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No. 2019/01977/C2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC1A 2LL

Wednesday 29th April 2020

B e f o r e:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
(Lord Burnett of Maldon)

MRS JUSTICE McGOWAN DBE

and

MRS JUSTICE CUTTS DBE

REGINA

- v -

KYRIES DAVIES

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Mr D Bentley QC appeared on behalf of the Appellant

Mr O Glasgow QC appeared on behalf of the Crown

J U D G M E N T

Wednesday 29th April 2020

THE LORD CHIEF JUSTICE:

Introduction

1. The appellant was born on 7th March 2002. He was almost 16 years and 3 months old when, just before 5pm on 2nd June 2018, he and others murdered Tavis Spencer-Aitken (aged 17) in Ipswich in a gang-related revenge attack.

2. Following a lengthy trial in the Crown Court at Ipswich before His Honour Judge Levett and a jury, the appellant and three others were convicted of murder and another of manslaughter. On 30th April 2019, the appellant was sentenced to be detained at Her Majesty's Pleasure, with a minimum term of 21 years (less 327 days spent on remand in custody to count towards it).

3. The appellant now appeals against sentence by limited leave of the single judge.

4. On the appellant's behalf, Mr Bentley QC, for whose written and oral submissions we are grateful, submits:

(i) That the increase to 21 years from the 12 year statutory starting point for a defendant aged 16 was far too great:

(ii) The judge paid insufficient regard to the age of the appellant, and of its effect on his culpability;

(iii) The judge paid insufficient regard to the personal circumstances of the appellant, as described in the pre-sentence report;

(iv) The sentences for the three adult co-defendants demonstrate that the judge allowed insufficient disparity between their minimum terms and that imposed upon the appellant, given the different applicable statutory starting points.

5. The co-accused nearest in age to the appellant was Isaac Calver, whose date of birth was 28th September 1999. Thus, he was almost 19 at the time of the murder – two and a half years older than the appellant. He, too, received a minimum term of 21 years for the offence of murder. Aristote Yenge was aged 22 at the time of the murder. He received a minimum term of 25 years. Adbayo Amusa was almost 20 at the time of the offence. He received a minimum of 23 years.

The Facts

6. The appellant had been a member of a gang called "J Block" since he was only 13 years old. The deceased was associated with a rival gang called "Neno", or "The Three" (a reference to its postcode location within Ipswich).

7. The facts underlying the murder are truly appalling. They illustrate the pernicious, destructive and evil influence of gang culture on young people.

8. Earlier in the day of 2nd June 2018, the appellant and Yenge had been in Ipswich town centre. They had been chased by two members of the Neno gang. They took refuge in a shop. An off-duty police officer intervened. Rather than leave the matter alone, they decided to exact

some revenge. The appellant and Yenge went to a nearby house, where the appellant made contact by telephone with a range of members of J Block who then assembled in a nearby park. They drove to Nacton, the home territory in Ipswich of the Neno gang, armed with knives. Their purpose was to seek out a member of that gang to exact revenge. It appears that the deceased was the first member of that gang they saw. They set upon him in the street, close to his home. Between them, they stabbed him 15 times. He died shortly afterwards in hospital.

9. This is a tragedy spoken to eloquently in the Victim Personal Statements we have read from the deceased's mother, his father and his grandmother. His sister cradled her dying brother in her arms on the pavement.

The Sentencing Remarks

10. The judge set out his reasoning for arriving at each of the sentences, and by setting them in the overall context of what had occurred, with meticulous clarity. His material conclusions so far as the appellant was concerned were these:

- (i) The appellant had been responsible for corralling the group which proceeded to kill the deceased. Despite his age, the appellant was influential in the gang.
- (ii) The attack was a premeditated, targeted revenge attack.
- (iii) The appellant – and indeed the others convicted of murder – had an intention to kill the deceased.
- (iv) The appellant and Yenge took the two knives used in the attack to the scene, but all knew that knives were there and to be used.
- (v) Overall, the appellant had a prominent, leading role in what occurred.
- (vi) The killing was the result of a long-standing hostility between the gangs.
- (vii) All the co-accused had taken care to turn off their telephones to avoid the possibility of their movements being traced. After the attack, they not only disposed of their weapons, but also washed their bodies and clothes in an attempt to eliminate forensic traces.

11. In sentencing the appellant to a minimum term of 21 years, the judge took into account the appellant's disturbed background, to which we will return, but took the view that the Sentencing Council Definitive Guideline which sets out overarching principles for sentencing children and young people had no direct application to sentencing for murder. It may well be that he reached that conclusion as a result of a footnote at the beginning of the guideline, which reads:

“This section does not apply when imposing a mandatory life sentence, when imposing a statutory minimum custodial sentence, when imposing a detention for life under the dangerous offender provisions or when making certain orders under the Mental Health Act 1983”.

He made it clear that the guideline had no application in the sense that the usual factors applicable in sentencing young people would not be in play. Nonetheless, he considered that youth and immaturity were relevant factors. However, that footnote is concerned only with the

general approach to sentencing children and young people found in section one of the guideline.

12. As part of the background information available to him, the judge noted that the appellant had been a professional Class A drug dealer since he was 13. The appellant had explained this in his evidence by way of background. The appellant had convictions for battery and threatening with an offensive weapon when he was aged 14 and threatening behaviour when he was 15. He had also been cautioned for battery.

13. The judge's overall conclusion was that the age difference between the appellant and his co-accused also convicted of murder was of much less importance than would at first sight appear.

The Pre-Sentence Report

14. The detailed pre-sentence report illuminated the path followed by this 16 year old appellant enroute to becoming a murderer. He lived with his mother, but spent much time, both as a young child and since, with his father who was not only a heavy drug user, but also a drug dealer. When he was with his father, he mixed in an environment which included many other people who both took hard drugs and dealt in hard drugs. From a very young age, such an environment was the appellant's normal way of life. In short, it is the environment into which he was born. He was also subject to, and witnessed, violence as a child. That, too, was normal for him from a very early age. By the time he was 11 years of age, he was a habitual cannabis user. By the age of 13, he was a user of and became addicted to liquid codeine. His early gang involvement arose at about the same age, as did his becoming a drug dealer. His involvement with the gang led to violent attacks on his mother's home, which precipitated more than one relocation. The appellant himself had been stabbed in a gang-related attack when he was aged 14.

The General Approach to Sentencing in Murder Cases

15. Schedule 21 to the Criminal Justice Act 2003 applies to the determination of the minimum term. For adults (those 18 and over), the starting point for the minimum term is generally 15 years, but with a higher starting point in a range of circumstances. One of those circumstances is when a knife is used and taken to the scene of the murder. If that is established, the starting point for an adult is 25 years. The starting point applied by the judge in the cases of the three co-accused convicted of murder was that enhanced starting point.

16. By contrast, the starting point for offenders under the age of 18 is 12 years. There are no comparable higher starting points specified by the statute for young murderers who, if adults at the time of offending, would have been subject to enhanced minimum terms. The starting point for young offenders covers all those from the age of criminal responsibility to the eve of their eighteenth birthday. Much flexibility in the calculation of the minimum term is needed on that account alone, as well as to reflect the individual circumstances of the offence. Put shortly, were two children together convicted of murder, one aged 12 and the other aged 17, it would be wrong to suppose that the age-related reduction was entirely reflected in the statutory provisions.

17. Schedule 21 also contains a non-exhaustive list of aggravating and mitigating factors. Importantly, however, the features of a murder that would lead to an enhanced starting point for an adult act as significant aggravating factors when sentencing someone under 18. Taking a knife to the scene of a murder is such an aggravating factor – and a seriously aggravating factor. So much has been confirmed repeatedly by this court: for example, see *R v M, AM and Kika* [2010] 2 Cr App R(S) 19 at [3] and [4]; *R v James Moore* [2011] Cr App R(S) 94 at [24] and [25]; and *R v Odegbune* [2013] EWCA Crim 711 at [35].

18. Mr Glasgow QC, who appears today on behalf of the prosecution, as he did at the trial, recognises that the judge's approach to the applicability of the guideline relating to children and young people displayed an error. Whilst the judge recognised that youth and maturity were material factors, he did not consider the guideline in any detail, and in particular paragraph 4.10. The approach to that guideline in the context of murder was considered in this court in *R v DM* [2019] EWCA Crim 1354, a decision which postdates the sentencing in this case. In giving the judgment of the court, at [28] Holroyde LJ said:

"The Sentencing Council has published a Definitive Guideline which sets out Overarching Principles for Sentencing Children and Young People. Because the sentence for murder is fixed by law, the nature of the sentence is not affected by considerations of the welfare of the offender, or of the principal aim of the youth justice system which is to reduce offending by children and young persons. It nonetheless remains important when considering the appropriate minimum term to consider the developmental and emotional age of the offender and to consider, in accordance with paragraph 4.10 of the guideline, whether the young offender has:

'the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.'"

19. As is well-known, starting points are no more than that. In arriving at the minimum term, whether for adults or for children, a careful assessment of all relevant features in a particular case can lead to a significant departure from the statutory starting point, both upwards and downwards.

Discussion

20. At the heart of the submissions advanced by Mr Bentley this morning is the proposition that in arriving at the minimum term of 21 years, the judge gave insufficient weight to the appellant's age (two and a half years younger than his nearest co-accused and nearly seven years younger than the oldest), and also to his background. We have summarised that by reference to the pre-sentence report.

21. In his written skeleton argument, Mr Glasgow drew our attention to the observation of Maurice Kay LJ in *R v Taylor* [2008] 1 Cr App R(S) 4, to the effect that it was "neither just nor logical" to impose "significantly divergent" minimum terms for two offenders of equal culpability when they were either side of their eighteenth birthdays. That was a reference to what is sometimes described as the absence of a "cliff edge" in the approach to sentencing those either side of their eighteenth birthdays. This, however, is not such a case, as Mr Glasgow readily accepted in his oral submissions. In chronological terms and in terms of maturity there is a real difference between a defendant who has just passed his sixteenth birthday and one who is

just shy of his nineteenth birthday.

22. The aggravating features identified by the judge in his sentencing remarks are unimpeachable, but we find ourselves in respectful disagreement with the judge's conclusion that, despite the appellant's youth and background, the starting point should be as high as 21 years. The appellant was a good deal younger than the others. That is itself a factor which carries significant weight. Moreover, a striking feature of this case is the appellant's circumstances, which we have summarised. They led him to be a drug user at 11, an addict by 13, and by the same age a professional drug dealer. By then he had been swept up into gang violence. Violence had been a constant background of his life from a very early age.

23. We would emphasise that a minimum term is just that. There is no automatic release from detention for those in the appellant's position. He will only be released if the Parole Board judges it safe to do so. Yet, this appellant was a child who was steeped in criminality whilst he was still of primary school age. He was only a little over 16 years when this dreadful murder was committed.

24. We accept Mr Bentley's submission that these factors, when taken together, lead to the conclusion that the minimum term of 21 years is significantly longer than is appropriate.

25. The use of a knife and the other aggravating features identified by the judge inevitably lead to the conclusion that the minimum term must be above the statutory starting point, despite the appellant's youth and circumstances.

26. In our judgment, the appropriate minimum term, having regard to all material factors in this dreadful case, is one of 16 years, to which the time spent in custody on remand will count.

27. In those circumstances, we allow this appeal and we substitute the minimum term of 16 years in the way we have described for that of 21 years.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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