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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 24 May 2019

B e f o r e:

LORD JUSTICE DAVIS
MR JUSTICE JEREMY BAKER
RECORDER OF CARDIFF
(HER HONOUR JUDGE REES)

R E G I N A

v

DWAYNE ANTHONY JOHNSON

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Ms Bennett-Jenkins QC appeared on behalf of the **Appellant**
Mr J Lloyd-Jones QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE DAVIS:

Introduction

On 24 July 2017, after a trial in the Crown Court at Leicester, before His Honour Judge Stuart Rafferty QC and a jury, the appellant, Dwayne Johnson, a man now aged 31, was convicted on a count of murder. In due course he was sentenced to imprisonment for life (as required by law) and the judge specified a minimum term of 21 years less days spent on remand as the specified term for the purposes of the Criminal Justice Act 2003.

2. The appellant now appeals against conviction by leave of the single judge. His appeal raises a familiar issue, albeit of course an issue that has to be resolved by reference to the facts and circumstances of this particular case: it is whether the trial judge was justified in permitting evidence of the appellant's bad character, in the form of numerous previous convictions for assault and similar violence, to be adduced in evidence before the jury.

3. There is also before this court an appeal, again brought by leave of the single judge, against sentence. That challenges the finding of the judge, made in the course of his sentencing remarks, that the appellant had brought a knife to the scene. That, if so, connoted a starting point of 25 years under the relevant provisions of schedule 21 of the Criminal Justice Act 2003, as amended. What is said on behalf of the appellant is that it was not open to the judge, properly applying the criminal standard of proof, so to find. In consequence, it is said that the appropriate starting point which should have been taken was one of 15 years' imprisonment; and because the judge did not take that starting point, he reached too high a figure by way of specified term. Thus it is said that the sentence was either wrong in principle or was manifestly excessive.

Background Facts

4. We will set out the background facts in summary form without attempting to replicate the detail of the evidence that was given at trial.

5. On the night of 10 and 11 December 2016 the appellant had been at a party at the deceased's house in Sneinton, in Nottingham. It appears that they had not really known each other. The appellant had arrived at the house looking for someone called Jamie Robb and had been told that he was at the house. The house belonged to or was occupied by the deceased, Junior Fuller. Initially Junior Fuller refused the appellant entry but subsequently he relented.

6. The appellant was in the house for some time during which there were no problems at all. By around 4 o'clock in the morning the deceased Junior Fuller, the evidence being that he had had a significant amount to drink and also that there was cocaine in his system, apparently became frustrated that he had lost his keys and phone. He accused others of taking them and asked people to leave. His suspicions were misplaced because it transpired that the keys were in the pocket of one of the partygoers, who was

apparently drunk, and as for his mobile phone that apparently was found behind a mirror in his bedroom. It was noted by the prosecution that the appellant's fingerprints were found on the bedroom door. But whatever the relevance or irrelevance of that, there was an altercation. In particular, the appellant took umbrage at being asked to leave. He was heard to say things like: "Don't talk to me like that" and "What do you mean leave" to the deceased Junior Fuller. The men squared up to each other. It may be that the first actually to confront was the deceased but at all events there was a confrontation between the two. Witnesses were to observe the deceased Junior Fuller then punching out at the appellant and indeed administering two punches. He, according to the witnesses, was the first to administer punches. The two then grappled and moved outside through the back door into a back garden. No one had, at that stage, seen any knife either on the deceased or on the appellant in their hand or elsewhere. When in the garden the two fell into some bushes and the scuffle continued for around 40 seconds. After that, the appellant had got up quickly, walked through the house and left. The deceased stumbled back into the kitchen and collapsed. There was evidence that he said words to the effect "I've been stabbed" and "he stabbed me". He lay down on the kitchen table. He was in fact pronounced dead at 4.44 am.

7. The post mortem examination revealed three sharp force injuries by way of bladed weapon to his chest. Two of those had penetrated the ribcage causing fatal injuries to the heart and lungs. There is no doubt but that a knife had caused those fatal injuries. That knife has never been recovered.

8. It was common ground, and the prosecution accepted, that the appellant had not set out that evening with a view to stabbing the deceased: rather, what happened happened in effect relatively spontaneously. It was the prosecution case that the appellant had become angry with the deceased, in particular for being asked to leave the party, and lost his temper. It was the prosecution case that the appellant had a knife on him and he gave in to his anger in the garden, stabbing the deceased whilst there. In support of the prosecution case, amongst other things it was sought to say that the appellant had numerous previous convictions for violence in his antecedent history.

9. So far as the direct evidence was concerned, there was, amongst other things, evidence from Jamie Robb who was a mutual friend of the appellant and the deceased and indeed was the man the appellant had been looking for when he went to the house in the first place. Robb gave evidence about the fight and described how it started. He was to say that it was the deceased who threw the first punches. He was also to say that he heard the deceased saying words: "I've been stabbed ... He stabbed me".

10. Another witness, Casey Starbuck, said that the appellant took offence and started to get angry when the deceased started asking people to leave. She was to say that she had heard the appellant querying why he had to leave and, according to her, the two started in effect wrestling. She said she went outside the front of the house to have a cigarette and the appellant came out. According to her, as he walked past he said words to the effect: "Why did he make me do that?" When she asked him what he meant, according to her he made no reply and walked away.

11. There was also other evidence which it is not necessary for this court to set out in any detail. For example, a witness called Janine Salmon claimed to have heard a male voice saying: "I did not mean to do it. He should not have got it into my face". That evidence was, it appears, strongly undermined in the course of cross-examination.

12. In due course the appellant handed himself into a police station on 15 December 2016. It appears that the appellant has learning and other difficulties. In interview, he was to say that he had been struck by the deceased from behind in the garden and that it was a sneak attack. The blows that were being delivered to him were blows with full violence and force intending to knock him out. He tried to punch back but to no great effect because he was stunned and was also under the influence of drink and cannabis. He said that he had gone in the garden in effect to take refuge but had been the subject of further one-way violence on the part of the deceased, Junior Fuller. He had been knocked or tripped to the ground and struck repeatedly from behind when he was on the ground. He was to say that he then found himself confronted by the deceased who had produced a knife. In addition, the deceased was also trying to choke him with one hand. Thus he was to say that in effect he had been the victim throughout of the attack and in so far as the deceased came to be stabbed that had been by way of accident. The prosecution were to seek to say at trial that the version of events which he gave in his interviews did not cohere in a number of respects with what various other witnesses had described.

13. At all events the issues at trial were accident, self-defence and also intent. The appellant did not himself give evidence at trial. There were a number of agreed facts also placed before the jury. It was among other things accepted that the appellant had two cut injuries to his hands as well as a minor cut to his left thigh area.

The bad character application

14. Prior to trial the prosecution had lodged an application seeking to adduce evidence of the appellant's bad character. That application was founded on propensity and based on section 101(1)(d) of the Criminal Justice Act 2003. However, it is also right to note that the application had, on its face, as Mr Lloyd-Jones QC for the prosecution has explained to us, also reserved the right to make an application under section 101(1)(g), amongst other things, if circumstances changed so as to warrant it. Furthermore, the defence, prior to trial, had put in an application by reference to section 100 of the Criminal Justice Act 2003, seeking to have the relevant previous convictions of the deceased Junior Fuller put in evidence. Those previous convictions of Junior Fuller, as we understand, included convictions for violence albeit not convictions for knife violence.

15. So far as the convictions of the appellant were concerned, he unfortunately has a bad record, having 31 convictions for 71 offences in total, between 2000 and 2017. The particular instances of bad character which the prosecution were proposing to have put in evidence dated back to 2002 and ran up to 2016. These included 12 convictions for assault or battery, two for threatening behaviour and two for assault occasioning actual bodily harm committed in 2011 and 2014. It is right to note that the appellant had pleaded guilty to all such matters. Furthermore, none of those offences had involved

the use of a knife or any other weapon; and he had no previous convictions for possession of a knife or bladed article.

16. However, perhaps at least in part at the prompting of the judge, the prosecution application at trial was varied to focus, in particular, on the provisions of section 101(1)(g) of the Criminal Justice Act 2003: a position which the prosecution had expressly reserved under its original application.

17. It was accepted at trial that the way in which the defence case was being conducted had involved an attack on the deceased's character and it was not disputed before the judge that the requirements for passing through the gateway of section 101(1)(g) were made out.

18. That being so, it was also before the judge, as before us, common ground that evidence of bad character admitted under that gateway could also potentially be admissible for other potentially relevant purposes - see, for example, decisions of constitutions of this court in the cases of R v Hatton [2005] 1 Cr App R 7; R v Campbell [2007] 2 Cr App R(S) 28 and R v Lafayette [2008] EWCA Crim 1684. Consequently, if the bad character evidence was properly admissible for such purposes, the question then was whether, in the interests of fairness and justice, the judge should nevertheless exclude such bad character evidence as being unduly and unfairly prejudicial to the defence.

19. The matter was debated before the judge in some detail and he gave a detailed ruling. He set out the background facts with care. He went through the relevant provisions of the Criminal Justice Act 2003.

20. Perhaps the core of his ruling for present purposes is found at page 7 of the judge's ruling. Amongst other things he said this, having decided that the matter fell within section 101(1)(g):

> "The second issue that I have to consider of course, that, even if I did not allow the prosecution application on the basis of propensity, but allowed it on the basis of attack upon character, the state of the law is that, once the evidence is admitted, then it would swing open the door for propensity, potentially, unless the court did not direct the jury about propensity. It seems to me, in fact, that if the evidence is admitted, the fairer way, on reflection would be to give a carefully crafted and properly weighted direction about propensity, making it plain to the jury that it's very much a secondary consideration in the case, and making it plain to them that this should not embark upon the impermissible reasoning, concluding that they can decide the case on propensity if all else fails. As a matter of common sense and justice, it must be the other way round...
>
> Now, I return to where I was earlier on. The defendant's propensity, on the record he has, never has been to arm himself, to commit serious offences of violence. It is however, a propensity to lose his temper under provocation or under pressure. If the jury are directed on that basis then

> it seems to me that they can properly take account of the evidence if it is admitted and would not then have a difficulty, either of going on to build into propensity, the propensity that is impermissible, namely to use knives to commit serious violence ..."

It is not necessary to read out other aspects of his ruling for present purposes.

21. In the result, the judge having so ruled, the evidence of the previous convictions went in in the form of agreed facts. The defence did not desire that the details of the previous convictions be given. It was in due course, however, made absolutely clear to the jury that in each such case the appellant had pleaded guilty on all those occasions and it was made clear that no knife or other weapon had been involved. So the jury had those considerations before them.

22. It may also be noted that the judge further acceded to the defence application that the bad character of Junior Fuller should itself be placed in evidence: bad character in the form of his previous convictions for violence. So in the result the jury knew both of the bad character of the appellant and of the bad character of Junior Fuller.

23. Then, when he came to sum up to the jury the judge dealt in detail with how the jury were to treat the bad character of Junior Fuller. Having done that the judge then went on in further detail to deal with the bad character of the appellant. Among other things the judge said this:

> "You have heard evidence that the defendant also has previous convictions for offences of violence. The reason that you have done so is that the positive defence that he has advanced of necessity has involved an attack on the character of Junior Fuller by asserting, as he has, that it was Junior Fuller himself who was the sole aggressor and who produced and sought to attack and injure the defendant with a knife. In fairness in such circumstances it would have been wrong for you to be left in ignorance of the character of the man making those accusations. You are entitled to have regard to the defendant's own bad character when deciding what the truth is in this case. Whether and to what extent his previous character assists you in that respect is a matter solely for your judgment.
>
> Since it had been placed before you in that way a further issue for you to determine is whether the bad character of the defendant demonstrates that he has a propensity; that is a tendency, to lose his temper and commit offences involving the use of unlawful violence. The prosecution submit that if he does have such a propensity then it is more than mere coincidence that the evidence points to him acting in that way towards Junior Fuller and would make it more likely that he did behave as has been alleged when the violence began ..."

The judge then went on to give the usual qualifications and limitations which are conventionally given in such cases in order to protect the position of a defendant.

24. The judge having done that, he then went on, at page 15 to say this:

> "The issue to which the propensity does relate may be expressed as follows: in the circumstances in which he found himself, whatever you find them to have been, what effect, if any, did the propensity have upon the conduct of the defendant? Did he seek to avoid confrontation regardless of the propensity? Or was it instrumental in prompting him to respond to them with unlawful violence? Whatever the reason for its admission, and upon whatever ground you are considering it, please bear in mind also that the purpose of bad character evidence is not to generate unfair prejudice towards a defendant and you must guard against that. Certain it is that the evidence of bad character should not be used to bolster a weak prosecution case ... "

The judge then went on to give further directions in this regard, including inviting the jury to consider the submission that the defence would make that they should disregard such bad character evidence entirely. The judge of course made it absolutely clear that propensity could only be one element of the case and that the jury were disentitled from convicting on the strength of bad character alone.

Disposal

25. Although before us, today, Ms Bennett-Jenkins QC has made some criticisms of the summing-up, no such criticisms are advanced in the grounds of appeal and we do not think in any event that there is any valid basis for criticising the adequacy of the summing-up. The real attack is on the judge's prior decision to allow the bad character evidence to be admitted in the first place.

26. In that regard, Ms Bennett-Jenkins has this morning elucidated her grounds of appeal. Her primary case is that the previous convictions of the appellant should have been entirely excluded from the jury. Her alternative case is that even if such previous convictions were properly placed before the jury for the purposes of section 101(1)(g), it was wrong to allow the jury, if they so chose, also to have regard to those previous convictions in assessing propensity. It is submitted that the judge should have firmly instructed the jury that such previous convictions should not be relied upon at all as evidencing any relevant propensity.

27. In this regard, as we have said, Ms Bennett-Jenkins has conceded that gateway section 101(1)(g) did apply here. Therefore her argument has to be that the bad character evidence should have been excluded on the ground that it was unfairly prejudicial to the defence. We cannot possibly agree. We think the judge was entirely justified, and indeed correct, in allowing such bad character evidence to go in given that that gateway had been passed. It would have been quite wrong for the jury to not have known about the bad character of the appellant once he had attacked the character of the deceased Junior Fuller. Moreover, it is striking that the judge had also permitted the defence to put in the bad character of Junior Fuller himself.

28. So far as permitting the bad character evidence also to be adduced as showing propensity, Ms Bennett-Jenkins submitted that, in truth, she said, the appellant's record had no substantive probative value in this regard at all. Even if it be the case that this appellant had frequently been violent in the past, his loss of temper had only ever resulted in minor violence. It had never, on any previous occasion, resulted in serious violence, let alone violence involving a knife or any other weapon. Thus, she says, it should not have been permitted to be used as propensity evidence, and at all events it should have been excluded on the ground that it would be unfairly prejudicial to allow it to be used for such a purpose.

29. Again, we cannot agree. It was a matter for the judge's evaluation and discretion as to whether or not to allow this bad character evidence to be adduced as showing propensity. In our view it was relevant evidence for this purpose. Once gateway 1(g) had been passed through, this aspect of using the evidence was also potentially in play. Indeed it could have been under section 101(1(d). The evidence was unquestionably potentially relevant because it did indeed show, if the jury so decided, that this appellant did have a propensity to be violent when under the influence of bad temper or provocation.

30. In our view, the judge's approach, namely that the evidence could be used by way of propensity evidence, but subject to appropriately tailored directions, was an entirely proper one. Moreover, the judge stressed to the jury, and the jury knew on the agreed facts, that the previous incidents of violence had involved pleas of guilt and had also never involved the use of any weapon. Given also that the bad character of Junior Fuller had been allowed to be put in, we are in no doubt that the judge's decision in this regard was a proper one and there was no unfairness: and thereafter he gave proper and adequate instruction in his summing-up. We do not think that any unfair prejudice was involved so far as the defence was concerned in all such circumstances. Accordingly we conclude that this conviction for murder is safe. We therefore dismiss the appeal against conviction.

Sentence

31. In such circumstances we have to deal with the appeal against sentence. Quite obviously, it was essential to establish whether or not the appellant had brought the knife which inflicted the fatal three injuries to the scene. That is so because of the relevant provisions of schedule 21 of the Criminal Justice Act 2003, which we do not need to read out.

32. In the course of her submissions Ms Bennett-Jenkins, who said that the judge had no entitlement to conclude, as he did, that the appellant had brought the knife to the scene, placed some emphasis on what the judge had said at previous stages of the proceedings. For example, in the course of his ruling on bad character, the judge, among other things, had said this:

> "The prosecution's case is that he started fighting back immediately. That is something else the jury will have to consider. There is no evidence that the defendant went armed to this house. That is an issue

that they may have to be revisited later on in the event of conviction.

Equally, however, it is a valid possibility, the jury may think, that there are knives in pretty much every kitchen in the country and so either he could have armed himself with a knife there, or Mr Fuller could have, equally ... "

33. Ms Bennett-Jenkins focused on those observations of the judge as indicating that it could not be said, certainly to the criminal standard, that the appellant had brought a knife to the scene. Indeed the judge had said:

"There is no evidence that the defendant went armed to this house."

34. As my Lord, Jeremy Baker J, pointed out in the course of argument this morning, it may well be that the judge was simply wrong at that stage in saying what he did. But at all events the judge cannot fairly be said to have been committing himself, because he immediately went on to say:

"That is an issue that may have to be revisited later on in the event of conviction."

35. Ms Bennett-Jenkins also, however, relied upon further remarks made by the judge after the jury had retired. Rather surprisingly perhaps, the judge debated with counsel in the absence of the jury as to whether or not the jury should be invited to return a special verdict, namely as to whether they formed a the view as to whether or not the knife had been taken by the defendant. The judge in discussion said this:

"But it seems to me actually on analysis it may well be the case that they reach a verdict of that kind and simply cannot decide where the knife came from. Equally, it seems to me that the evidence as it stands is simply completely opaque on that topic."

36. Counsel appearing at trial rightly dissuaded the judge from seeking to obtain a special verdict from the jury. But Ms Bennett-Jenkins' point is that, even at that stage, the trial judge was regarding the evidence as "completely opaque" on the topic of whether or not the appellant had brought the knife to the scene. But again, this must be put in context: because very shortly after he made those observations the judge went on to say this, having been dissuaded from asking for a special verdict:

"My own view, having thought about it overall, is that I will have to decide the issue myself on the evidence. I do not say anything for the moment, obviously all these things are open for discussion... But we will see what happens later on."

37. Although Ms Bennett-Jenkins was in a position to make these forensic observations, ultimately what we have to focus on is the considered decision of the judge made at the relevant time: that is to say, the time when he passed sentence. That is where we have to place our emphasis.

38. The judge, in the course of sentencing, gave detailed reasons for drawing the conclusion which he did draw, which was to the effect that the appellant had indeed brought a knife to the scene. In drawing that conclusion the judge made clear that he had applied, as he was required to apply, the criminal standard of proof.

39. Amongst other points on which the judge relied (and his points have to be taken cumulatively) were these. First, there was evidence of damage to the appellant's left-hand pocket of his tracksuit bottoms which he had been wearing on the evening in question, which had been consistent with a knife blade being present in that pocket. (It may be noted that it was agreed evidence that the appellant was left handed.) Second, no one had seen a knife picked up by either man in the kitchen area before the two went into the garden. Third, the deceased Junior Fuller had initially been seen to be striking out with punches: Junior Fuller had not, at that stage, used any weapon. Fourth, the knife had never been recovered: the judge pointed out that that was consistent with the appellant having taken it away unobserved, which again was consistent with him having brought it to the house in the first place unobserved. Fifth, it is clearly the case that the jury must have rejected the defence case that the deceased had first attacked the appellant in the garden with a knife.

40. Mr Lloyd-Jones, before us, sought to add to that by saying that at one stage in one of his interviews the appellant had apparently referred to "my knife" but in our view no real weight can be given to that particular point. Nevertheless the other points all made by the judge were, taken cumulatively, valid points.

41. Ms Bennett-Jenkins nevertheless says, applying as one must apply the criminal standard, that simply was not enough. No one, she pointed out, had at any time seen the appellant with a knife. Further, his previous convictions had never involved possession or use of a knife. She observed that no blood, as such, had been found on his trousers. Moreover, the initial altercation had started in a kitchen and a kitchen is an area where obviously knives may well have been present, even if no one had seen either man pick up or use a knife there. She further pointed out that such issues had been left to the jury in the course of the summing-up. Yet further, she understandably emphasised that, on any view, what happened was relatively spontaneous and it was never suggested that the appellant had gone to the house in the first place looking for violence and for trouble.

42. These were precisely the points that were raised at trial and debated before the judge for sentencing purposes. We must remember that this was the trial judge who had seen and heard all the evidence as it unfolded. It was his task and duty as trial judge to form the necessary conclusions needed to pass the appropriate sentence. He specifically applied the criminal standard. We consider that he was entitled, applying that standard, to draw the inference that he did for the reasons that he gave and he was entitled to conclude that the appellant had brought a knife to the scene.

43. Applying ordinary principles applicable to the approach of the Court of Appeal in such cases, this court has no sufficient basis for interfering with that conclusion which was one properly open to the judge. It follows therefore that he was right, and required by statute, to take a starting point of 25 years as the specified minimum term. Ms

Bennett-Jenkins fairly and rightly concedes that if the right starting point was taken, she cannot then pursue any further challenge to the appropriateness of a minimum term of 21 years' imprisonment less time spent on remand. In such circumstances, we must dismiss this appeal against sentence.

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