



Neutral Citation Number: [2021] EWHC 1423 (Admin)

Case No: YOR/03/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 June 2021

Before:

MR JUSTICE JAY

LAMARR GORDON

Recommendation to the Secretary of State for Justice

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 9th June 2021 at 10:00am.

MR JUSTICE JAY:

1. On 14th August 2011 Lamarr Gordon was sentenced to Detention at Her Majesty's Pleasure with a minimum term of 14 years, less time spent on remand, for his role in the murder of Nicholas Pearton. The minimum term expires on 22nd June 2024.
2. Lamarr Gordon was born on 19th September 1993, and is now aged 27. On 5th May 2010, when both he and his victim were both aged 16, the latter was murdered in Sydenham Road. He died as the result of one stab wound which was not delivered by Lamarr Gordon. This was a gang-related killing with Lamarr Gordon being a member of a gang known as the "Shanks and Guns". Lamarr Gordon was found guilty after a trial before HHJ Morris QC on the ground of joint enterprise. The details of the offence do not require close examination in this judgment, although I have read and carefully considered all the information in the dossier, including in particular the judge's sentencing remarks.
3. Lamarr Gordon did not cooperate with the probation officer for the purposes of the pre-sentence report, but the judge did have available to him a report from a psychologist, Dr Melora Wilson. In her view, Lamarr Gordon might be developing an emerging mental disorder, possibly a depressive episode with psychotic features. This evidence must have made little contribution towards the overall sentence. My reading of the sentencing remarks is that the stabber, Green, received a minimum term of 15 years to reflect the nature of his role, and that Lamarr Gordon's sentence reflected his position in the hierarchy within this gang and the fact that he was also being sentenced for an offence of violent disorder committed on 14th February 2020. That offence aggravated the index offence.
4. Before HHJ Morris QC there was also a report from a psychiatrist, Dr Andrew Johns. For these purposes all that it is necessary to state is that he made no diagnosis of autism. Finally, there was evidence from Dr Davis of an "unsocialised conduct disorder".
5. Lamarr Gordon's mental health deteriorated after his sentence. On my understanding, he was initially held at the YOI, Feltham. In September 2012 he was sent to Broadmoor Special Hospital for assessment. When his case was considered by the Court of Appeal, Criminal Division on 4th July 2018 ([2018] EWCA Crim 1555), there was evidence in the form of reports from Dr David Murphy and Dr Merrill.
6. In his report dated 12th December 2012, Dr Murphy noted a number of unusual features of Lamarr Gordon's case. His overall diagnosis was of autistic spectrum disorder, most likely Asperger's Syndrome. This diagnosis, he said, had significant implications for understanding his previous offending and difficulties. Furthermore:

"Most notably Mr Gordon appears to have been socially naïve and was lead into offending rather than directly instigating it. Mr Gordon described experiencing a significant degree of regret and shame with regard to his past offending."

However, this opinion was heavily influenced by Lamarr Gordon's account to Mr Murphy of what happened on the day: in effect that he was a mere bystander. The evidence before the jury was rather different. It may well be that Lamarr Gordon finds

it difficult to process and understand what he did and why he did it, but that to my mind raises a separate issue.

7. Dr Murphy reported again on 9th September 2013 and 11 December 2017. In the latter report he concluded:

“In my opinion, many of Mr Gordon's presenting difficulties could be framed in terms of a combination of an ASD, social immaturity and naivety, some dysfunctional personality features (likely to be linked to his social circumstances and skewed experiences such as being exposed to gang culture) and poor coping strategies when under stress (also likely to be linked to ASD).”

8. When cross-examined before the Court of Appeal, Dr Murphy accepted that Lamarr Gordon's condition had deteriorated significantly when in custody. He also agreed that his condition might not have been recognised in 2010.
9. The issue for the Court of Appeal was whether this new evidence, which included Dr Merrill's which I have not summarised, should be admitted under s. 23 of the CAA 1968 as forming the basis of the partial defence of diminished responsibility. The Court of Appeal did not accept this argument. In short:

“32. We accept, as did the Crown, that this applicant suffered from an ASD at the time of the offence. It is clear to us that that condition makes it more difficult for those who suffer from it to appreciate and react to spontaneous events. However, that difficulty is less significant if an offender has had previous relevant experiences or the event is planned. In our judgment, there was much about the events in the park which was not spontaneous or the subject of prior experience by this applicant. There had been at least one previous similar trip to the park for a violent confrontation. This applicant had been seen brandishing a knife on the YouTube clip in the circumstances described. He knew from the gathering at Grove Park that Green was proclaiming an intention to stab a member of the opposition and had personally followed that with a call to those present to provide support. When in Grove Park he was aware that others had knives and that the planned violent confrontation was to take place.

33. It is clear that his subsequent description of events, both in prepared statements put forward when interviewed and to the experts now relied on, minimised his role in events. Whilst care needs to be taken since such minimisation or falsehood does not of course mean that this applicant was not suffering from an ASD, our conclusion that he had not given an accurate account does, to an extent, undermine the basis upon which the two experts approached the matter.

34. We also think it relevant that much closer to the time, highly-qualified experts had not seen the applicant in a condition which showed that his ASD was a significant feature of his mental makeup at the time. The totality of the evidence shows that this applicant's condition seriously deteriorated after his admission into custody. This is consistent with Dr Murphy's evidence that the effect of the condition upon the applicant is substantially determined by his environmental circumstances at any given time.

35. This court is required to consider the applicant's condition as at the time of the offence. It must also consider the effect of that condition upon his actions, and in particular upon his intentions and perceptions at that time. Given that this was not a spontaneous and unexpected event, and given a lack of evidence to show that in May 2010 this applicant's condition was such as significantly to impact upon his behaviour at the time of the offence, we do not consider that the fresh evidence was of a nature and strength to undermine the safety of the conviction. Accordingly, we decline to receive the fresh evidence under s.23 of the Criminal Appeal Act 1968. The consequence of this is that this renewed application is refused and the conviction for murder remains in place.”

10. These reasons of the Court of Appeal, Criminal Division are not decisive when it comes to the specific issue I am required to resolve.

11. Lamarr Gordon was in Broadmoor Special Hospital until 15th March 2017 when he was transferred to HMP Gartree. I have read the evidence of his progress since then. His progress cannot fairly be described as “exceptional”, but that is not the basis on which the present *Smith* review is being sought.

12. It is now said on behalf of Lamarr Gordon that had the evidence from Broadmoor Hospital been available at the time of his sentencing hearing, there would have been powerful mitigation open to him which would have resulted in a lower sentence. It is of course the case that evidence of mental illness or disorder is a statutory mitigating factor. So, for the purposes of this review exercise it is contended that there is here a:

“... [new] matter that calls into question the basis of the original decision to set the minimum term at a particular level (for example, about the circumstances of the offence itself or the detainee’s state of mind at the time), together with any other matter which appears relevant.”

13. The real question for me is whether the medical evidence that was not before HHJ Morris QC should be seen as lowering Lamarr Gordon’s culpability. In their excellent representations dated 2nd October 2010, Hine Solicitors say this:

“Mr Gordon was found guilty of murder along with a number of other individuals. At the time of his trial he was assessed by professionals who did not pick up on his Autism condition and

therefore the Judge did not consider this disorder when sentencing him. It is our submission that had the Court have been aware of Mr Gordon's condition, his role in the offence would have been understood differently. The Court would have considered Mr Gordon's vulnerabilities and how they would have affected his behaviour and overall involvement in the offence. As such, the Judge would have considered the impact of Autism Spectrum Disorder in setting the tariff which we argue would have been less than the 14 years set. We seek to rely on Schedule 21 [para] 11 (c) of the Criminal Justice Act 2003 in arguing that Mr Gordon's ASD should have been considered as a mitigating factor in sentencing. We therefore ask that this new matter of Mr Gordon having Autism calls into question the basis of the original decision to set the tariff at 14 years less 408 days on remand."

14. I shall assume for present purposes that these submissions are appropriately raised in the context of this application for a review, rather than an out-of-time application for permission to appeal against sentence.
15. For the purposes of this exercise, I must ask myself what impact, if any, Dr Murphy's evidence would have had on HHJ Morris QC in setting the tariff he did. I consider that it is right that I proceed on the premise that the diagnosis of ASD is correct, even though Dr Murphy has not expressed himself in the strongest terms. I suspect that ASD is only part of the diagnostic picture here: Lamarr Gordon would not have spent five years in a Special Hospital just with that condition.
16. The difficulty I have is the link between Lamarr Gordon's ASD and his behaviour, thought-processes and actions at the material time leading up to the murder and its immediate aftermath. The account Lamarr Gordon gave Mr Murphy was seriously deficient, and sought to minimise his involvement, whether or not he has the insight to recognise that. This was a premeditated attack in which Lamarr Gordon played a leading role, not an impulsive event. In my judgment, it is not sufficient – to avail this prisoner - for Mr Murphy to say that the ASD diagnosis has significant implications for understanding his previous offending and difficulties, and that it would appear to be a significant mitigating factor. A closer forensic analysis is required, and that has not been undertaken.
17. I am not persuaded that a new matter of sufficient weight and moment has been raised which should cause me to intervene in this case on an exceptional basis by recommending a lowering of Lamarr Gordon's minimum term.
18. This application for a review must be dismissed.