IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT LIVERPOOL
HHJ FLEWITT KC T20237011
[2024] EWCA Crim 1400

CASE NO 202303415/B5

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 25 October 2024

Before:

LADY JUSTICE MACUR

MR JUSTICE SWIFT

MR JUSTICE GRIFFITHS

REX
V
LEA ROSE CHENG

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MS C WADE KC & MS S HARRIS appeared on behalf of the Appellant.
MR J BENSON KC appeared on behalf of the Crown.

J U D G M E N T

LADY JUSTICE MACUR:

1. On 4 September 2023, the appellant was convicted of the murder of Dylan Bacon. We mean no disrespect to his memory in referring to him hereafter as "DB".

2. On 8 September 2023, the appellant was sentenced to life imprisonment with the minimum term specified to be 16 years less 541 days spent on remand. She appeals against conviction with leave of the single judge.

3. The sole ground of appeal is that the judge was wrong to rule that the partial defence of loss of control should not be left to the jury in circumstances where arguably there was sufficient evidence of all three components of section 54(1) of the Coroners and Justice Act 2009 to meet the test as set out in *Clinton* and *Goodwin*.

4. The appellant is represented by Ms Wade KC and Ms Harris. Mr Benson KC appears for the respondent.

The Facts

5. On 14 March 2022, shortly before 9.00 pm, DB exited from a first floor flat occupied by the appellant in Old Swan in Liverpool. He managed to walk a short distance before he collapsed. He had suffered fatal stab injuries and was pronounced dead at the scene at 9.32 pm.

6. A postmortem showed the deceased had eight incised wounds to his head and torso:

> "... the majority of which were superficial and relatively minor and

> there were also a number of scratch-type abrasions present. Scattered blunt force injuries were identified, namely bruises, mainly to the trunk and upper limbs though the majority appeared to be healing or fading. Two deep stab wounds were also present to the body, consistent with being inflicted by a fairly large, sharp, bladed weapon such as a knife. One of these was to the left upper back area and penetrated …flaying the skin and underlying muscle. The other deep stab wound was to the right upper aspect of the front of the chest …a stab track that extended entirely through the right upper pulmonary lobe and then continued part way through the right inferior pulmonary lobe."

7. At trial it was not in dispute that the appellant had stabbed DB with a kitchen knife. The appellant said she had no memory of the stabbing and so a positive defence was not advanced.

8. The appellant and DB were well known to each other. Evidence of the events leading up to the killing were set out in a timeline document and CCTV compilation that was played to the jury.

9. On 14 March 2022, the appellant left her flat shortly before 2.00 pm. She went to Higgins Irish Bar in Old Swan in company of her grandfather and thereafter they went to the Old Swan public house where they continued drinking. DB was already in the pub when they arrived, and he eventually joined the appellant and her grandfather at their table. CCTV captured the appellant with her arm around DB and, at one stage, she kissed him on the cheek. When the three of them were seated together, the appellant vomited on the table. DB was seen to go to the bar and the appellant, and her grandfather left. DB left shortly thereafter. It was around about this time that the appellant said that her recollection of events stopped.

10. The appellant and her grandfather first made their way to the grandfather's home. DB went to the Millfield public house. Just before 5.30 pm, the appellant left her grandfather's address and walked down to Prescott Road and passed the Millfield public house. By this time, she was alone and had changed her top. She walked into Day Street. A few minutes later DB left the Millfield public house and walked in the same direction as the appellant, turning into Day Street. The next recorded sighting came at 7.00 pm when the appellant and DB were seen arriving together at the appellant's block of flats. They entered the appellant's flat, and it seems that they remained there until DB is captured on CCTV leaving at 8.51 pm, by which time he had been fatally stabbed.

11. At the relevant time the appellant had a domestic violence alarm fitted in her flat. The alarm was activated at 8.51.46 pm, that is after DB's exit. Ms Wade has produced, for the benefit of the Court this morning, a transcript of the call made at 8.51.46 pm. That transcript records as a female, who was obviously crying, talking to herself, iterating that she was not a killer, and then talking relating to her own wounds and interacting with a male neighbour who came on the scene, it appears, in response to his sighting of blood leading to the doorway of the appellant's flat.

12. The police forced entry into the flat where they found extensive bloodstaining. Again, Ms Wade has provided to the Court a transcript of the body worn camera footage and conversation that took place thereafter. That transcript runs to several pages. The appellant, throughout, refers to her distrust of the police and her disapproval of them in

that they had failed to help her previously. She referred to previous events when her flat had been trashed and mentioned one man by name. She said she was "a sweet innocent girl who didn't deserve this" without reference to what "this" was and then made clear that she felt unloved by her mother, her father and 'Dylan'.

13. The appellant was shouting and screaming that she had been stabbed. The police could see that there was a small puncture wound to her right thigh, which was bleeding and saw, on the floor in the hallway, the large, bloodstained kitchen knife. The appellant was arrested on suspicion of murder. During her early dealings with the police, she said amongst other things:

> "I haven't murdered anyone are you joking"
>
> "Someone's tried to kill me. They've tried to murder me."
>
> "The people who've stabbed me I don't even know. I can't remember."
>
> "The only person who was in there, the last person who was in was [DB]."
>
> "I haven't killed anyone – I would never do that."
>
> "I love Dylan, I'm in shock."
>
> "I can't believe he stabbed me.
>
> He's obviously seen what he's done and killed himself because he didn't want to go to prison."

The appellant was taken to hospital for treatment to her leg injury which were treated with absorbent sutures.

14. She was subsequently interviewed under caution, in the presence of her legal

representatives and an appropriate adult. In the first interview, the appellant recalled going to the pub with her grandfather and seeing DB who was "a family friend". She said that she and DB had gone back to her flat for a drink. She told the police that when DB was asked to leave, he became aggressive. She had pressed the panic button. DB had gone into her kitchen and then stabbed her in the leg. In the second interview, she denied having stabbed the deceased. She said she could not remember if DB had any injuries and had not seen any injuries when he had been at her address. She said that DB must have stabbed himself after he had stabbed her.

15. However, at trial it was accepted that the appellant had told lies in her interviews and a *Lucas* direction was subsequently given to the jury.

16. A forensic scientist examined the penile swabs taken from the deceased on postmortem and found that they had the appellant's DNA present although the scientist could not identify the source of the DNA or how it had been transferred. She concluded, further, that the knife which had caused the injuries to the appellant was the same knife that had been used to stab DB, but she was unable to determine the order in which the appellant and DB were injured. Toxicology investigations revealed traces of cocaine in DB's blood samples indicative of recreational use and there was also evidence of alcohol consumption; he being 2.5 times over the legal limit for driving.

17. In evidence the appellant said that she had no memory of the stabbing and so did not assert a positive defence. She said she recalled up to the point she left the Whitehouse public house with her grandfather but nothing thereafter until she was arrested by

police at her address. She gave evidence about her background and the events leading up to the 30 March 2022. She described an unhappy childhood and said she suffered with mental health issues. She gave evidence about difficult previous relationships she had had, including that she had been subject to domestic violence and controlling behaviour by former partners.

18. She said that in 2020 she was living in the flat in Old Swan and began associating with a group of people that included DB. She had met them in the pub, and they began to come back to her flat to continue drinking. At first this was on her terms, but it developed to the stage where the group would come to her flat whenever they wanted. They would use her flat to party in, drinking and taking drugs and for sexual activity and caused damage. She said that in the past DB had been aggressive and tried to force entry to her flat and on one occasion had tried to force himself upon her and became violent. She had made complaints to her housing association, and they installed a domestic violence protection alarm in 2021. She said in November 2021 she had started a new relationship. However, that relationship had ended, and she described taking an overdose of pills around two days before her arrest because of the breakdown of the relationship.

19. The judge summarised her evidence in his written ruling in terms that:

> "as a result of the long gap in her memory (a) she had no recollection of stabbing [DB] although she now accepted that she did so; (b) she is unable to make a positive assertion that she was acting in self-defence when she stabbed [DB] although she believes on the basis of all the circumstantial evidence that she may have been defending herself from an actual or threatened

> physical and/or sexual assault; (c) she is unable to make a positive assertion that she stabbed [DB] as a consequence of losing her self-control although she believes that, if he had sexually assaulted her, she would have 'flipped.'"

20. A joint expert report from two psychiatrists agreed that the appellant met the diagnostic criteria for a personality disorder with emotionally unstable traits and that the diagnosis could also be conceptualised in the similar diagnosis of complex post-traumatic stress disorder.

21. In a written ruling, having reminded himself of section 54 of the Coroners and Justice Act 2009 and the non-exhaustive list of factors that he should bear in mind when evaluating whether loss of control ought to be left to the jury, as explained by Davis LJ in *R v Goodwin* [2018] EWCA Crim 2287 at [35] , and having regard to *R v Islam* [2019] EWCA Crim 2419, in which Holroyde LJ had observed that it is often difficult for a defendant charged with murder to rely both on the defence of self-defence and on the partial defence of loss of control, he determined:

> "The high point of her evidence on this issue is as set out in paragraphs 7 and 8 of the written submissions made on her behalf. In my judgement that is not evidence that she stabbed [DB] as a result of losing her self-control. Rather, it is speculation about what might have happened if [DB] had sexually assaulted her.
>
> Although, when considering self-defence, I concluded that there was circumstantial evidence that justified leaving that issue for the consideration of the jury, I am simply unable to identify any circumstantial evidence that the defendant stabbed [DB] as a result of losing her self-control. Although it may have been out of character for the defendant to use physical violence, I do not accept that the pathological evidence supports the suggestion that [DB] was stabbed in a frenzied attack.
>
> As part of my legal directions, I told the jury that they should avoid

> speculation. In particular, I directed the jury that '[d]rawing common sense conclusions from agreed or proven facts is entirely proper but speculating or making up theories to fill gaps in the evidence is not permitted'. With the greatest of respect to defence counsel, the submissions made in support of the first limb of the partial defence of loss of control are
> the expression of a theory constructed to fill the gap in the evidence left by the defendant's stated inability to recall what actually happened.
>
> It follows that I have concluded that there is no or no sufficient evidence that the defendant's acts in killing [DB] resulted from a loss of self-control.
>
> In R v Gurpinar [2015] EWCA Crim 178, the LCJ said the following: -
>
> *As the task facing the trial judge is to consider the three components sequentially and then to exercise his judgement looking at all the evidence, it follows from the terms of the Act … that if the judge considers that there is no sufficient evidence of loss of self-control (the first component) there will be no need to consider the other two components. Nor if there is insufficient evidence of the second will there be a need to address the third."*
>
> Having concluded that there is insufficient evidence of a loss of self-control, it is not necessary for me to consider the further elements of the partial defence that are identified in s.54(1)(b) & (c) of the C&JA 2009. For that reason, there is no need for me to address those issues in this ruling."

22. The issue of self-defence was left to the jury, as was the partial defence of diminished responsibility.

23. Paragraph 7 and 8 in Ms Wade's written submissions, to which the judge referred in his ruling are in terms:

> "7. During the course of her evidence, the defendant said that she was not sexually attracted to the deceased and that if she had come to realise that he was having sex with her she would have 'blown

> up, I would have flipped. Why? I wouldn't have consented to have sex with him. He wasn't my type. People seem to think they can do what they want and with me [it would have] really caused me really to flip.'"
>
> 8. She also said, 'If he had had sex then that would have caused me to go off me head. Straw [that broke the] camel's back. I couldn't already take no more. [He] followed me.'"

The circumstantial evidence said to be indicative of loss of control

24. A black bra was seized from the couch in the living room beside the leggings and knickers the appellant had been wearing and near to a coat that the deceased had worn. The forensic scientist's evidence indicated that the bra strap of the bra was no longer attached and damage to the left back of the garment appeared recent and would have required force and a hook was missing.

25. The forensic evidence linked the deceased to the black bra. The appellant was naked apart from wearing a different bra when the neighbour and then the police arrived. The deceased's DNA was on the inside cup of the bra that the appellant was wearing when she was detained by the police; the scientific evidence was that this could be the result of transference. The appellant complained of vaginal bleeding, although she was not examined in this regard. Her DNA was found on the deceased's penile swabs.

26. Ms Wade prays in aid the nature of the attack on the deceased as indicative of a loss of control. There were eight incised wounds which the pathologist agreed could have been inflicted rapidly in a matter of seconds and would appear to be a frenzied attack.

The wound to the defendant's thigh could have been inflicted deliberately or accidentally. The appellant cannot say how she came to sustain the stab wound but if it had been sustained during her attack upon the deceased, then this itself could indicate a loss of control. The appellant was of previous good character; violence was out of character for the appellant - she had never hurt anyone and never been in a fight. Therefore, there was evidence suggesting that she had lost her ability to maintain her actions in accordance with considered judgment or lost her normal powers of reasoning; see *Gurpinar* at [19].

27. Ms Wade has amplified upon her written submissions. First, the "frenzied" nature of the attack: of the eight incised wounds, three were in such close proximity to one and another that the pathologist said they could have been inflicted in a single motion. Several of them were not at "typical attack sites" to the head and the face. The pattern of injuries was suggestive of rapid infliction. Second, if causation of the injury to the appellant's leg was consistent of it being self-inflicted that was not only contrary to the appellant attempting to manifest a defence but supportive of a loss of control during a frenzied and fast-moving incident. Third, there was damage and general disturbance within the living room. A mirror which had been hung on the back of the door had come off and was on the floor and there were other items from the sofa suggestive of a fight or struggle, as was the blood pattern evidence. Fourth, the appellant did not have a violent disposition. Accordingly, the attack on the deceased was out of character. Fifth, the appellant's behaviour shortly after the killing as recorded on the domestic violence panic alarm where she was heard mumbling and talking to herself incoherently. Sixth, when the police entered the appellant's address soon after the

killing, she was naked apart from wearing a nude-coloured bra in a volatile and highly aroused state, alternatively shouting incoherently to the police, and crying to her mother to help her. Seventh, the appellant suffered a memory loss. Eighth, her evidence was that, if she had come round from her drunken state to find that the deceased was having sex with her or was trying to have sex with her, she would have "flipped".

28. Ms Wade argues that these matters cumulatively provide sufficient evidence of loss of control. The judge was not required to make a qualitative assessment of the evidence but rather to evaluate the same with a threshold of what the jury "might" conclude was the evidential basis. Instead, he made findings of fact in relation to whether, for example, the attack was frenzied in its nature. The circumstantial evidence is significant evidence to be taken into account and interpreted in its widest sense, including the inferences that may be drawn by the jury which could otherwise be favourable to the defence of loss of control.

29. Mr Benson, on behalf of the respondent prosecution, has submitted a Respondent's Notice and skeleton argument. We have not called upon him to amplify the same. In short, he submits that the presence of the stab wound to the appellant's leg does not assist on the issue of loss of control. Secondly, that although the appellant had no previous convictions, her medical records, which were in evidence before the jury, indicated a woman with anger issues, that is a short fuse; she had previously made a statement , whether throw-away or not, that she felt like killing someone and, further, had said that she had assaulted a bus driver in an argument.

30. As regards what is said to have been a prospective qualifying trigger, he supports the judge's findings that it was mere speculation that the appellant had been subject of a sexual assault at DB's hands. The appellant had been asked in her police interview whether there had been any sexual contact on the night between herself and DB and she denied it, as she denied that she had ever been naked in his presence that night.

Discussion and Outcome

31. Section 54(1) of the Coroners and Justice Act 2009 provides:

(1) Where a person ("D") kills or is a party to the killing of another ("V"), D is not to be convicted of murder if—

(a)D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b)the loss of self-control had a qualifying trigger, and

(c)a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.

32. As indicated above, the judge must approach the issue sequentially. We start therefore with what Ms Wade submits did constitute circumstantial evidence of a loss of control of a sufficient basis to leave the same to the jury.

A frenzied attack

33. We agree with the judge that it is difficult to describe the injuries as reflective of a frenzied attack. According to Ms Wade's own submissions, three of the wounds may have arisen from one blow of the knife. Only two of the injuries were penetrating, one of which was fatal. Others were described as "superficial". Accepting that in certain circumstances there needs be no frenzied attack at all, and that just one blow may nevertheless, in the context of other evidence, suggest a loss of control, we do not consider that these are arguments that take the case any further. Even if the judge did make a finding of fact rather than an appraisal of what a jury may decide, when seen alone, the evidence of the injuries to DB and the appellant did not provide sufficient evidence of loss of control.

Damage to the living room

34. The damage described by Ms Wade is insignificant. It is not suggestive of a violent struggle.

The appellant's good character

35. We agree with Mr Benson that the appellant's character is not defined by the lack of previous convictions. In any event, even previous positive good character would not necessarily demonstrate the stabbing as committed in a loss of control. However, the appellant's medical records identify incidents which betray the description of 'good character' as inapt.

The appellant's demeanour

36. It is clear from the transcript of the recorded telephone conversation prompted by the activation of the domestic violence alarm button that the appellant was obviously in distress. She was concerned about the wound to her leg and referred repeatedly to the fact that she was not "a killer." So too the evidence of the appellant's demeanour at the time when the police forced entry into the flat. In the circumstances, we may agree with Ms Wade's description that this was a woman "completely besides herself", making complaints as to the past and her perception of her own place in the world. However, there was no evidence to suggest than her behaviour was other than reactive to the incident. To rely upon it as a predictive indicator of her state of mind prior to stabbing the deceased is speculative.

37. We turn to the questions that are explicitly or implicitly raised by Ms Wade's submissions.

38. Does the judge require to consider all three components of section 54(1) of the 2009 Act to arrive at a conclusion as to whether there is sufficient evidence of a loss of control? Our answer is "no". Whilst it was accepted in *R v Clinton* [2012] 3 WLR 515 at [9] that:

> "... where there is a genuine loss of control, the remaining components are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used."

the authorities make clear the component should be analysed sequentially and separately. See also *Gurpinar* at [13]:

> "... it follows from the terms of the Act (as clearly set out in both *Clinton* and *Dawes*) that if the judge considers that there is no sufficient evidence of loss of self-control (the first component) there will be no need to consider the other two components. Nor if there is insufficient evidence of the second will there be a need to address the third."

39. Did the judge accede the remit of gatekeeper and become an arbiter of fact? Our answer is "no". The judge rejected the descriptor "frenzied" to describe the attack which was predicated from the injuries seen on postmortem. The adjective "frenzied" is not a precise descriptor. We observe that most of the injuries to the deceased were superficial, and some appeared old. In any event, a frenzied attack, properly so called, is not determinative of the issue of a loss of control. There was no evidence of causation of the appellant's leg injuries, and, in any event, the fact of those injuries does not assist the determination of whether there was loss of control.

40. The judge was bound to consider the weight and quality of the evidence in concluding as to whether there was sufficient evidential basis to leave loss of control to the jury (see *R v Jewell* [2014] EWCA Crim 414 at [51] to [54]). In his making a vigorous assessment of the evidence we see nothing to suggest that he overstepped his mark as gatekeeper.

The possible sexual assault

41. We agree with Ms Wade that there was circumstantial evidence of sexual contact between the appellant and DB but, as she accepts, there was no evidence that if it had taken place prior to the fatal assault that it was non-consensual or when it had occurred. The appellant denied in interview that sexual contact had taken place that day in her

flat, although indicated that she would have "flipped" if she discovered DB had sex with her while she was unconscious through the effects of drink, not that she had.

42. We are bound to agree with the judge that Ms Wade was inviting him to sanction mere speculation as to what may have occurred. The appellant said that she had recovered from an alcoholic stupor to find that she was being subjected to a sexual assault at the hands of the deceased she would have "flipped", it would be the "straw that broke the camel's back". Ms Wade is forced to concede that this is speculation but relies upon the difficulty of the appellant's loss of memory. We do not see how this assists the point. The evidence of whether a sexual assault took place remains highly speculative. Evidence that the appellant's loss of memory is genuine is not indicative of a loss of control.

43. As indicated above, it was necessary for the judge to undertake a vigorous assessment of the evidence to assess the sufficiency of the evidence before leaving the issue of loss of control to the jury:

> "This requires a common-sense judgment based on an analysis of all of the evidence... Valued judgments are only left to the jury when the judge concludes that the evidential burden has been satisfied." (see *Clinton* at [45])

44. The trial judge must "undertake a much more rigorous evaluation of the evidence before the defence could be left to the jury than was required under the formal law of provocation" (see *Clinton* [14]). There is no room for a defensive summing-up on such an issue (see *Goodwin* at [38]). A trial judge should not "clutter up" a jury's

deliberations by inviting them to consider issues which do not arise on the evidence see *R v Skilton* [2014] EWCA Crim 154.

The interconnection with self-defence.

45. The judge left the issue of self-defence to the jury on the basis that:

> "Before the issue of self-defence is left to the jury, there must be evidence, whether from the prosecution or the defence, which, if accepted, could raise a prima facie case of self-defence; if there is such evidence, the issue must be left to the jury, whether relied on by the defence or not.
>
> 10) I can deal briefly with the basic defence. As the defendant says that she is unable to recall what happened inside 18A Rock Grove, she is unable to advance a positive case that she was acting in self-defence. Although, in my view, defence counsel has overstated the strength of the circumstantial evidence, I nevertheless agree that there is some circumstantial evidence from which the jury could infer that the defendant may have stabbed Dylan Bacon in the course of defending herself from an act of sexual or other violence.
>
> 11) I agree with prosecution counsel that, viewed as a whole, the evidence favours the proposition that the defendant stabbed herself in the leg after stabbing Dylan Bacon and does not support the proposition that any sexual activity was non-consensual. However, I recognise that the jury may not share that view, and so fairness demands that they should be allowed to consider the issue of self-defence."

46. The judge acknowledged in his ruling that self-defence and loss of control are not happy bedfellows, although in an appropriate case may both be matters which a jury need to consider. That is, the issue of self-defence does not preclude, on the appropriate facts, the defence of loss of control. However, a viable issue of self-defence by no means necessarily carries with it an issue of loss of control: see *Goodwin* at [39] and *R*

v Jovan [2017] EWCA Crim 1359, paragraph [47] to [49].

Conclusion

47. We consider that the judge's ruling on whether there was sufficient evidence of loss of control is focused, direct and responsive to the appellant's submissions. It is unquestionable that the appellant sought to advance an entirely speculative scenario on the issue of loss of control, absent any sufficient factual matrix. Nevertheless, the judge fairly left such evidence as there was for the jury to consider whether the prosecution could disprove the appellant's possible self-defence through fear of violence or actual attack. Logically, he concluded that there was insufficient evidence of a non-consensual sexual encounter that would entitle him leave self-defence on the basis that DB had become a trespasser.

48. The judge had well in mind not only the legal requirements of the offence of loss of control but all relevant authorities. He cannot be in his conclusion that there was no sufficient evidence of loss of control to leave to the jury. Consequently, it was unnecessary for him to proceed to consider whether there was a trigger, or the appellant's possible reaction to it.

49. The appeal against conviction is dismissed.

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

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