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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2022] EWCA Crim 1109



No. 202200912 A3

Royal Courts of Justice

Thursday, 19 May 2022

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE SWEENEY
HIS HONOUR JUDGE LOCKHART QC

ATTORNEY GENERAL'S REFERENCE UNDER s36
OF THE CRIMINAL JUSTICE ACT 1988

REGINA
v
ELAINE CLARKE

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MS A MORGAN QC appeared on behalf of the Solicitor General.

MR T J STORRIE QC and MS S WATSON appeared on behalf of the offender.

J U D G M E N T

LORD JUSTICE HOLROYDE:

- 1 Elaine Clarke (to whom we shall refer as "the offender") pleaded guilty to the manslaughter by gross negligence of her daughter (to whom we shall refer simply as "Debbie").
- 2 On 24 February 2020, in the Crown Court at Preston, she was sentenced by Yip J to nine years and seven months' imprisonment. Her Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to s.36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.
- 3 The facts of the case are distressing. For present purposes, they can be summarised as follows. The offender had four children, all of whom suffered from physical and/or learning difficulties. Local social services authorities were at various times involved with the family, including as a result of concerns about the offender's parenting abilities.
- 4 Debbie was born with Down's Syndrome. Throughout her life she was dependent on the care of her mother, to whom she was devoted. The offender received Carer's Allowance in respect of Debbie and another of her children. Photographs taken in late 2016 showed Debbie happy and in apparently good general health. At the end of that year, she weighed a little over ten stone. At the time of her death in August 2019, at the age of 24, she was in a pitiable state, was severely emaciated and weighed less than four stone. The judge found that there had been a dramatic deterioration in Debbie's condition in the months prior to her death.
- 5 In April 2018 she was referred to hospital suffering from Norwegian scabies, a severe form of scabies infestation which is highly infectious and extremely debilitating. Treatment in hospital seems initially to have been successful, but the offender failed to keep a follow-up appointment which had been arranged for Debbie.
- 6 At the end of 2018 a visit to the family home by social services representatives, who were involved with another of the offender's children, found that the living conditions in the house were filthy.
- 7 During 2019 family and friends who came to the house observed a clear deterioration in Debbie's condition. She had a painful skin condition, had lost weight and appears to have left her bedroom rarely, if at all.
- 8 Relatives who visited in April 2019 ignored the offender's suggestion that Debbie should be left alone and went to her bedroom. They found it dark, dirty and with a terrible smell. Debbie herself was wearing heavily stained pyjamas and found it difficult to walk. The offender's sister said she would report matters to the authorities if there was no improvement in two weeks. The offender did seek some treatment for Debbie's scabies in June 2019, but by the end of July Debbie was in a terrible state, such that family members warned the offender that Debbie would die if something was not done. There was a stench of dirty nappies and rotting food in the bedroom and Debbie was clearly in distress. She was crying out for her mother, but the offender did not go to her.
- 9 The family members did contact social services and a doctor arranged to visit. Before he arrived, the offender showered Debbie, which must have been a painful experience because of her scabies. The offender then gave an untruthful account of Debbie's condition to the doctor, who had not seen Debbie before and did not think there were any safeguarding concerns. The doctor returned two weeks later, but was unable to gain access, and the offender thereafter ignored attempts by the surgery to contact her.

- 10 Social services representatives who attended on 29 July were told that the offender was out. She contacted them later that day claiming that Debbie was doing really well. She then cleaned Debbie up in preparation for a visit on 1 August. Neighbours however heard Debbie crying during the last weeks of her life and a person who visited the house in late August described Debbie as "skin and bones".
- 11 On 29 August 2019 the offender rang the emergency services. She said that Debbie had been ill for a few days and had died. Police officers and ambulance crew who went to the house found what the judge rightly described as "a truly shocking scene". There was a terrible smell in the bedroom and faeces on the bed and floor. Debbie was lying on the floor in an unnatural position. She was wearing heavily soiled clothes and live maggots were found near her. Like the judge, we have been provided with photographs of the scene. We agree with the judge that they are very disturbing.
- 12 The pathologist's report describes Debbie as suffering a severe scabies rash covering her face and affecting a large area of her body with active scabies mites. She was severely emaciated, in a filthy condition and had plainly suffered severe neglect. The cause of death was emaciation and neglect, combined with the overwhelming scabies infection.
- 13 At the sentencing hearing, the judge was assisted by a pre-sentence report and by victim personal statements from Debbie's father and cousin. They spoke effectively on behalf of the bereaved members of the family, to whom we offer our condolences. The judge was also assisted by submissions from both counsel as to the application of the Sentencing Council's relevant definitive guideline. This sets out four categories of culpability, with starting points and category ranges which reflect the fact that the harm in every case of manslaughter is, inevitably, of the utmost seriousness. It indicates a number of factors indicative of high, medium or lower culpability. It states that the top category (Category A – very high culpability) may be indicated by "the extreme character of one or more culpability B factors and/or a combination of culpability B factors." At step two of the sentencing process the guideline sets out a non-exhaustive list of potential aggravating and mitigating factors, preceded by an instruction that "care should be taken to avoid double counting factors already taken into account in assessing culpability."
- 14 The judge had no doubt that this case fell into Category A, with a starting point of 12 years' custody and a range from ten to 18 years. She found that the offender had done absolutely nothing to care for Debbie in the last days of her life, but had instead abandoned her to die alone, in pain, without nourishment and in the most awful physical surroundings. In addition to Debbie's suffering, the judge rightly noted the impact of the offending on those bereaved and haunted by the death, and on the emergency services who attended.
- 15 The judge said that the offender had neglected Debbie over a period of many months. She had prepared for visits by professionals, so that Debbie would present a better appearance, but had then failed to care for her. She had been grossly neglectful during the last month of Debbie's life, ignoring her obvious suffering, and disregarding the warnings of her family and the obvious risk of death.
- 16 The judge accepted that the offender's own inadequacies and difficult upbringing may provide some explanation for her general lack of parenting skills, but said that it did not excuse the way in which the offender had abandoned Debbie and left her to die. She concluded that the offender's culpability was of a particularly extreme character. The judge went on to identify a number of aggravating factors, but noted that many of them formed part of the extreme circumstances on which she had relied in placing the case into Category A. She therefore avoided counting the same factors again in order to uplift the sentence

further. She said, however, that the sentence would have been somewhat higher than the Category A starting point if it were not for the available mitigation.

- 17 The mitigating factors included the fact that the offender (then aged 49) had no previous convictions. Her life had not been easy, because all four of her children had additional needs. The offender may effectively have lost her family as a result of this offence. There had been some delay because the offender was not charged until April 2021 and was being sentenced some two and a half years after Debbie's death.
- 18 The judge concluded that the sentence after trial would have been 12 years' imprisonment. She reduced that by 20 per cent having regard to the stage of proceedings when the offender entered her guilty plea. The sentence was therefore nine years and seven months' imprisonment. The judge directed that 16 days should count towards that sentence to reflect a period when the offender was on bail subject to a qualifying curfew.
- 19 In her submissions on behalf of the Solicitor General, Ms Morgan QC accepts that the judge's approach to the categorisation of the offence cannot be faulted and accepts that it was necessary to avoid double counting, but she argues that the judge should have moved upwards from the starting point to reflect the overall seriousness of the offending and the significant aggravating features. She submits that there were two extreme Category B high culpability factors present, namely that the offender continued or repeated the negligent conduct in the face of the obvious suffering caused to Debbie by that conduct, and that the offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct. Ms Morgan emphasises that the period of gross negligence identified by the judge as being about one month prior to the death had been preceded by a longer period of many months during which Debbie had suffered terribly. She argues that the nature of the factors which lifted the case into Category A should have caused the judge to make a further upward movement from the category starting point before considering aggravating and mitigating factors.
- 20 The aggravating features which Ms Morgan identifies are the serious pain inflicted, as we have said, over a period of many months; the offender's failure to respond to the warnings and interventions both by professionals and by family members; the offender's attempts to mislead others as to Debbie's true condition; and Debbie's vulnerability and complete dependence on her mother. Ms Morgan fairly accepts the presence of four mitigating factors: the absence of previous convictions, the guilty plea, the demands placed on the offender as a result of the special needs of her children and the offender's personal history.
- 21 Mr Storrie QC, who with Ms Watson represents the offender in this court as they did below, reminds the court of the familiar words of Lord Lane Chief Justice in *Attorney General's Reference No. 4* (of 1989, 1990) 1 WLR 41:

"A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."
- 22 With that test in mind, Mr Storrie submits that the judge's meticulous approach led her to a conclusion which, even if it could be regarded as lenient, could not be said to be unduly lenient.
- 23 We are grateful to counsel for their well-focused submissions.
- 24 The offence-specific guidelines issued by the Sentencing Council adopt a two-step approach. At the first step, the seriousness of the offence is assessed by reference to

specified features in order to place it into the appropriate category. At step two, aggravating and mitigating factors are then considered in order to determine whether there should be any adjustment of the category starting point, whether upwards or downwards. In making that determination, sentencers must always be careful to avoid giving weight for a second time to an aggravating or mitigating factor which has already been taken into account in categorising the offence at step one. To do so would be to fall into the error generally referred to as "double counting". In some guidelines, where there may be a particular risk of such an error, there is a specific warning against double counting. As we have noted, that is the case in the gross negligence manslaughter guideline. Particular care is needed where the extreme character and/or combination of Category B culpability factors are taken into account by placing the offence into Category A, which has the effect of increasing the starting point from eight years' custody to 12 years.

- 25 The judge in this case took the necessary care. Her sentencing remarks were lengthy and detailed. As will be apparent even from our short summary of them, she identified and considered all relevant features of this serious case. She rightly regarded the offence as falling into Category A of the guideline. She identified a number of aggravating features, but rightly explained that some of them had already been taken into account in placing the case into Category A and should not be double counted in order to increase the sentence above the Category A starting point. She made clear that the aggravating features which remained to be considered would have resulted in an uplift in the starting point if it were not for the presence of personal mitigation. It is apparent that, having brought the relevant mitigating factors into account, the judge found that they effectively balanced out the aggravating features so that the appropriate sentence after trial would have been 12 years.
- 26 In our judgment, there is no basis on which either the approach taken by the judge or her conclusion as to the appropriate sentence can be criticised. She gave full weight to the seriousness of the offending. She correctly identified the aggravating and mitigating features. She was in the best position to balance those features and the conclusion which she reached was within the range properly open to her.
- 27 With all respect for Ms Morgan's submissions, we can see no basis upon which the sentence could be characterised as unduly lenient. For those reasons, leave to refer is refused. The effect of our decision is that the sentence remains as before.
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CERTIFICATE

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This transcript has been approved by the Judge