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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 1569



Nos. 202202076 B4

202202101 B4

202202106 B4

202301911 B4

Royal Courts of Justice

Thursday, 30 November 2023

Before:

LADY JUSTICE WHIPPLE

MR JUSTICE GOSS

HIS HONOUR JUDGE DENNIS WATSON KC

REX

v

ALFIE FERGUSON

KAIYAN DECORDOVA

SAMUEL BARTLEY

JAMAL DAKISSAGA-BENITEZ

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Mr I. Henderson KC appeared on behalf of the Appellant Ferguson.

Ms S. Elliott KC and Ms K. O'Raghallaigh appeared on behalf of the Appellant Decordova.

Ms S. Tafadar KC appeared on behalf of the Appellant Bartley.

Mr A. Campbell-Tiech KC appeared on behalf of the Appellant Dakissaga-Benitez.

Mr J.C. Dawes KC appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE WHIPPLE:

- 1 At around 9 o'clock on 23 October 2020, 17-year-old Bubacar Jabbie was walking alone towards his home on Westbury Road in Walthamstow when he was attacked and killed by the appellants. He was stabbed through the chest by the appellant Ferguson and died yards from his home. He was discovered by a passer-by who contacted the emergency services. He was pronounced dead at the scene. Buba, as he was called by his family, was killed just outside his home. He was seen there by members of his family. The victim impact statements describe the trauma of the events of that night and the family's lasting distress at Buba's loss.
- 2 Four young men were convicted of his murder on the basis of joint enterprise following a 10-week trial at the Central Criminal Court before Her Honour Judge Dhir KC. At the time of the murder three of them were aged 17 - Ferguson, Bartley and Dakissaga-Benitez ("Benitez") - and one was just 18, Decordova. With the leave of the single judge, Ferguson, Bartley and Decordova appeal against the sentences imposed for the murder. The fourth, Benitez, applies for an extension of time of 340 days in which to apply for leave to appeal which application has been referred by the registrar to the full court. In the circumstances we grant that extension of time and we grant him leave to appeal also.
- 3 All advocates representing the appellants in this Court represented the at trial also except for Mr Campbell-Tiech KC who acts for Mr Benitez. Mr Dawes KC prosecuted at trial and appears in this court also. We are grateful to all counsel and their legal teams for their most helpful submissions.

Sentences

- 4 The sentences imposed were as follows, taking the youth defendants first and putting them in descending order of length of term imposed, finishing with the single adult defendant: Ferguson was detained at His Majesty's Pleasure for life with a minimum term of 22 years; Bartley was detained at His Majesty's Pleasure for life with a minimum term of 19 years;

Benitez was detained at His Majesty's Pleasure for life with a minimum term of 17 years; and Decordova was sentenced to custody for life with a minimum term of 20 years. Each appellant was given credit for time served on remand. The usual consequential orders were made.

Facts

- 5 The facts can be shortly stated. The appellants came from the Priory Court Estate, 15 minutes' walk from Westbury Road. The appellants all associated with the Higham Hill/Priory Court Boys gang. They had a rivalry with gangs from their immediate area, including a gang called the Drive Marlowe and another called St James or the Mali Boys. They had embarked upon a ride-out to an area controlled by rival gangs and they were armed with weapons. The route taken by the group to get to Westbury Road was unusual. The appellants used the route to try to avoid CCTV cameras.
- 6 The post-mortem examination of the deceased revealed a single stab wound to the upper left chest which had penetrated the left first rib and upper part of the breastbone. The track was 12 centimetres in length and had passed into the upper aspect of the chest cavity, damaging the aorta and trachea before terminating by impacting the right side of the spine at the back of the chest wall. The cause of death was the volume of blood lost from the wound. Incised wounds were found on the palmar aspect of the left ring and left little finger, typical of defensive wounds.
- 7 After the murder, the defendants fled on foot and bicycles back to the Priory Court Estate. Once the appellants reached that estate, they entered an area for about 30 minutes and re-emerged wearing different clothes. Footage showed the group hiding when hearing a police siren. The appellant Bartley then gave a false name to order a taxi to take the group away from the estate. The appellants were arrested on 25 March and in interview they all answered "no comment".

Sentencing Remarks

- 8 In her clear and well-structured sentencing remarks, the judge noted the circumstances of the attack and its devastating impact on the family of the deceased. She concluded that this was a professional, co-ordinated, planned ride-out. The planning included sourcing clothing to conceal identity, wearing face masks on the way to Westbury Road, leaving mobile phones behind, using a route to avoid detection on CCTV and having a plan to meet and leave together as well as a place to go afterwards to hide weapons. She described the group as "vigilant and organised".
- 9 The police had obtained recordings of telephone calls and face-to-face visits with Ferguson and Decordova while they were in custody awaiting trial. Those confirmed the planning of this attack and revealed a lack of remorse for the murder. Having originally denied presence at the scene, in their amended defence case statements the appellants accepted they were present at the scene but said that the purpose of the trip had been to steal drugs. She noted that Ferguson and Bartley tried to blame the deceased for what happened, saying the deceased had a knife, but he did not have a knife.
- 10 She recorded that Ferguson had composed a video after the killing with pictures of the deceased's home set to drill music with lyrics and emojis added to the footage. The judge held that this was a glorification of murder. The judge held that each appellant was carrying a large knife. She was not sure if Decordova was carrying a shot gun, as the prosecution had alleged. She held that Ferguson's "weapon of choice" was a knife, and that he had a particular interest in large knives which he admitted buying and selling regularly.
- 11 The fatal blow was administered by Ferguson with a knife he accepted he had taken to the scene. Bartley was close by. Benitez and Decordova were a little further away, each ready to lend support when needed. The deceased was not the intended target.
- 12 Turning to sentence, the judge reminded herself of schedule 21 of the Sentencing Act 2020

and of her role in fixing the minimum term for each defendant taking account of the aggravating and mitigating factors, including age and maturity and personal circumstances. She referred to the Sentencing Council's definitive guideline on sentencing children and young people. She took account of *R v Karolia* [2021] EWCA Crim 1839.

- 13 The judge identified the following aggravating features: (a) the extent of and the sophisticated nature of the planning; (b) this was a group attack on a single victim; (c) the victim was defenceless and unarmed; (d) the murder was committed in a public place, witnessed by members of the public and residents of Westbury Road; (e) knives were taken to the scene; (f) the group set out with the intention of causing someone at least really serious harm; (g) no remorse was shown by any member of the group for their actions. The judge identified the following common mitigating features: (a) relative age and immaturity; (b) lack of intention to kill; (c) the fact that the early part of their time in custody was served during the pandemic.
- 14 The judge then came to sentence the appellants individually. She noted that Ferguson was 17 years and seven months old at the time of the murder, having a date of birth of 16 March 2003. He had two previous convictions, the first in 2018 for assault occasioning actual bodily harm for which he was given a six-month referral order for an offence involved a group attack on a single male, punching and kicking him; and the second in 2020 for possessing an offensive weapon for which he was given a nine-month referral order which involved being found with cannabis, cocaine and a lock knife in his possession. The aggravating features in his case were that he was the stabber, using the knife with such force that the knife cut the bone; further, he made a video after the killing. The mitigating features were that he had had a difficult childhood, in care from a very young age until his mid-teens. She imposed a minimum term of 22 years.
- 15 So far as Mr Bartley was concerned, he was 17 years and one month at the time of the murder with a date of birth of 16 September 2003. The judge identified the aggravating

features in his case as being his two previous convictions, the first a conviction in 2020 for possession of cannabis and, secondly, a youth conditional caution in 2020 for four offences of criminal damage, two assaults occasioning actual bodily harm and possession of an offensive weapon. The judge held that Bartley was very close to Ferguson when the fatal stabbing took place. He was able to see what happened and to give assistance. He was armed and ready, having a large knife in his hand. The mitigation personal to him was that he was young and immature, that he was not the person who had stabbed the deceased. Further, he was receiving help at the time from the Wilderness Project where he had done well for eight months, after which his attitude had changed and he had disappeared. In his case the judge imposed a minimum term of 19 years.

16 As to Mr Benitez, the judge noted that he was 17 years and two months old at the time of the murder. His date of birth was 29 August 2003. He had one previous conviction for various offences, all committed after the date of this murder, for which he had received a 10-month referral order (those offences were taking a vehicle without consent, possession of a bladed article, driving without a licence and driving without insurance). She noted that Benitez came to the scene and left the scene by bike; he did not get off his bike to support the attack and during it he was further away. The judge recognised his mitigation as age, lack of maturity and his personal factors, including academic achievements, noting that he had offers of places at three universities at the time of sentence. She imposed a minimum term of 17 years.

17 Turning then to Decordova, the judge noted that he was just 18 at the time of the offence with a date of birth of 10 October 2002, so he was just a week past his eighteenth birthday. He had no previous convictions but there was evidence that he had previously been involved in acts of violence involving weapons. He was the oldest in the group, and an integral part of the team. She identified the aggravating features in his case, that he was involved in the planning, going with Ferguson to source and collect a change of clothing and being involved at all stages in the planning of the attack. The mitigating factors were that he was

only just 18, he was immature, he was not the stabber and he had a difficult relationship with his mother and that had had a profound effect on him. The judge was aware of the evidence as to his character, including his skills in football and assistance in the scouts group. She imposed a minimum term of 20 years.

The Appeals

- 18 Mr Henderson KC represented Mr Ferguson. He submits that that term imposed was manifestly excessive or wrong in principle for two reasons: first of all, because the judge erroneously treated lack of remorse as an aggravating feature and, secondly, because the judge failed sufficiently to mitigate the sentence or to dilute the aggravating features in light of Ferguson's age. In oral submissions Mr Henderson supported his written grounds, focusing in particular on Ferguson's young age and immaturity. By their respondent's notice, the prosecution accept that lack of remorse should not be treated as an aggravating factor but otherwise contend that the judge weighed aggravating and mitigating factors appropriately.
- 19 Ms Tafadar KC advanced two grounds of appeal on Bartley's behalf. First, she submitted that the judge afforded inadequate weight to the mitigating factors in Bartley's case. She identified in particular that the judge should have taken greater account of (1) his background, including the fact that he had no previous convictions for knife crime, (2) the lack of evidence that he was closely involved in the planning of this offence, unlike Ferguson and Decordova who had taken a bike ride during the afternoon of the offence as part of its planning, by contrast, he was always at the back of the gang and had no knowledge of the deceased, and (3) that he had played a lesser role in the murder because he was not the stabber and did not assault the deceased himself. Ms Tafadar's second ground of appeal was that evidence existed which was not put before the judge that this appellant had been attacked on other occasions and coerced into gang membership, and that he was likely to be a modern slave. In oral submissions she has pressed these points and

emphasised that Bartley was not an organiser, although she realistically accepted that he was involved in this planned enterprise. She drew the court's attention to his troubled background shown in the conclusive grounds decision consequent on a referral to the National Referral Mechanism in September 2019. By their respondent's notice, the prosecution dispute the first ground to the extent that it is said that Bartley was not part of the planning. On the contrary, the prosecution submit that he, too, had a change of clothes ready, which indicated close involvement in the planning. The prosecution also note that Bartley was standing close to Ferguson with a knife drawn. As to the point about the further evidence, the prosecution contend that Bartley's defence team at trial were well aware of the conclusive grounds decision and that he was or had been found to be a victim of trafficking; further they were aware of that in advance of sentence but made a conscious decision not to deploy that material before the judge. In any event, the conclusive grounds decision related to 2018 and 2019 and had no relevance, even possibly, to the later events of 2022 when these offences were committed.

20 Mr Campbell-Tiech advanced three grounds of appeal: first, that insufficient weight was allowed for youth; secondly, that insufficient weight was allowed for the fact that Benitez took no part in the incident, not even dismounting his bicycle; and thirdly, the judge moved too far above the 12-year starting point in the circumstances of this case. In oral submissions, Mr Campbell-Tiech emphasised those points and, in addition, submitted that there was no intention to kill, that Benitez took the lesser part and that he did not draw a weapon, and that in light of all these circumstances the minimum term imposed in his case was simply too long. By their respondent's notice, the prosecution pointed to the lack of evidence to suggest that Benitez' developmental age was any lower than his chronological age, and suggested that Benitez took an active part in the attack because he acted as lookout.

21 For Decordova, Ms Sarah Elliott KC and Ms O'Raghallaigh submitted that the sentence was wrong in principle or, alternatively, manifestly excessive by reason of disparity between his sentence and that imposed on Bartley and Benitez. They submitted that his level of

involvement was, if anything, less than Bartley and very similar to that of Benitez. He was only just an adult who was close in age to Bartley and Benitez and so should have been given a minimum term which was closer in length to each of theirs. They submitted that the disparity was "more than a fair reflection of the age difference between offenders", a reference to *Attorney General's References (Nos. 143 and 144) Brown and Carty* [2007] EWCA Crim 1245 at 27. Their oral submissions focussed on the part played by Decordova which were said to be similar to that of Benitez, so that three years disparity between them was excessive. They drew the court's attention to the fact that these four young men were of similar ages and in the same year group at school so that the approach in each of their cases should have been the same or at least very similar. By their respondent's notice, the prosecution pointed to evidence that Decordova was involved in planning this attack and submitted that he was integral to the team and not properly comparable with Benitez for two reasons: first of all, because he was some months older than Benitez and, secondly, because his role was different to that played by Benitez. Benitez was a lookout and overall played a lesser role.

Discussion

Approach – general points

- 22 We shall first make some general points. These convictions were on 13 May 2022, which was before the Police, Crime, Sentencing and Courts Act 2022 came into force. The sentences are not, therefore, affected by the amendments to schedule 21 in the 2020 Act, which amendments came into force on 28 June 2022. Three of the appellants were under the age of 18 at the time this offence was committed and it is common ground that in their cases the starting point under schedule 21 was 12 years. For the fourth appellant, Decordova, the starting point under schedule 21 was 25 years.
- 23 The approach to sentencing young offenders has been considered in a number of cases. The sentencing judge referred to *Karolia*. More generally, a number of relevant authorities were

considered by this court in *R v Meanley* [2022] EWCA Crim 1065, see paragraphs 50 to 59 in particular, and *R v ZA* [2023] EWCA Crim 596, paragraphs 55 to 62 in particular. Both of those cases post-date the sentence hearing in these appeals. The youth guideline is directly relevant to the youth sentences passed in this case and it has some indirect relevance to Decordova's case also given that he was only just an adult and bearing in mind the approach in these cases that there is no "cliff edge": see *R v Clarke* 2018 EWCA Crim 185, [2018] 1 C.App.R. (S) 52, paragraph 5. The considerations relevant to this sentencing exercise can be summarised as follows:

- a. So far as youth offenders are concerned, the purposes of sentencing are different; the primary purpose is not to punish but to rehabilitate, prevent further offending and to have regard to welfare.
- b. Youth has already been taken into account to a significant degree by the terms of schedule 21 in setting the lower starting point and it is for the sentencing judge to adjust as appropriate, depending on aggravating and mitigating factors, in which exercise the sentencing judge has a wide discretion.
- c. It is wrong to start the sentencing process at paragraph 6.46 of the youth guideline although that paragraph does provide helpful guidance as to the likely range of sentences for youth offenders by comparison with a mature adult.
- d. When sentencing someone who is only just over 18 and only separated by a few months in age from other co-defendants, it is necessary to ensure that any disparity in sentence reflects fairly the age difference between the offenders.
- e. The taking of a knife to the scene is a significant aggravating factor; for an adult, it serves to increase the starting point by 10 years from 15 to 25 years; for a young offender, it remains a very significant aggravating factor.

24 We have considered whether we should have invited pre-sentence reports before considering this appeal, noting the terms of section 33 of the Sentencing Act 2020. Paragraph 1.14 of the youth guideline requires the court to have full information before it prior to sentence for reasons which are explained in the guideline and in *Meanley* the Court suggested it was usually advisable to get a pre-sentence report when sentencing youths. But in this case the judge was not, we understand, invited to direct pre-sentence reports for any of the appellants, all of whom were represented by very experienced counsel. No party has invited this court to obtain a pre-sentence report in preparation for these appeals, noting that each of the parties today present is still represented by very experienced counsel. The single judge, Sir Nigel Davis, ordered prison reports on each appellant, which have been received and are informative, in preparation for this appeal but did not direct preparation of pre-sentence reports. We do not consider in this case that it was necessary in all the circumstances to obtain pre-sentence reports either for sentence or on appeal. We take the view that the trial judge was entitled, in the face of the information and submissions before her, to assume that the appellants' chronological ages were broadly matched by their developmental ages and we take the same approach, subject to specific submissions made in the context of any of the individual appeals.

Lack of Remorse

- 25 We think there is merit in the Ferguson's challenge to the judge's inclusion of lack of remorse in her list of aggravating factors. Lack of remorse is not a statutory aggravating factor and its existence is not, in the usual case, to be treated in and of itself as an aggravating factor. If a defendant demonstrates genuine remorse, then that can be a factor taken into account in that defendant's favour as part of the mitigation.
- 26 Although the judge treated a lack of remorse as an aggravating factor, and was in error in doing so, the error was not necessarily material. We shall consider each sentence substantively before coming to any conclusions on the appeal.

(1) Ferguson

27 We turn then to the individual appeals. Ferguson was 17 years and seven months old at the time of offending. There was no evidence to suggest that he was especially immature for his age, and his minority had already been taken into account in the 12-year starting point. There were here significant aggravating factors, as the judge identified. He was the stabber, using the knife he had brought to the scene for that purpose. He had relevant and serious previous convictions. This was a highly planned and deliberate attack in a public place on an innocent victim, and the killing was subsequently glorified.

28 The only mitigation in his case was his youth, already substantially taken into account in the lower starting point. There was a lack of intention to kill which was important. But that has to be understood in the context of a brutal and forceful attack which in our judgment displayed an intention only just short of an intention to kill. The judge did not state what the minimum term might have been if Ferguson had been a mature adult, but we think the likely sentence on that hypothesis would be around 28 and 29 years. Ferguson was only just short of his majority at the time of offending and so the minimum term in his case might reasonably equate to around 75 to 80 per cent of the adult equivalent. We conclude that the minimum term in his case was well within the permissible range.

(2) Bartley

29 Turning to Bartley's case, we deal first with the contention that the judge failed to take account of relevant information, namely the conclusive grounds decision and the fact that this appellant had been a victim of trafficking. It is accepted that this information was available to the defence team in advance of sentence although it was only brought to their attention very close to the time of sentence. But it is clear that a conscious decision was taken by experienced counsel not to put that material before the judge and, in consequence, the judge was unaware of it. We have considered that material for ourselves and we are not persuaded that it should or might have influenced the sentence imposed. The conclusive grounds decision related to a point in time some years earlier and connected Bartley with

drug suppliers, but this case did not arise in the context of drug offending, and anyway took place years later. We are, therefore, not persuaded there is merit in Ms Tafadar's point about past trafficking.

30 As to the weight attached to the mitigation in Bartley's case, the trial judge was well positioned to evaluate the aggravating and the mitigating factors. The starting point in his case was 12 years but there were very strong aggravating factors to elevate the minimum term considerably: Bartley was standing by Ferguson, Bartley was holding his own knife in readiness although he did not use it, Bartley was part of the careful planning of this attack having his change of clothes ready and even if he was not an organiser, he was certainly part of the plan. We consider his culpability to have been close to that of Ferguson's. It is reasonable to think a minimum term of around 26 or 27 years would have been imposed on a mature adult in these circumstances. A minimum term of 19 years in his case lies within the reasonable range and is not manifestly excessive.

(3) Benitez

31 Turning to Benitez's case, the judge had well in mind that he did not himself land any blow on the deceased and that he was positioned a little distance away on his bike acting as lookout for the group. The judge was aware of his age and background factors. In our judgment she took these into account fully and fairly. He would, if an adult, have been subject to the 25-year starting point and his sentence would have fallen around that mark, possibly down to 24 years to recognise the lesser role that he played. It is right to note that there was no intention to kill and that overall he did play the least substantive role of all in this plan. Our conclusion is that the minimum term of 17 years in Benitez' case is not manifestly excessive.

(4) Decordova

32 Turning, finally, to Decordova's case, he was an adult at the time of the attack, having just turned 18. The mainstay of his mitigation is his youth relative to that of Bartley and

Benitez; they are both 10 or 11 months younger than him. The judge was plainly conscious of the need to ensure that the minimum term imposed on him was appropriate to his age and fairly reflected the difference between offenders. In our judgment, the role he played was central to this joint enterprise murder. He was on his bicycle, at some point reasonably close to Ferguson when the fatal blow was inflicted. He might not have been quite so close as Bartley but we do not accept the submission that his role can be equated with Benitez because he was not acting as lookout, rather he had actively engaged with the victim shortly before the attack. The judge was entitled to conclude that the role he played was more substantive than Benitez. He was an adult by only a very short period of time and his youth was very much a factor to keep in mind. We are confident that the judge did so. Standing back, the minimum term of 20 years in his case was not manifestly excessive.

Conclusion

- 33 This was a difficult sentencing exercise. The judge had the advantage of presiding over the trial. She formed a clear picture of the respective roles played by each of the appellants. We are not persuaded that the minimum term she imposed on any one of the four cases before us was manifestly excessive or wrong in principle. Accordingly, we dismiss these appeals.

CERTIFICATE

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