IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 943

No. 202202721 B2
Ind. No. T20227007

Royal Courts of Justice

Thursday, 20 July 2023

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE MARTIN SPENCER
HIS HONOUR JUDGE LICKLEY
(Sitting as a Judge of the High Court)

REX

V

SHANE JAMES HENDERSON MYLES

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MR J CAMMEGH KC and MR A BARTHOLOMEUSZ appeared on behalf of the Appellant.
MR L MABLY KC and MR D STEVENSON appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE DAVIS:

1. On 10 August 2022 in the Crown Court at Maidstone, Shane Myles was convicted of murder. His trial had begun on 27 June 2022 at which point a woman named Kayleigh Halliday was his co-accused. Part way through the trial on 21 July she pleaded guilty to murder. At the end of the trial, both were sentenced to imprisonment for life. The minimum term in Myles' case was 22 years, less time spent on remand. He now appeals against his conviction with leave of the single judge.

2. He was represented at trial by Mr Cammegh KC and Mr Bartholomeusz. They appeared before us today. Representing the prosecution today was Mr Mably KC, who did not appear below, and Mr Stevenson, who did. We had excellent written submissions from both parties and we heard oral submissions from Mr Cammegh.

3. The deceased was a man named Paul Wakefield. He lived in a flat in Folkestone. On the afternoon of 2 January 2022, a small number of people gathered at his home. They included the appellant, Halliday and a man called Simon Mead. According to Mead, the atmosphere was good. Everyone was drinking cider and vodka. Mead left at some point during the afternoon, as eventually did everyone else, apart from the appellant, Halliday and Mr Wakefield. Mr Mead returned to the flat at around 9 p.m. Mr Wakefield was on the floor. He was grievously injured. There was no one else there. Mr Mead called 999 and Mr Wakefield was taken to hospital. He was found to have lacerations to his head and face caused by a blunt force trauma. That trauma had caused significant brain damage. There were patterned injuries to the head and the back indicative of stamping. There were numerous rib fractures. Mr Wakefield had obviously been subjected to a severe beating. He died the next day due to complications from the head and facial injuries.

4. From other evidence, it was apparent that the only people at the flat, when Mr Wakefield was attacked, were the appellant and Halliday. They left the flat together at some point before 9 p.m. They took with them Mr Wakefield's bank card. They were still together at 11 p.m. when they were arrested. When interviewed, they accepted that they had been present when Mr Wakefield had been attacked. Each blamed the other for causing his injuries. In his defence statement, submitted in the course of the proceedings, the appellant continued to say that he had not inflicted any violence on Mr Wakefield.

5. The appellant's account in his evidence to the jury was rather different. He said that there had come a time when he and Halliday were in the flat alone with Mr Wakefield. Halliday had been dancing and had knocked over a television. Mr Wakefield's reaction had been to tell them to get out of his flat. In response, Halliday had attacked him. She had hit him around the head with a vodka bottle. When he fell to the floor, she stamped on him. The appellant said that at this point he heard Haliday call Mr Wakefield a "nonce". He said that he was thinking about the son he had had with Halliday in 2016, when they were in a relationship. It was an agreed fact at the trial that in 2017 Halliday had asked Mr Wakefield to look after the child. At that time, a man had been living with Mr Wakefield, who had been charged with serious sexual offences involving a child. In due course, the appellant's son had been taken into care and has since been adopted.

6. The appellant said that he thought that some kind of assault could have been carried out to his son, whether by Mr Wakefield or a friend of Mr Wakefield. This was something that he had first conceived as a possibility in 2017, when children's services became involved with the child. His anger, he said, was triggered by Halliday referring to Mr Wakefield as a "nonce". He said that he lost control. He stamped on Mr Wakefield's face. He went to

stamp for a second time, but he did not like the feeling of stamping so, instead, he kicked Mr Wakefield to the head. After this, Halliday had stabbed Mr Wakefield in the stomach with a broken vodka bottle. The appellant said he had shouted, "No" at this point. The appellant and Halliday, once the assault had finished, had remained at the flat for a further 15 minutes before they left.

7. At the conclusion of all of the evidence, it was submitted on behalf of the appellant that the judge should leave the defence of loss of control to the jury. The appellant had already pleaded guilty to manslaughter on the basis of lack of intent. Were the jury to conclude that the appellant, in fact, did have the intent necessary for murder, the appellant wanted the jury to have the option of finding that the partial defence applied. The defence submission was resisted by the prosecution.

8. The judge ruled that there was no sufficient evidence of loss of control by the appellant. He set out the three matters of which there had to be sufficient evidence before the partial defence could apply. Those are the matters set out in section 54 of the Coroners and Justice Act 2009.

> (1) The appellant's acts resulted from his loss of self-control;
>
> (2) there was a qualifying trigger, namely, something said or done or both, which constituted circumstances of an extremely grave character and which caused the appellant to have a justifiable sense of being seriously wronged;
>
> (3) a person of the appellant's sex and age with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way to the appellant.

9. The judge noted that the defence had to be left if, but only if, the evidence of each of those matters was sufficient for the jury to consider them. The judge considered the approach required by this court's decision in *Goodwin* [2018] EWCA (Crim.) 2287 and the non-exhaustive list of factors set out therein that have to be considered by a trial judge. The judge also noted that the statutory defence of loss of self-control was significantly different to the defence of provocation, which hitherto had applied. A much more rigorous evaluation of the circumstances was required than under the old law. A judge was required to consider the issue sequentially. Were there no sufficient evidence of loss of self-control, the judge would need to go no further. Equally, if there were sufficient evidence of loss of self-control but not of a qualifying trigger, the judge would not need to consider how a person of a normal degree of tolerance and self-restraint might have reacted.

10. With those principles in mind, the judge assessed the evidence of the appellant and of the surrounding circumstances. He said that the key to whether there had been a loss of control rested with what had occurred in the flat at the time of the attack. However, that had to be put into context in relation to the appellant's son. He had been taken into care. That was because there was apparently inadequate care on the part of Halliday. There was no evidence that Mr Wakefield had engaged in any form of sexual misconduct. It was noteworthy that Halliday had maintained contact with Mr Wakefield after the child was taken into care. Moreover, at no point, prior to the events of 2 January 2022, had the appellant considered that Mr Wakefield was someone who had abused children in any way.

11. Having considered those background issues, the judge analysed the evidence given by the appellant. The appellant had said that Halliday had called Mr Wakefield a "nonce". This was something that he had heard her say in the past. He was angry, both with Halliday and with Mr Wakefield. He said that he thought about his son, that something could have happened

to him. At that moment, he experienced anger. He said that he just lost it and stamped on Mr Wakefield's face. Having done that, he did not like the feeling. Therefore, he kicked him, albeit not as hard. When asked why then he stopped, the appellant said that, "Much as I was angry, it did not feel right". It was after that that the appellant and Halliday left with Mr Wakefield's credit card.

12. The judge rehearsed what emerged in cross-examination of the appellant. The appellant said that he became very angry and stamped on Mr Wakefield's face. He went to do it again, but then changed the motion from a stamp to a kick. He described with clarity the part of Mr Wakefield's face with which his foot came into contact. He did that in order to deny that he had inflicted a particular injury which was apparently of significance in respect of Mr Wakefield's death.

13. With all of those matters in mind, the judge concluded that there was no sufficient evidence of loss of control. Thus, it was not necessary for him to consider the other elements of the statutory partial defence.

14. The sole ground of appeal is that the judge was wrong in his conclusion. There was, it is said, sufficient evidence of loss of control. Three matters are relied on. First, the judge failed to adopt the most favourable view of the appellant's evidence that a reasonable jury might determine, as required by *Clinton* [2012] EWCA 2. Second, the judge gave insufficient weight to the lack of evidence that the appellant's act was premeditated. Third, there was error by the judge in concluding that loss of self-control required some kind of involuntary conduct by the appellant. Reliance is placed, in particular, on the fact that the appellant, in evidence, had said that he had not been in control of his actions when he kicked Mr Wakefield. Thus, at no point during his participation in violence had he exercised self-control. It is argued that a reasonable jury would have been entitled to accept the appellant's evidence on this issue. The proposition that the stamp and the kick should be separated and compartmentalised was artificial. Both acts, it is said, could reasonably have been found to have been due to a loss of self-control. It is emphasised that loss of self-control does not necessarily mean complete loss of control. The failure of the judge to refer to the absence of premeditation in his analysis was significant. The level of deliberation, it is argued, always will be relevant to loss of self-control.

15. The judge, it is said, gave undue emphasis to the fact that the appellant's actions apparently were purposeful and that he made a choice when he switched from a stamp to a kick. The real issue is whether the appellant had been so overwhelmed by emotional passion that he could not stop himself from attacking Mr Wakefield.

16. We consider that the judge did not fall into error, as suggested on behalf of the appellant. The fact that the appellant said that he had lost it had to be assessed in the context of the other evidence in the case. We are prepared to accept that, when he said he lost it, he was implicitly saying that he had lost self-control. But there was other evidence in the case of significance: the failure to raise this issue in interview or in the defence statement; the fact that Halliday had previously called Mr Wakefield a "nonce" without any reaction from the appellant; the events following the attack on Mr Wakefield, namely the theft of the credit card from the flat, and what was observed of the appellant's behaviour with Halliday as observed on CCTV in the period before their arrest. All of those matters pointed away from the appellant's actions being due to any loss of control. They indicated a clear participation in an unlawful attack on a deliberate and considered basis. In our view, the judge was not wrong to rely on the appellant's deliberate decision to switch from stamping to kicking and then to desist from any further attack. That was the evidence before the jury. Those factors were inconsistent with loss of self-control. In our view, a reasonable jury could not have

concluded otherwise. Whilst it is true that the judge did not refer, in terms, to premeditation or lack of premeditation, he did set out in full the factual background. In our view, it is unrealistic to suggest that that factual background was not part of the judge's reasoning.

17. When it is alleged that the judge should have found sufficient evidence of loss of self-control, this court must determine whether that finding was wrong. It is not an issue of discretion. Equally, this court has to give proper regard, when making the determination, to the fact that the judge has heard the evidence in its entirety. We have taken that fact into account in this case. This was a very experienced judge. We conclude that he was entirely correct when he found that there was no evidence of loss of self-control.

18. That is sufficient to dispose of the appeal. As we have explained, once an appellant fails to establish sufficient evidence of the first limb of the statutory defence, the defence fails without any consideration of further issues. However, both the appellant and respondent addressed full argument, whether in writing or orally, in respect of the two other matters relevant to the defence. In deference to those arguments, we shall consider the position briefly.

19. Was there a qualifying trigger? The appellant submitted that there was evidence of things said or done: namely, Halliday calling Mr Wakefield a "nonce". They constituted circumstances of an extremely grave character, given the appellant's son's potential association with Mr Wakefield. In those circumstances, a reasonable jury could have found that the appellant had a justifiable sense of being seriously wronged. None of those factors would have been defeated by the continued association between the appellant and Mr Wakefield or by the very limited contact that the appellant had had with his son. We note as to the latter that the judge made a specific finding that limited contact did not necessarily mean that the appellant did not retain a strong emotional connection with his son.

20. We consider that there was no sufficient evidence of a qualifying trigger. The appellant's evidence was that he had considered the possibility of his son being the subject of sexual abuse in 2017, yet he had continued to regularly associate with Mr Wakefield. Further, he had never thought of Mr Wakefield as someone who had sexually abused his son or any other child. The highest it could be put on the appellant's evidence was that he thought that Mr Wakefield could have done something to his son. On that evidence, no reasonable jury, in our view, could have concluded that the appellant had or might have had a justifiable sense of being seriously wronged.

21. Might a person with a normal degree of tolerance and self-restraint have reacted as the appellant did to what was said by Halliday? The appellant's argument is that, taking into account his circumstances, a reasonable jury might have concluded that what might be termed a normal person might have reacted as the appellant did. Those circumstances included the significance in the appellant's life of both Halliday and his son. Moreover, whatever the appellant's circumstances, any person with a normal degree of tolerance and self-restraint would have been revulsed by anyone who had committed sexual offences against children.

22. We consider that the submission in relation to the third limb of the defence is untenable. Even on his own account, the appellant stamped on Mr Wakefield's head. This was an extreme and violent reaction to what allegedly was said. On the face of it, it went well beyond what might be expected of someone of a normal degree of tolerance and self-restraint. At its highest, all that happened was that Halliday said "nonce", as she was attacking Mr Wakefield, which led the appellant to think that something could have happened to his son. It was not even as if he believed that something had happened. In the

course of his evidence in chief, when being asked about what he thought of the actions of Halliday, the appellant had said that he was drunk and that the drink made him think differently. The circumstances of an individual seeking to rely on the statutory defence cannot include voluntary intoxication. It is the degree of tolerance and restraint of a sober person which is relevant. A reasonable jury would have been bound to take into account the appellant's drunkenness when considering the issue. Most if not all people feel revulsion towards those who commit sexual offences against children, but those with a normal degree of tolerance and self-restraint would not stamp on a man's head in consequence thereof.

23. We are satisfied that, had the judge considered it necessary or appropriate to determine whether a reasonable jury might have found the further factors relating to the defence of loss of self-control to be present, he would have concluded those issues against the appellant just as he did the main issue that was argued before him.

24. This was not a case of loss of self-control. In our judgment, the judge's ruling was unimpeachable. This appeal is dismissed.

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This transcript has been approved by the Judge.