him, including his troubling obsession with dangerous knives. Whilst the Judge did not consider it necessary to make Carrington the subject of a discretionary life sentence, it was, in his judgment, necessary to impose an extended sentence in order to protect the public. Were there to be determinate sentences for Carrington in relation to these matters, even after reduction for totality, the sentence would be one of seven years' imprisonment for the robbery and 13 years' imprisonment for the manslaughter, to run consecutively, making a total sentence of 20 years' imprisonment. The Judge said that he would reflect the overall conduct by imposing a determinate sentence of seven years' imprisonment in relation to the robbery and for the manslaughter a concurrent extended sentence, with a custodial element of 20 years and an extended licence period of three years, making in total an extended sentence of 23 years.

Grounds of Appeal

24. We have had the benefit of submissions from Ms Gerry QC for Cumberbatch and from Mr

Henley QC for Carrington. All counsel, including junior counsel, have appeared pro bono, and the court expresses its gratitude to them all for their contribution to the disposal of the issues on these renewed applications.

25. On behalf of Cumberbatch, Ms Gerry argues by way of overarching submission that the sentence passed on Cumberbatch was manifestly excessive for what was only a daytime street robbery in which a weapon had been used, but for which use Cumberbatch was not responsible. Whilst it was a co-offender offence, it was by no means clear that Cumberbatch knew that Carrington would use a knife. Indeed, it is suggested that his knowledge of such matters was rejected by the jury in their acquittal of Cumberbatch in relation to the offending on the following day. Ms Gerry submits that too much weight was given by the Judge to Cumberbatch's association with Carrington. Further, the Judge made an error in his sentencing remarks when he stated that Cumberbatch and Carrington had run in conjunction towards Mr Harrison. In fact, they had approached him separately. In addition, it is suggested that the Judge gave too much weight to the taunting with the knife on the mobile telephone after the attack. The suggestion that it was Cumberbatch who threatened with a knife after the attack was contrary to the jury's verdicts.

26. Ms Gerry submits that, on a proper analysis, none of the three factors indicating high culpability, as set out in the Robbery Guideline, was present. The use or production of the knife in the robbery should have played no part in the offence as against Cumberbatch. As for force, Cumberbatch inflicted only a single blow. The Judge, and indeed the single judge when refusing leave, misunderstood this point. Whilst there may have been force, or even significant force, applied, there was nothing here to justify a finding of "very significant force".

27. It is thus argued that the Judge erred in holding that the offence fell within the highest sentencing bracket and/or by mischaracterising the offence, having regard to how the case was put and what inferences could properly be drawn. In addition, no or insufficient discounts were given for the pandemic conditions in prison, the fact that Cumberbatch had some encouraging personal mitigation, and that he had accepted having both struck Mr Harrison and having stolen his telephone. Ms Gerry further submits that Cumberbatch's age at the time of sentence was significant. It will be difficult for him to serve the time imposed on him with any view of regrouping his life thereafter.

28. As a separate matter, Ms Gerry suggested that this court should take the view that the Judge had in some way artificially inflated the sentence for Cumberbatch because of Article 3 of the Release of Prisoners (Alteration of Relevant Proportion of Sentencing) Order (SI 2020/158) ("Article 3"), which came into force on 1st April 2020. The suggestion was that the Judge may have tailored, or at least it appeared that he had tailored, the length of the sentence to be imposed so as to reach the threshold of seven years, thereby triggering the service of a period of two-thirds, as opposed to a period of one-half of the custodial term in question.

29. For Carrington, Mr Henley submits that by ordering the custodial sentences imposed on Carrington effectively to run consecutively, with an insufficient downward adjustment for totality, the overall sentence imposed was manifestly excessive. He focuses in particular upon the custodial term of 20 years. Realistically, he makes no challenge to the Judge's finding of dangerousness, but he says that the error in relation to the term of 20 years was compounded by the addition of an extension period of three years.

30. His submission in relation to the robbery is that there was little difference between the sentence imposed on Carrington and that imposed on Cumberbatch. A difference of only six months was insufficient. It was insufficient because the principal offender in the robbery was Cumberbatch. The robbery was, in effect, complete before Carrington even arrived on the

scene. Seven years' imprisonment on the robbery alone, when added to a term of 13 years, produced a manifestly excessive result.

31. Further, Mr Henley submits that it was wrong in principle to pass a sentence on Carrington that was so much longer than the sentence imposed on Gracia. The Judge's approach in relation to his findings as to Carrington's involvement was difficult to reconcile with the jury's verdicts. It is said that the jury plainly did not accept that this was a joint attack by all four individuals participating in different ways, given in particular the acquittal of Eriken and Cumberbatch of both murder and manslaughter.

31. Mr Henley emphasises various aspects which demonstrate how the Judge erred in his approach to the facts. For example, the material recovered in relation to Carrington's involvement with knives was recovered from Carrington's telephone. That was the only telephone which had not been deliberately broken or disposed of by the time that the police arrived on the scene. Therefore, the picture painted was potentially a misleading one: it gave the impression that it was only Carrington of the two applicants and those charged with murder who was obsessed with knives. Mr Henley goes so far as to suggest that the finding by the Judge that Carrington was the individual who inflicted the fatal stab wounds was perverse. He refers to inconsistencies in the witness evidence and submits that there are a number of factors which at least cast doubt as to the true identity of the stabber and over the suggestion that it was Carrington. The Judge could not properly have been sure that Carrington was the person ultimately who inflicted the fatal stabs.

32. The respondent has lodged written grounds of opposition, which we have also considered.

Discussion

33. As a general preliminary observation, we note that the Judge was uniquely well-placed to carry out the sentencing process. He had presided over what was a lengthy trial with detailed evidence. He had also watched the CCTV footage of the robbery, which clearly had a significant impact on his assessment of the seriousness of that offending. This court does not have his advantage.

34. Further, there can be no question but that the Judge was aware of the relevant principles to apply in terms of his approach to the fact-finding exercise and also totality and dangerousness. As for the facts, as he correctly identified, his role was to identify those facts based on the evidence about which he could be sure. It was not his role to second guess the jury's reasoning, although he could not draw conclusions that were inconsistent with their verdicts.

35. We turn first to the application by Cumberbatch. As for the categorisation of his offending by reference to the use by Carrington of a weapon, the Judge was unarguably entitled to find that Cumberbatch appreciated that an attack with Carrington, who was clearly previously known to Cumberbatch, was very likely to involve the use of a knife. Carrington was someone whom the Judge described as having a "fixation with ferocious knives". Carrington had a significant record for knife crime, and knives were found at the flat at 202A Central Drive, together with Mr Harrison's telephone, which Cumberbatch had stolen, as well as in Cumberbatch's car, the Golf. The Judge found that Carrington was someone who was open about his knives and, indeed, enjoyed showing them off. Thus, the submission on the application that nothing on the evidence was capable of proving that Cumberbatch was aware that the stabbing would happen is simply ill-founded. The timing of the individual approaches by Cumberbatch and Carrington towards Mr Harrison makes no material difference to this analysis.

36. In any event, the Judge found that Cumberbatch had inflicted "a most violent attack" on Mr

Harrison. It involved very significant (or as the Judge put it "most significant") force. The Judge was keen to emphasise just how much force had been involved, consistent with the severity of Mr Harrison's facial injuries. The characterisation of this offending for Cumberbatch as involving just a punch and theft of a mobile telephone in daytime materially underestimates what was very serious offending. There is also no prospect of appellate interference with the Judge's finding that it was Cumberbatch who taunted Mr Harrison's cousin and who waved a knife in front of the telephone which he had stolen.

37. None of these findings was inconsistent with the jury's acquittal of Cumberbatch on the count of murder or the alternative count of manslaughter. They justified the Judge's categorisation of the robbery offence for Cumberbatch as category 1A offending, involving as it did the use of a weapon and, in any event, very significant force.

38. Further, even if, as is submitted for Cumberbatch, the offending ought to have been treated as falling within category 1B of the Robbery Guideline, with a starting point of five years' custody, the Judge would have been entitled to increase the sentence to reflect all the aggravating features present, in particular the extent of force used. A substantial upward adjustment from five years to seven and a half years would not have been excessive, let alone manifestly excessive, and still within the range for category 1B offending.

39. As for the other matters relied upon, the Judge referred in the very early stages of his sentencing remarks to the fact that he had regard to such mitigation as was available to Cumberbatch and also to the difficulties of serving a prison sentence in Covid conditions. We do not consider that there are grounds for making any real inroad into the ultimate sentence imposed for the latter reason, particularly given the realistic length of any sentence: see *Attorney General's Reference (R v Brehmer)* [2021] EWCA Crim 390 at [27]. Equally, it is hard to give Cumberbatch any credit for his acceptance of his involvement in the robbery, given the available CCTV footage. Equally, there is nothing, in our judgment, to suggest that the Judge's approach was in any way infected by any improper considerations such as a desire to reach a term of seven years' custody for the purpose of Article 3.

40. In summary, a term of seven and a half years' imprisonment for Cumberbatch cannot, in our judgment, arguably be said to be manifestly excessive in all the circumstances. Indeed, it was below the starting point for category 1A offending. We therefore refuse Cumberbatch's renewed application.

41. We turn to the renewed application by Carrington. The Judge commented that, had the robbery stood alone, the sentence would have been in excess of the starting point of eight years' custody. That was a wholly justified position. Carrington took part in a robbery in which Cumberbatch had already inflicted serious injury by knocking Mr Harrison to the ground. Whilst there, Carrington stabbed him twice to the buttocks, designed to cause injury, pain and humiliation. The gratuitous nature of the violence would, undoubtedly, have required an upward adjustment from the starting point if this offence had stood alone. Carrington took a knife to a robbery and used it. This was properly categorised as 1A offending, setting a starting point of eight years' custody before substantial increase to reflect all the aggravating factors.

42. The following day Carrington was party to another serious attack on another victim, this time involving three men in the street, one of whom inflicted fatal injuries by the use of a knife to stab the victim three times. Whilst, of course, not determinative, it remained the prosecution's case at the end of trial and conviction (and acquittal) that it was Carrington who inflicted the fatal injuries.

43. In our judgment, the Judge was unarguably entitled to agree and make that independent

finding. First, there was the evidence of the events on the day. The Judge expressly considered the reliability of the only eyewitness, who identified Carrington as the stabber. He stated, in terms, that after hearing and seeing that witness, he accepted the accuracy of his evidence on this issue. It is not for this appellate court to interfere with that finding. There may, as Mr Henley ably submitted, have been arguments for and against his finding. But we are quite satisfied that it cannot be properly said that the Judge was not entitled to reach the conclusion that he could be and was sure. Added to that were Carrington's behaviour the previous day and his fascination with and regular use of knives. On the following day, Carrington was again in a group targeting a victim, this time Mr Kam, who was again punched to the ground, kicked and stabbed whilst on the ground. Accordingly, the Judge was entitled to sentence on the basis that it was Carrington who on the second day carried the knife which was used in the course of a group attack and that he was the stabber.

44. The analysis of the evidence advanced for Carrington is the most favourable interpretation towards the applicant. The Judge was, self-evidently, not bound to accept that interpretation. As indicated, there was ample evidence from which the Judge could be sure that Carrington was the knifeman, as he set out in terms in his sentencing remarks.

45. There can be no argument with the Judge's conclusion that this was category B offending for the purpose of the Manslaughter Guideline, with a starting point of 18 years' custody and a range of eight to 16 years. As is recognised and accepted, the combination of the offences justified a finding of dangerousness and the imposition of an extended sentence.

46. As the single judge pointed out, the notional term of 13 years for the manslaughter would not have been an adequate sentence had it stood alone. Equally, seven years' imprisonment would have been too low a sentence on the facts of the robbery alone. The Judge reduced what would have been appropriate sentences for each offence to take account of totality. In our judgment the term of 20 years overall was not arguably manifestly excessive for the combination of the two. The finding of dangerousness was unimpeachable, and an extended licence period of three years was justified on the ground of public risk, not least given Carrington's offending history.

47. Accordingly, Carrington's renewed application for leave to appeal against sentence will also be refused.

48. In summary, we find both renewed applications to be without merit. We will now hear submissions as to why we should not make loss of time orders.

(The court retired to confer)

LADY JUSTICE CARR:

49. We have been persuaded that we should not make a loss of time order in respect of either applicant in all the circumstances.

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

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