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No: 201904126/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 17 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER S.36 OF THE CRIMINAL JUSTICE ACT 1988

R E G I N A
v
SALIH KHATER

Miss A Morgan QC appeared on behalf of the **Attorney General**
Mr P Carter QC appeared on behalf of the **Offender**

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(Official Shorthand Writers to the Court)

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: Salih Khater (to whom we shall refer as "the offender") was convicted of two offences of attempted murder. On 14 October 2019, at the Central Criminal Court, he was sentenced by the trial judge (McGowan J) to concurrent sentences of life imprisonment, with a minimum term of 15 years less the period of time which he had spent remanded in custody. Her Majesty's Attorney General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

2. It is important to emphasise at the outset that the application relates to the length of the minimum term. An offender serving a life sentence cannot be released on licence until he has served his minimum term, which must be fixed in a case of this nature in accordance with the provisions of section 82A of the Powers of Criminal Courts (Sentencing) Act 2000. Whether the offender is in fact released at that time will depend on the Parole Board's assessment of whether he then presents a danger to the public. Thus, the minimum term is what it says - it is a minimum term to be served, not a guaranteed date of release. If and when the offender is released, he remains on licence for the rest of his life and is therefore liable at any time to be recalled to prison to continue serving his life sentence.

3. This offender is now 30 years old. He came to the United Kingdom in 2010 from his native Sudan and later became a British citizen. He had no previous convictions. In the months preceding his offences there had been some signs of a change in his mood but nothing to suggest that he would commit the grave crimes which he did.

4. The offender arrived in Central London at about 12.30 am on 14 August 2018, having driven from his home in Birmingham. He spent some time driving around the area where he would later commit his crimes. He then parked and spent several hours alone in his car. Around 6.00 am he drove to Parliament Square. He drove around the Square and then parked for a time, apparently waiting for the area to become busier. The judge was satisfied that at one point the offender got out of the car and looked towards the Palace of Westminster to see whether uniformed police officers in high visibility vests had taken up position guarding a slip road which gives access to the Palace of Westminster. They had, and the offender began to drive. He made a number of circuits of Parliament Square, apparently picking his moment to attack. After four circuits the offender suddenly turned left, a manoeuvre which involved going back on himself, and drove on the wrong side of the road into a group of cyclists who were stationary at a set of traffic lights. As the judge was to put it in her sentencing remarks, he "deliberately drove at that group intending to kill as many of them as you could". He then, in a manoeuvre which required considerable concentration, drove back onto the correct side of the road, accelerated over a short distance and turned sharply into the access slip road. Two uniformed police officers were guarding the security barrier of that slip road. The offender aimed his car at them. They had to jump aside as he crashed into the security barrier.

5. By great good fortune the physical injuries caused to those who were either hit by the offender's car, or had to take evasive action, were much less serious than might have been expected. One cyclist suffered a fractured clavicle, another suffered a fractured finger and several sustained bruises and grazes. In addition, as one would expect and as the victim personal statements before the court showed, they and others suffered psychological harm. As the judge put it:
    i. "They will continue to experience the effects of [these crimes] for a long time; possibly forever."

6. At trial the offender said that he had lost his way when driving in Central London. He had struck the first cyclist by accident and had then lost control, hitting others and driving into the barrier. The jury disbelieved his evidence and convicted him of the two offences which we have mentioned.

7. A number of psychiatric and psychological reports have been prepared but none was relied upon by the defence either at trial or in connection with sentencing. A pre-sentence report assessed the offender as posing a high risk of serious harm to members of the public and to police officers. The offender had given no explanation of his motive and showed no insight into his behaviour. The author of the report commented that it was therefore the more difficult to predict what might trigger such behaviour in the future.

8. The judge was satisfied that the offender had intended to kill as many people as possible and by doing so to spread fear and terror. He had attacked members of the public and uniformed police officers outside the seat of democracy in this country. It was only by extraordinary good fortune that no one had been killed or had sustained life threatening injuries. The judge found him to be a dangerous offender as that term is defined for sentencing purposes.

9. The judge referred to the Sentencing Guideline which is presently in force in respect of offences of attempted murder, which she was required to follow unless she concluded that it would be contrary to the interests of justice to do so. Under that guideline the most serious category of offences of attempted murder level 1 is defined in these terms:

    i. "The most serious offences including those which (if the charge had been murder) would come within para 4 or para 5 of schedule 21 to the Criminal Justice Act 2003."

10. For offences in the category, where serious and long-term physical or psychological harm has been caused, the starting point for sentence is 30 years' custody, with a range from 27 to 35 years. Where some physical or psychologic harm has been caused, the starting point is 20 years' custody, with a range from 17 to 25 years.

11. Paragraph 4 of schedule 21 to the 2003 Act relates to the minimum term in cases of murder where a mandatory life sentence must be imposed. It provides that in a case of murder in which the seriousness of the offence is exceptionally high, and the offender is aged over 21 at the time of the murder, the starting point for sentence is a whole life order. Paragraph 4(2) identifies a number of categories of case which would normally fall within paragraph 4(1). These include the murder of two or more persons, where each murder involves a substantial degree of premeditation or planning; the murder of a police officer in the course of his or her duty; and a murder done for the purpose of advancing a political, religious or ideological cause. The judge clearly had those statutory provisions, and the provisions of the guideline, in mind when she said this at page 9G-H of her sentencing remarks:

    i. "If you had succeeded this would have been the murder of more than one person. It would have been the murder of police officers in the execution of their duty. It involves the use of a car as a weapon. It would be in the highest category of seriousness and whole life order would have been likely."

12. The judge went on to refer to the injuries caused in the terms which we have already mentioned. She noted that the offender had no previous convictions but observed that that provided little mitigation in all the circumstances. She said however that she would take it into account in his favour to the limited extent appropriate.

13. Section 30 of the Counter Terrorism Act 2008 requires a court, when considering the seriousness of an offence of attempted murder and certain other categories of offence, which may have a terrorist connection, to determine whether it does have such a connection and, if so, to treat that fact as an aggravating factor and state in open court that the offence was so aggravated. The judge clearly had that provision in mind when she said, at page 10C:

    i. "I must look particularly at your motivation. A terrorist connection would aggravate the seriousness of your offending."

14. She then posed the question: "Did these offences have a terrorist connection?" Having set out her reasoning on that topic she found, to the criminal standard of proof, that the offending was connected to terrorism. In reaching that conclusion she took into account that no evidence had been put forward by or on behalf of the offender to counter the inference as to his motivation which was clearly to be drawn from his actions.

15. In those circumstances the judge at page 11C concluded:

    i. "The seriousness of this offending and the continuing risk that you present can only be met by sentences of life imprisonment. But if I had not passed a sentence of life imprisonment but a determinate sentence, the sentence would have been 30 years. Therefore, I

impose a life sentence with a minimum tariff term of 15 years, less the days you have already served."

16. We should explain that when setting the minimum term to be served in a case of a discretionary life sentence, the sentencer is required by statute to take into account the early release provisions which would have applied to the offender if a determinate sentence rather than a life sentence had been passed. As the then Lord Chief Justice said in the case of R v Burinskas [2014] EWCA Crim 334, at paragraphs 33 and 34, the effect of the statutory provision in section 82A of the 2000 Act is that the judge must identify the sentence which would have been appropriate if a life sentence had not been necessary, and reduce that notional sentence to take account of the fact that a prisoner serving a determinate sentence would be entitled to early release. The usual approach is for judges to reduce the notional sentence by one-half to reach the minimum term. That was the approach the judge adopted in this case.

17. In her helpful submissions on behalf of the Attorney General, Ms Morgan QC does not challenge the judge's approach of deciding what determinate sentence she would have passed if not imposing life imprisonment and then halving that notional term. She submits however that the judge had accepted that these offences fell within level 1 of the attempted murder guideline. The starting point for sentence should therefore have been 30 years' imprisonment and there should then have been a significant upward adjustment to reflect the aggravating feature of the terrorist connection.

18. Ms Morgan seeks to draw a comparison with the level of sentencing under the guideline applicable to offences of preparation of terrorist acts contrary to section 5 of the Terrorism Act 2006. She does not however suggest that the judge should have taken a notional determinate sentence in excess of the level 1 range in the attempted murder guideline. She makes clear, helpfully, that neither in the court below nor in this court does she submit that it would be contrary to the interests of justice to apply the attempted murder guideline.

19. For the offender Mr Carter QC, in his helpful submissions, accepts for present purposes that the judge was entitled to pass life sentences and was entitled to find that the offending had a terrorist connection. But he points out, one of the factors listed in paragraph 4 of schedule 21 is a murder done for the purpose of advancing a political or ideological cause. He submits that the terrorist connection in this case is therefore already reflected in the categorisation of the offences as level 1 offences. He argues that any increase in the minimum term, on the basis of an aggravating feature of a terrorist connection, would therefore be double counting. His submission is that the sentence was entirely appropriate and was not unduly lenient.

20. We are grateful to both counsel for the care and clarity with which they have put forward their written and oral submissions. Having reflected on those submissions our

conclusions are as follows.

21. The judge, as we have said, was required to follow the attempted murder guideline. We do not think any error of principle is involved in inviting the court to look at the guideline applicable to particular terrorist offences as an indication, if any be needed, of the seriousness of terrorism. The judge's duty however was to follow the attempted murder guideline unless it would be contrary to the interests of justice to do so.

22. The judge clearly addressed the provisions in that guideline. She rightly placed the offences in level 1. She identified more than one factor which, if the offender had succeeded in his aim of killing civilians and police officers, would have brought the case within paragraph 4 of schedule 21 and so would likely have resulted, as she said, in a whole life order.

23. The judge would have been entitled to move upwards from the guideline starting point to reflect the fact that there were three separate features of exceptional seriousness, any one of which would have sufficed to bring a completed offence of murder within paragraph 4. We do not accept Mr Carter's submission that that approach would have involved unfair double counting.

24. However, as the judge rightly noted, the physical injuries were less serious than they might have been. She did not specifically say whether she regarded them as "serious and long-term physical or psychological harm". We are not persuaded that such a finding is necessarily implicit in the words used by the judge in her sentencing remarks. But even if she did take the view that the physical and psychological harm in this case came within that category, she was clearly entitled to regard it as falling at the lower end of the applicable scale. We do not for a moment underestimate the psychological effect upon those who were caught up in these terrible crimes, but it has to be recognised that the guideline must cater for offences of attempted murder where life threatening injuries, serious head injuries, amputated limbs and the like are suffered by the victim or victims.

25. The judge was also right to note that at least some allowance had to be made in the offender's favour to reflect the absence of any previous convictions.

26. The judge concluded that the notional determinate sentence would have been one of 30 years' imprisonment. Having presided over the trial, she was in the best position to assess the culpability of the offender. We accept that the judge could properly have taken a rather longer term within the guideline range, which goes up to 35 years, and we accept that her total sentence could be described as lenient in all the circumstances of the case. We are not however persuaded that it was unduly lenient. To adopt the familiar words of Lord Lane LCJ in Attorney-General's Reference No 4 of 1989 [1990] 1 WLR 41, at page 46A, it cannot in our view be said that this sentence "falls outside the range which the judge, applying her mind to all the relevant features, could reasonably consider

appropriate".

27. For those reasons we refuse the application for leave to refer.

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