No: 201803104 A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019]EWCA 185 (Crim)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 7 February 2019

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE HOLGATE

MR JUSTICE MURRAY

R E G I N A
v
AHMED HASHI

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Mr B Aina QC and Ms M Karaikos appeared on behalf of the **Appellant**

Mr O Glasgow QC appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

LORD JUSTICE FLAUX:

1. On 24 May 2018, in the Crown Court at Wood Green after a trial before His Honour Judge Dodd QC and a jury, this appellant, who is now aged 18, was acquitted of murder and convicted of manslaughter. On 29 June 2018, he was sentenced by the judge to 9 years' detention in a Young Offender Institution. He now appeals against sentence with the leave of the single judge.

2. The facts can be summarised as follows. At around 10.00 pm on 28 November 2017, at the Bethel Café on Seven Sisters Road in London, Mohamed Hersi was playing pool with other customers of the café. The appellant and various other men were waiting for their turn to play. An argument subsequently broke out between Mohamed Hersi and another man named Saleban Hussain about whose turn it was to play. Mohamed Hersi subsequently became angry and told Saleban Hussain to play pool with the kids, referring to the appellant and another young man with him called Mahamoud Adbi Ali Farah.

3. Following the argument, Mohamed Hersi left the café but subsequently returned as he had forgotten his scarf. When he returned to the café the argument continued. Witnesses heard someone say "come outside" and saw Mohamed Hersi appearing to beckon to Saleban Hussain, the appellant and Mr Farah. The judge said in his sentencing remarks that it did not appear to be in any sense a violent or offensive gesture. Mohamed Hersi and Saleban Hussain attempted to go outside the café to fight but had been prevented from doing so.

4. At about 10.10 pm, Mohamed Hersi left the café but returned once again. On this occasion the appellant and Mahamoud Adbi Ali Farah went towards Mohamed Hersi.

The appellant had picked up a chair from inside the café. Holding the chair with its legs pointing towards Mohamed Hersi, the appellant threw or pushed the chair at Mohamed Hersi twice in quick succession. One of the metal chair legs went into Mohamed Hersi left eyeball, penetrating, apparently, by some 3 inches. Mohamed Hersi fell to the floor with the top half of his body outside the café and the bottom part of his body inside the café. The appellant then used his foot to stamp on Mohamed Hersi's genital area and on his throat before running from the café followed by Mahamoud Adbi Ali Farah.

5. Mohamed Hersi was pulled back into the café, various calls were made to the police and the ambulance service. Paramedics attended and he was conveyed to the Royal London Hospital but sadly he subsequently died from his injuries at about 2.18 pm on 29 November. On 1 December 2017, the appellant handed himself in to Wood Green police station and was arrested and cautioned. In reply to the caution, the appellant stated:

> "I was in a café in Finsbury Park on 28 November 2017 when I had an argument with the male. I hit him in the eye with a chair. Today I heard he died. I've come to hand myself in."

6. In interview, the appellant accepted that he had hit Mohamed Hersi with a chair but stated that he had stamped on Mohamed Hersi's neck area and not his head. The appellant claimed that he had acted in self-defence and did not know that he had hit Mohamed Hersi in the eye and did not intend to cause Mohamed Hersi serious injury. By its verdict, the jury clearly rejected that defence, although in acquitting the appellant of murder they obviously did not consider that he had the intention to kill or to cause grievous bodily harm.

7. The appellant was born 29 April 2000, so he was 17 years and 7 months old at the time of the offence. He had one conviction for an offence committed on 22 December 2016

of using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence. The appellant lost his temper during the course of a dispute with a shopkeeper. He picked up a plastic pallet in the shop and threatened the shopkeeper with it. For that offence he was conditionally discharged in the North West London Juvenile Court on 10 January 2018.

8. The judge adjourned sentence for a report inter alia on the issue of dangerousness. The pre-sentence report noted that the appellant asserted that he been acting in self-defence and denied that he had been angered by the comments that the victim had levied towards him. The appellant stated that he had a growing fear that the victim would cause him harm due to his intoxicated state and the fact that the victim kept leaving and returning to the café. The appellant accepted that his actions had caused the death of the victim.

9. He was statistically assessed as posing a low risk of reoffending and a medium risk of violent reoffending. However, it was the professional opinion of the writer of the report that the appellant posed a medium risk of reoffending and that this level of risk was likely to rise in the event that he was faced with a conflict or confrontational situation. Using an assessment tool he was assessed as posing a high risk of serious harm to the general public and a medium risk of serious harm to other prisoners. However, it was the writer's opinion that the appellant did not meet the dangerousness criteria. His conclusion noted that the highlighted risks could be effectively managed by way of a determinate sentence but that this would be a decision for the court.

10. In sentencing the appellant, the judge said that Mohamed Hersi had been 40 when the appellant had killed him and had been much loved by his family, his wife and their four young children, as well as by his circle of friends. The victim's death would inevitably cast a long and deep shadow on their lives and their loss had been profound. No

sentence that the court could pass could ever equate to the value of the life that had been lost. Like the judge, we have read the moving and eloquent victim impact statement of Mr Hersi's wife.

11. The judge said that much of the incident had been captured on CCTV from inside the café. We should say that we have viewed the CCTV footage, which appears to bear out the judge's findings. Immediately before the incident, the judge said, Mr Hersi was at the door apparently beckoning. It was not apparent to the judge why he did that but it did not appear to be in any sense a violent or offensive gesture. The appellant and his friend had got up from their seats near the pool table and walked the short distance to the door. Why they had done that was not clear to the judge. As he did so, the appellant picked up one of the chairs and used it to attack Mr Hersi, a man who had displayed no aggression towards him and was a total stranger. He had held the chair as he attacked Mr Hersi then stamped on his throat and groin, further acts of violence which the judge considered were indicative of his feelings towards Mr Hersi.

12. The judge said that no witness could shed any clear light on why the appellant had suddenly attacked a man much older than himself, who posed no threat to him and had displayed no hostility towards him. The judge referred to the argument between Mr Hersi and Saleban Hussain, both of whom seemed to have been drinking, and how in irritation with Saleban Hussain, Mr Hersi may have told him to go and play with the kids, ie the appellant and his friend. Mr Hersi may have said "come outside" or simply "come" to someone inside the café but, as the judge said, these were all matters of complete and utter trivia.

13. The judge felt in that some way the appellant felt slighted by Mohamed Hersi and wanted to teach him a lesson and so he had attacked Mohamed Hersi with a chair. The

chair had four metal legs, one of those had the rubber foot missing and it was that that pierced Mohamed Hersi's left eye and caused catastrophic damage which had resulted in his death. The judge noted that it was the view of the pathologist that severe force would have been required to cause the damage that he found at the post mortem. The injuries caused by the stamping to the throat indicated the use of moderate force.

14. The judge said that having behaved on the night of the offence in a disgraceful and violent manner, the appellant subsequently had the decency, encouraged by his own family, to give himself up to the police once he had found out that the man he had attacked had died. The appellant had admitted much of what had been alleged but maintained that he had acted in self-defence. In the judge's view, there had been no foundation or basis for that whatsoever.

15. The judge had read the prosecution note on sentence and had been referred to the recent case of *R v Hobbs and DM* [2018] EWCA Crim 1003 and the judgment of the Lord Chief Justice. The judge had read the guidelines of the Sentencing Council setting out the overarching principles applicable to the sentencing of those under 18. The appellant, whilst he was now 18 years old, had been 17 years old at the time that the offence had been committed.

16. In relation to the mitigation, the judge had read the pre-sentence report and the letter from the appellant in which the appellant had expressed remorse and had set out his hopes for the future. The judge said that he not seen any indication of remorse during the trial but he now accepted that the appellant had expressed a measure of sorrow and regret for his actions and now understood in some way the enormity of the pain that he had caused.

17. The judge said that the pre-sentence report described the appellant's progress whilst on

remand in rather mixed terms. He had continued to show he was bright and able, engaging with educational opportunities but he had become involved in some incidents showing a lack of respect to staff and some violence towards other inmates. The writer of the report suggested that that was as a result of immaturity rather than a sign of anything more significant.

18. The judge said that he accepted that there had been little by way of premeditation but this remained an extremely serious offence and had been a dreadful and shocking incident far removed from any childish prank. The appellant had chosen to arm himself with a chair in order to attack a wholly innocent man who had done him absolutely no wrong. The violence was sudden, wholly without excuse and it was brutal. The judge had to assess harm and culpability in order to determine the sentence. Harm was there by virtue of the loss of life. It was of the utmost seriousness. So far as culpability was concerned, the judge accepted that the appellant did not intend to kill Mohamed Hersi but he had plainly intended to cause him some harm, albeit falling short of really serious harm, otherwise why had he picked up the chair and used it with some significant force as a weapon to attack his victim. Culpability was therefore high.

19. The judge noted the appellant's previous conviction, which indicated a disturbing attitude towards others when he was challenged. The judge said that he was conscious of the appellant's age. His level of maturity was below the level of an adult. That was a relevant factor in determining the appropriate sentence because it reduced his culpability to a degree. The judge thought that that was the only mitigating factor that he could identify along with a measure of remorse.

20. The judge had considered the issue of dangerousness and he agreed, not without some hesitation, with the conclusion of the author of the pre-sentence report that

dangerousness was not established. He had decided to deal with the appellant by way of a conventional determinate sentence. Had the appellant not been as young as he was and had he been a fully mature individual, the sentence of the court would have been one of 12 years' imprisonment. Because of the appellant's age, the sentence was reduced to one of 9 years' detention in a Young Offender Institution.

21. The principal ground of appeal advanced by Mr Benjamin Aina QC on behalf of the appellant is that the judge did not give adequate weight to the overarching principles as set out in the guideline for children and young people. He referred to the passages of the guideline that are referred to in the judgment of this court in *Hobbs and DM*, culminating in the passage at paragraph 6.46, upon which he placed particular emphasis:

> "If considering the adult guideline, the court may feel it appropriate to apply a sentence broadly within the region of half to two thirds of the appropriate adult sentence for those aged 15–17 and allow a greater reduction for those aged under 15. This is only a rough guide and must not be applied mechanistically. The individual factors relating to the offence and the child or young person are of the greatest importance and may present good reason to impose a sentence outside of this range."

22. Mr Aina QC submitted that the judge was required to consider age, maturity and progress of the young offender even where the offender was 18 when sentenced, so technically an adult. As he put it, full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthday.

23. We agree with this submission, which is an important consideration when sentencing a young offender who is technically an adult at the time of sentence. As the Lord Chief Justice put it in *R v Clarke* [2018] EWCA Crim 185 at paragraph 5:

> "Experience of life reflected in scientific research (e.g. The Age of Adolescence: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her

18th birthday."

24. Mr Aina submitted in relation to paragraph 6.46 of the guideline and the reference to a reduction of one half to two thirds of the adult sentence, that the appellant having been 17 when he committed this offence was entitled to this reduction. He submitted that in only allowing a discount of 25 per cent, the judge had failed to take account of the immaturity of the appellant and the impact that this had had on his decision making and the lack of insight into the consequences of his offending. His behaviour had been immature. He had picked up a chair and he threw it in a childish way at a perceived aggressor without any thought of the risk that serious injury might occur. He was particularly critical in his oral submissions of the judge for failing to give any explanation as to why he was departing from the guidelines as he was required to do by section 125 of the Coroners Act 2009.

25. In an Addendum to his Advice and in his oral submissions, Mr Aina QC also referred to the sentencing guideline on manslaughter. Whilst recognising that that was not applicable when this appellant was sentenced, since it only applies to those sentenced on or after 1 November 2018, he submitted that the specific reference in that guideline to the need to refer to the guideline on sentencing children and young people when sentencing those under 18 for manslaughter, thereby taking those under 18 outside the sentencing guideline on manslaughter, illustrated the importance of distinguishing sentencing of adults from sentencing of young offenders. The overall approach, principles and objectives are different.

26. Attractively though these submissions were presented, we cannot accept them. As Mr Oliver Glasgow QC pointed out in his Respondent’s Notice, the guideline at 6.46 makes clear that the reference to a reduction of a half to two thirds from the adult sentence for 15- to 17-year-old offenders is "only a rough guide and must not be applied

mechanistically". The sentencing judge, having conducted the trial, was uniquely well placed to assess the extent to which the appellant's age and immaturity should be reflected by a reduction from the adult sentence.

27. Mr Aina's QC characterisation of the offence as the appellant picking up a chair and throwing it in a childish way at a perceived aggressor without any thought of the risk that serious injury might occur downplays the seriousness of this offending and is contrary to the judge's findings based on the evidence. The judge specifically rejected the defence submission that this was some sort of childish prank that had gone wrong, as in *Hobbs and DM*. He also rejected any suggestion that Mr Hersi had behaved aggressively towards the appellant or that the appellant was responding to a perceived threat. Likewise, he rejected any suggestion that the appellant acted without any thought for the consequences. He found that the appellant plainly intended to cause Mr Hersi some harm, albeit falling short of really serious harm, otherwise why had he picked up the chair and used it with some significant force as a weapon to attack his victim.

28. Mr Glasgow QC seems to have thought in his Respondent's Notice that the appellant was seeking to challenge the judge's starting point of 12 years' imprisonment for an adult offender. We did not understand Mr Aina QC to be doing so and he certainly did not suggest anything of the kind in his oral submissions. In any event, whether there were such a challenge or not, we consider that on the basis of the judge's assessment of the evidence, which cannot be faulted, a sentence of 12 years' imprisonment for an adult committing this offence cannot in any sense be described as excessive. If anything, given the high culpability of the appellant, a slightly higher sentence of 13 or even 14 years' imprisonment if he had been an adult would have been justified.

29. The suggestion in Mr Aina's written submissions that the appellant was "entitled" to

a discount of one half to two thirds from that adult sentence is misconceived. As the guideline makes clear, the individual factors relating to the offences and the young offender may present a good reason for imposing a sentence outside the range. Here, as we have said, the judge was best placed to make an assessment of those factors.

30. Mr Aina submitted, on the basis of *R v Taylor* [2012] EWCA Crim 630, that the judge should have explained why he had departed from the guideline and why a lesser discount had been allowed than under the guideline and that his failure to do so made the sentence that he passed wrong in principle. We do not accept that submission. The guideline internally recognises that it is only a rough guide and that ultimately it is a matter for the sentencing judge as to what, if any, discount is to be given to a young offender in any particular case. It is clear that in the present case the judge did consider the guideline very carefully and there is nothing in the submission that he gave it insufficient weight. The judge concluded that the nature of this offending and the high culpability of the appellant despite his youth only justified a reduction of 25 per cent from the adult sentence that he would be passed.

31. In our judgment, this approach cannot be seriously criticised and the sentence passed of 9 years' detention cannot be described as manifestly excessive. This appeal against sentence must be 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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