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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 19 March 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

THE RECORDER OF NEWCASTLE
(His Honour Judge Sloan QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

REGINA

- v -

KEELEY THERESA BARNARD

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Mr H A Godfrey QC appeared on behalf of the Applicant

J U D G M E N T

LORD JUSTICE SIMON:

1. This is a renewed application for leave to appeal against conviction following refusal by the single judge.
2. On 13 February 2018, following a trial in the Crown Court at Chelmsford before Her Honour Judge Lynch QC and a jury, the applicant was convicted of murder.
3. There is no issue but that the applicant killed the victim, her mother, Margaret Simms on Saturday 10 August 2017. Mrs Simms had been diagnosed with Alzheimer's disease in 2014 and her illness worsened. Her husband gave up his job to care for her full time. One weekend in every month she went to stay with another of her daughters, Amanda Hollocks, and she was there on the weekend when she was killed.
4. The applicant was not as close to her mother as her sister, who described the applicant as an alcoholic, suffering depression and with marital difficulties. On Friday 18 August the applicant's husband left her. The following day Ms Hollocks' partner, Dougie Kilpatrick, collected the applicant and brought her back to stay with them for a short time.
5. During the late evening of 19 August, Ms Hollocks fell asleep downstairs and Mr Kilpatrick went upstairs to watch television in his bedroom before he, too, fell asleep. At some point before 11.45pm, the applicant went upstairs and joined her mother on a sofa bed.
6. A little while later Ms Hollocks heard the applicant shouting "Mum's not breathing, mum's not breathing".
7. Mr Kilpatrick went into their room and carried out CPR on Mrs Simms. The emergency

services were called at 11.56pm. The applicant took the phone and spoke to the operator. She was recorded as saying: "Well, my mum, she sort of like had a pillow over her face and she sort of like, she's had Alzheimer's and she's just passed away".

8. The applicant's initial account to the police was that she was tired and sleepy when she got into bed next to her mother. She said:

Mum was flat on her back and I could hear her breathing. I pulled the blinds to make the room darker. At this point mum had taken the pillow which had fallen into the middle of the bed, and put it over her face. I think I felt it move so that's how I know it happened. Mum didn't say anything and I put on my eye mask to go to sleep.

The applicant said that she lay with her back to her mother and could hear her breathing, but that at some point she was aware that she was not breathing. She moved the pillow and tried to shake her awake. She said:

I then pinched her nose and breathed air into her mouth. I then used my hand to hit her heart to try and get it to start, but it wouldn't. I did this several times to try and start her heart. I realised I couldn't start it. I got out of bed and started shouting to Amanda and Dougie that I thought mum had died.

9. A post-mortem examination revealed that the cause of death was compression of the neck due to manual strangulation. The victim had suffered a "constellation" of injuries including blunt force facial trauma, an injury to the mouth caused by the application of a hand over the mouth, bruising to the neck and chin, fractures of the hyoid bone and thyroid cartilage, and scratches to the nose, consistent with attempts by the victim to relieve the pressure being applied to her neck.

10. The applicant was arrested. In her police interview she denied causing the injuries to her mother. She gave an account that she repeated at trial:

... I turned my back to mum and I think I dropped off to sleep, but after about ten minutes I became aware that mum had stopped moving and I couldn't hear her breathing. I heard her choking, coughing, gasping sounds. I pulled my mask off, turned over and shook her. I don't know what I thought was happening, but I assumed that there was a blockage which had stopped her breathing, so I started manipulating or massaging her throat. I was not angry. I was not attacking mum. I was concerned for her.

I then pushed her head back further to lengthen her throat, and I continued to manipulate it. I pinched her nose and blew into her mouth, I think for about three breaths. I did not hear any breathing, so I then began tapping on her chest over her heart after listening for a heartbeat. I then called for Dougie and Amanda. I couldn't see any injury to her face. There were no injuries to her face or mouth. I have no idea how blood got on the pillow. I was absolutely devastated at what happened that evening. I do not accept that I caused the injuries which led to my mother's death. I told the truth in my police interviews ...

11. At trial the pathologist gave evidence that there had been sustained compression of the neck by manual means. The victim must have been alive when the injuries were caused. The pathologist rejected the applicant's account in interview, and no contrary evidence was called. The pathologist was specifically asked about the applicant's account and said that it would not explain the injuries to the victim which were caused by a compression of the neck due to manual strangulation.

12. In the summing-up at pages 14G and 15B of the transcript, the judge reminded the jury of the pathologist's observations about the applicant's description of what she had done, and reminded the jury of the evidence that what the applicant described could not have caused the injuries to the victim because she gave no explanation of the sustained compression of the neck sufficient to have caused the petechial haemorrhaging or sufficient pressure to fracture the hyoid bone.

13. At the conclusion of the evidence there had been a discussion about leaving an alternative

count of manslaughter for the jury's consideration. The point was raised by prosecuting counsel and discussed with the judge. Both counsel and the judge sought to identify whether there was an evidential basis for the alternative verdict and, if so, what it was. There was a discussion as to whether the jury could be directed that, if they were unsure whether, when she caused the injuries, she intended to kill or cause really serious harm, they should go on to consider whether she intended at least some harm.

14. The judge accepted that she had an obligation to direct the jury on an alternative verdict if the facts supported it, but considered that there was no evidential basis for doing so. Prosecuting counsel said that he had considered an alternative charge and verdict of manslaughter, but had concluded that there was no evidential basis for it. Counsel then appearing for the applicant said this:

... I agree, and I think I have always accepted that. I think I even said at one point earlier on in the trial that there is no evidential basis, and it does not seem to be, I am afraid, it is all or nothing on the evidence.

The judge then said that she would not direct the jury in relation to a verdict of manslaughter.

15. In the grounds of appeal and on this application Mr Howard Godfrey QC submitted that since the applicant had admitted physical contact with her mother, which might have caused, or at least contributed to her death, and had denied any intent to kill or cause really serious harm, an alternative verdict of manslaughter should have been added to the indictment and should have been summed up to the jury. In his oral submissions, he drew attention to background factors which bore on the decision whether to invite the jury to consider an alternative verdict. There was no motive for the killing. She was not a beneficiary of her mother's estate. There was clearly alcohol involved in the applicant's conduct. She was of previous good character. The killing took place in bed in the dark; and, as the judge said, on any view this was not a premeditated offence. The applicant had made it clear throughout that she did not intend to kill.

16. The law on directing the jury in relation to alternative verdicts is set out in *R v Coutts* [2006] 1 WLR 2154, *R v Foster and Others* [2008] 1 Cr App R 38, and *R v Barr* [2016] EWCA Crim 216. It can be summarised for present purposes. Where there is evidence to support an obvious alternative verdict, it should be left to the jury. An "obvious alternative verdict" was the term used by Lord Bingham in *Coutts* at [23] and is an alternative verdict "obviously raised by the evidence" and which suggests itself "to the mind of an ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after trial". See also Lord Hutton at [62].

17. In *Coutts* the potential defence was that the strangulation of the victim by a ligature occurred by accident during consensual sexual intercourse. The House of Lords held that a count of manslaughter should have been left to the jury as an alternative to the charge of murder. In the view of the House of Lords, it was an obvious alternative verdict because it was common ground that the victim had been strangled by a ligature and the issue was: in what circumstances?

18. In the present case, specific consideration was given to the alternative verdict with the discussion between both counsel and the judge. The discussion addressed the question of whether there was an evidential basis for such a verdict. The conclusion was that there was not. Each counsel and the judge specifically said that there was no evidential basis. It is implicit from this that the alternative verdict was not "obviously raised by the evidence" and did not suggest itself to the mind of an experienced criminal judge. It was not a case to use the phrase of Sir Igor Judge PQBD in *Foster*, where the lesser verdict "undoubtedly arose on the evidence".

19. The applicant accepted that she made physical contact with the victim, but in our view there was no evidential basis for directing the jury in relation to an assault which might have

accidentally or carelessly caused the victim's death, albeit inadvertently. What the applicant said she had done could not have caused the specific injuries. Those were the result of manual strangulation. The issue was stark: was the strangulation carried out by the applicant or someone else? The manslaughter alternative was (to use the language of some of the cases) "remote from the real point of the case"; or, as the single judge put it, the theoretical possibility that the applicant strangled her mother without intending to cause really serious harm was a remote one.

20. In our view, the verdict of manslaughter can properly be characterised as an alternative which counsel has identified through diligent, post-trial research. In these circumstances, the renewed application is refused.