



Neutral Citation Number: [2022] EWCA Crim 1104

Case No: 202201658 A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION
ON APPEAL FROM THE
CROWN COURT AT PETERBOROUGH
HIS HONOUR JUDGE ENRIGHT
T20227043

Royal Courts of Justice
The Strand, London
WC2A 2LL

22 July 2022

Before:

LORD JUSTICE STUART-SMITH

MRS JUSTICE FARBEY DBE

THE RECORDER OF LONDON

(His Honour Judge Lucraft QC)

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE
UNDER SECTION 36 OF
THE CRIMINAL JUSTICE ACT 1988

Between:

REGINA

- and -

JAKE LIAM McFARLANE

Mr N Hearn appeared on behalf of the **Attorney General**
Mr D Bishop appeared on behalf of the **Offender**

Approved Judgment

LORD JUSTICE STUART-SMITH:

1. This is an application by Her Majesty's Attorney General, under section 36 of the Criminal Justice Act 1988, for leave to refer to this court a sentence which she regards as unduly lenient.
2. On 16th March 2022, in the Crown Court at Cambridge, the offender pleaded guilty, to an offence of manslaughter and an offence of possession of a controlled drug of Class A with intent. On 29th April in the Crown Court at Peterborough he was sentenced by His Honour Judge Enright to 24 months' imprisonment for the offence of manslaughter and to a consecutive term of 21 months' imprisonment for the possession with intent. The total sentence was, therefore, 45 months' imprisonment. Ancillary orders were also made.

The Facts

3. On Sunday 30th January 2022, Mr Clitheroe was in the Samuel Pepys public house in Huntingdon with his partner. Towards the end of the evening as the public house was closing, Mr Clitheroe and his partner were outside and at some stage his partner came to be on the ground. An independent witness described Mr Clitheroe standing over his partner with his leg bent as if he was about to kick her. The witness then went out to stand between Mr Clitheroe and his partner. The offender and a friend of his then came out of the pub. The offender's friend went over and spoke to Mr Clitheroe. There were therefore two people speaking peacefully to Mr Clitheroe before what then took place.
4. A few seconds later, the offender ran up from behind and punched Mr Clitheroe once to the face or head, causing him to fall to the ground and hit his head. The offender then left the scene.
5. When police and paramedics attended, Mr Clitheroe was unconscious. He was taken to Addenbrookes Hospital where his breathing was assisted. He was placed in a medical coma and moved to the neuro-critical unit. Tragically, Mr Clitheroe died at just after 12.30 am on 3rd February 2022. A post mortem examination was conducted on 9th February 2022. The cause of death was described as "head injury". The forensic pathologist observed bruising to the left-hand side of the face, an occipital fracture at the base of the skull and a traumatic brain injury.
6. The offender was located on a train that was due to depart from Huntingdon train station on the afternoon of 30th January 2022. Officers detained him in respect of the assault allegation and he asked "Is he okay?". The offender was asked if there was anything the police should be aware of in his luggage. He replied "Gear and cocaine". He said that the drugs were in the front pockets of his suitcase.
7. The offender's bags were searched. The following items were found: multiple empty deal bags, digital scales, nine deal bags containing cocaine, a further bag which contained 11 further bags containing cocaine, and a mobile phone which was later found to contain messages relating to the supply of cocaine. The total street value of the recovered cocaine was in the region of £710.
8. At his police interview the offender initially answered "No comment" to all questions put to him about the offences. He then requested a consultation with his solicitor. The offender later admitted hitting a male after leaving the public house when he saw the male, whom he vaguely knew, arguing with two females and being aggressive towards

them (but not having used violence against them). The offender was apologetic in the police interview and stated that he had dealt with the incident in the wrong way.

9. The court had the benefit of three victim impact statements from Mr Clitheroe's partner of 20 years, his stepdaughter with whom he evidently had a close and loving relationship, and from his sister. Each spoke with eloquence that was heightened by their restraint as they described the devastating impact of his death upon their lives and on the lives of others, such as the employees who had to be laid off when his small business had to be wound down after his death. We have read them and take them fully into account.

Basis of Plea

10. The offender had from the outset accepted responsibility for the attack on Mr Clitheroe. Having initially been charged with an offence contrary to section 20 of the Offences against the Person Act 1861, he entered a written basis of plea to that charge, which he maintained once charged with manslaughter. In that basis of plea he said as follows:

"1. I accept that I am guilty of assaulting a male named Ian Clitheroe and causing serious head injuries in the early hours of 30th January 2022.

2. When I left the Samuel Pepys pub I have seen this male standing over a female and I thought he was about to assault her.

3. I accept that I have gone over and punched him once to the face and that he has fallen to the floor as a result.

4. At the time I thought I was acting in self-defence of this female but I accept in hindsight that my actions were probably not necessary and were not proportionate."

11. Having initially maintained that the drugs were for his personal use, the offender pleaded guilty on 16th March 2022 to the charge of possession of Class A drugs with intent to supply. He subsequently entered a basis of plea as follows:

"1. The drugs that I had in my possession on 30th January 2022 were mainly for personal use. I have a fairly heavy cocaine use and I buy in bulk before separating into small amounts for ease of use and to self-ration. I had all of these items in my property when I was stopped by police because I had planned to go away for a few days and I did not want the police finding these if they visited my home address.

2. I accept, however, that there are text messages on my phone which suggest an involvement in drugs supply.

3. I am a recreational drug user, as are many of my friends. I accept that friends who know I am a user myself will sometimes ask me to help them obtain drugs and me and my friends will sometimes buy drugs together to share.

4. I would not make any profits from selling drugs but I accept that

the friends with whom I would share the drugs that I purchased would contribute towards the costs of the purchases."

12. The prosecution did not, and the Attorney General does not, dispute the contents of the two written bases of plea.

Antecedents

13. The offender was born on 9th May 1999. He was therefore 22 years of age when he committed these offences. He had one previous conviction for an offence of battery committed on 13th January 2019, when he was aged 19. The facts bore an alarming similarity to the facts of the offence of manslaughter with which we are concerned. The circumstances of that offence were that the offender had spent the evening of 12th January 2019 consuming alcohol in the High Street area of Huntingdon, where the crime report stated that he saw a male who he believed was acting inappropriately towards a female. Both the male victim and female were unknown to the offender. The police report suggests that there was no evidence to support the offender's initial impression about what was happening between the male and the female. The offender followed the male to Huntingdon Bus Station, where he then assaulted him by throwing punches and kicking the victim whilst on the ground. The victim sustained a number of injuries, including a fractured outer right ankle, injuries to the right hand, and a number of injuries to the right cheek and eyebrows. For that offence the offender was sentenced to 18 weeks' detention in a young offender institution. There was also recorded against him a caution for an offence of battery in November 2017, when he was aged 18.

Pre-Sentence and Prison Reports

14. The court below had the benefit of a pre-sentence report. The offender told the author that he had been drinking with friends and was very intoxicated by the time of the assault. He had seen the victim being aggressive to one of two females and so had gone over and punched him. He explained that his younger sister had been the victim of physical and sexual abuse which had made him feel very strongly about females being abused and the need to protect them.
15. In a generally supportive report, while recognising the practical inevitability of a significant custodial sentence, the author assessed the risk of serious harm in the future as being medium, and recorded that the offender had responded well to previous supervision by the Probation Service.
16. We have had the additional benefit of a prison report from the offender manager who has been responsible for the offender since May 2022. It is apparent that he has responded constructively while in prison. He has applied to participate in the restorative justice programme and has made no attempt to justify his actions on the night of the offences. He has achieved enhanced Incentive and Earned Privileges status and is diligent in carrying out work in prison. His workplace supervisor gives him "a glowing reference for his helpful nature and assured presentation, showing enthusiasm and commitment to both staff and those he presents to".
17. We take these reports, as with all the other material before the court, fully into account.
18. There were four character references. One was from the offender's sister who spoke eloquently of his protecting her and the impact of what had happened in his earlier life.

Three others were from people who knew the offender well, either at work or socially. We have read them all. They are highly supportive. One refers to the offender having visited him shortly before the offences were committed and saying that he wished to turn his life around. It is regrettable to have to note that very shortly after that meeting, the offender was heavily intoxicated when he struck and killed Mr Clitheroe.

19. Finally, the offender had sent to the judge below a letter that was full of remorse, which the judge accepted to be genuine. As with all the other materials, we have read the letter and take it into account.

The Hearing Below

20. It was common ground before the sentencing judge that the offence of possession with intent to supply fell to be categorised under the drugs guideline as category C lesser role, for which the starting point after a trial would be three years' custody, with a range from two to four and a half years.
21. There were rival contentions about the proper categorisation of the manslaughter offence. The Crown submitted that it fell within culpability category C, between a case of higher culpability category B and lower culpability category D, because death was caused in the course of an unlawful act which involved an intention to cause some harm. In other words, by throwing such a heavy punch the offender must have envisaged or intended to cause some harm. That would indicate a starting point of six years' custody, with a range of three to nine years. The Attorney General notes in passing that category B would apply if the offender intended to cause harm falling just short of grievous bodily harm. The Attorney General does not submit that this was a category B offence, though it bears consideration, given the severity of the punch as described by witnesses.
22. On behalf of the offender, it was submitted that the case fell within category D because the death of Mr Clitheroe was caused in the course of an unlawful act which was in defence of the woman who had been on the ground. It was accepted that his actions by the time that he took them were neither necessary nor proportionate.
23. The judge recorded that "the defence of another was engaged ... and the evidence does suggest [Mr Clitheroe] presented a potential threat", although it is not clear from the transcript or from the recollections of counsel whether the judge regarded Mr Clitheroe as presenting a potential threat to his partner, who was on the ground, or to either one or two of the offender's friends who had approached Mr Clitheroe before the offender decided to intervene.
24. The judge held that the offender's response was "out of all proportion" and his finding was therefore that the offence fell into category D, with a starting point of two years' custody. He identified as aggravating features the offender's previous conviction "committed in drink in similar circumstances", which he regarded as a serious aggravating feature, and the caution. He identified drink as an additional aggravating feature, as were the fact that the offence was committed in a very public place and the impact on Mr Clitheroe's family.
25. Those aggravating features revised the starting point upwards to three years and six months' custody. As personal mitigation, the judge accepted that the offender was genuinely remorseful and that he had sought help for drink and drug use in counselling, and that he was 22 years old "young enough to change and inclined to do so". On that basis he reduced the sentence to three years' custody, before giving full credit for the

timely plea of guilty, which brought him to the sentence which he imposed for the offence of manslaughter, namely 24 months.

26. Turning to the drugs offence, the judge reduced the starting point of three years to two years eight months, to reflect personal mitigation. After a further reduction of 25 per cent for the guilty plea, he arrived at a sentence of two years. He then reduced that sentence to 21 months, apparently to reflect totality, which he ordered to run consecutively.

The Attorney General's Submissions

27. The Attorney General is represented before us by Mr Hearn, who did not appear before the court below. His submissions, shortly summarised, are that the sentence as a whole is unduly lenient because the judge should have held that the manslaughter charge fell within category C, with a starting point of six years' custody. That is submitted to be the appropriate category because the offender intended to cause harm to Mr Clitheroe. It is recognised that the offender thought that he was acting in defence of another person, but this can and should be reflected by a move downwards from the starting point of six years to five. The Attorney General draws attention to the fact that the offender delivered the punch on the run, and that he ran up and delivered the punch from behind, thereby giving Mr Clitheroe no possibility of taking evasive or defensive action.
28. In addition to the aggravating features identified by the judge, the Attorney General points to the failure of the offender to take any steps to help his victim or to hand himself in.
29. The aggravating features should, in the Attorney General's submission, then have exerted an upward adjustment, resulting in an increase of about 18 months. The mitigating features would then bring the notional sentence down by about 12 months. Had that approach been adopted, giving a full reduction for his early plea of guilty would have resulted in a sentence of 44 months' imprisonment, not the 24 months that the judge in fact imposed. The other elements of the sentence imposed by the judge are, and remain, appropriate.

The Offender's Submissions

30. The offender is represented before us, as he was before the trial judge, by Mr Bishop. His submissions may be summarised even more shortly. He submits that the judge's approach was correct and that the sentence was not lenient, let alone unduly lenient for the reasons given by the judge below.

Resolution

31. As the summary of the opposing submissions makes plain, the substance of this proposed Reference concerns the categorisation of the offence of manslaughter. We bear in mind the admonishments in the guideline that the court should avoid an overly mechanistic application of the various features that it identifies and that where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features. Both of these admonishments are relevant in the present case.

32. As the opposing submissions demonstrate, there are features of this case which mean that the categorisation of the offence is not entirely straightforward. In our judgment, it is wrong in principle to latch on to the offender's belief that he was acting in defence of another, however rational or irrational that belief may have been, and on that basis alone to categorise the case as falling within category D so as to start at a notional sentence of two years. It is wrong because it ignores the offender's grossly disproportionate and entirely unjustified response. Even if he did think that someone needed to be defended, others had already intervened peacefully before he launched his attack. There was, in truth, no justification for launching it as he did.
33. It follows that a substantial adjustment from the starting point of two years would be required before making further adjustments for aggravating and mitigating features, and reduction for the guilty plea. That did not happen, with the result that the ultimate sentence was too low.
34. At the same time, while we would accept that the offender must have envisaged inflicting some harm, or been reckless as to whether harm was caused or not, mechanistic application of category C, without any adjustment for the offender's belief that he was defending someone, would also be wrong in principle, as the Attorney General's submissions recognise.
35. In our judgment, the Attorney General's approach properly reflects the gist of the guideline, which is that where a person commits manslaughter by causing death in the course of an unlawful act which involved either an intention by the offender to cause harm, or recklessness as to whether harm would be caused, consideration of the appropriate sentence starts in category C, subject always to appropriate adjustment.
36. If we stand back and look at this offence in the round, it is better characterised by regarding it as a category C case that requires a degree of adjustment because of the offender's belief that someone needed defending, rather than as a category D case that requires a degree of adjustment because of the disproportionate and wholly unjustifiable violence that the offender inflicted on Mr Clitheroe.
37. For these reasons we consider that the sentence passed by the judge was not merely lenient, but was unduly lenient. If, as we consider appropriate, one adopts the six years derived from category C as the appropriate starting point, we agree that there should be an adjustment of about one year to reflect the offender's misguided belief that he was defending someone who needed to be defended.
38. We also agree that the net effect of the aggravating features identified by the judge, and the mitigating features that emerged from the offender's letter to the court, the pre-sentence report, the prison report and the character references, is that there should be a further net upward adjustment of about six months. That being so, we agree that a sentence after reduction for the guilty plea of 44 months' imprisonment would result.
39. Standing back and applying the principle of totality, we have considered whether a further reduction for totality, in addition to the three months' reduction of the sentences for the drugs offence is required. We are not persuaded that it is.
40. For these reasons we give leave to bring the Reference. We quash the sentence of 24 months' imprisonment for the offence of manslaughter and we substitute a sentence of 44 months' imprisonment. All other aspects of the sentence passed by the judge below remain as before, so that the effect of the aggregated sentence of five years and five

months' imprisonment is that the offender will now serve two-thirds of that sentence before being eligible for release.