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IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 1080



No. 202302184 A2

Royal Courts of Justice

Wednesday, 30 August 2023

Before:

LORD JUSTICE POPPLEWELL
MRS JUSTICE TIPPLES

REX

V

JAMIE MALCOLM MARTIN RUSSELL

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MR J ALLCHURCH appeared on behalf of the Applicant.

MS S CUTTER appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE POPPLEWELL:

- 1 On 8 June 2023, in the Crown Court at Swansea, the applicant pleaded guilty to the common law offence of preventing a decent and lawful burial of a dead body, having indicated his intention to do so at the first opportunity before the magistrates.
- 2 On 16 June, he was sentenced to two years' imprisonment. The application for leave to appeal against sentence has been referred to this court by the registrar. We grant leave.
- 3 The applicant is 45. He has a history of alcohol and drugs abuse. He had had a diagnosis of anxiety and depression for which he had been prescribed medication, which, unfortunately, he had stopped taking at the time of the offence. He had had lengthy periods of homelessness, which was how some years ago he had met the deceased, Matthew Scott, who, when he died, was aged 42. By that time, the applicant was living in a flat in Neath, which he allowed to be used as what he described as a dosshouse for others who were drug users.
- 4 Mr Scott was reported missing by his family on 9 June 2022. His ex-partner was Elizabeth Dean and they had two children together, then aged 22 and 19.
- 5 CCTV was reviewed by police in their efforts to locate Mr Scott. Footage showed that he had last left his flat on 4 June and had not returned. On 17 June, a witness told officers that he had seen Mr Scott and another male outside the door to a flat on Windsor Road in Neath, near to a betting shop. He believed this had been between 7 and 9 June.
- 6 On 28 June, officers attended the betting shop and were told by an employee that since the previous week they had noticed maggots coming through the ceiling into the shop. It was established that the applicant was the tenant of the flat immediately above the shop and officers attended there just after 3 p.m. that afternoon. They knocked but got no reply. They noticed a bad smell coming from the flat and flies emerged from the doorframe, when they knocked. Officers entered the flat.
- 7 The applicant was there and said that he had been sleeping. When asked if there was anything in the flat that should not be, he replied, "Yes, my mate, Matthew" and directed them towards a bedroom. When asked if he was still alive, the applicant shook his head.
- 8 Mr Scott's body was found in the room lying on a mattress. It was clear that he had been dead for some time. He was wearing the same clothes which he had been wearing when seen leaving his home on 4 June on the CCTV.
- 9 The applicant told officers that he and Mr Scott had taken heroin in the flat; that he had left Mr Scott there with a blanket over him to sleep and gone into another room; and that, when he woke up, he realised Mr Scott was still under the blanket, had not moved and was now unresponsive. He said that he had tried mouth-to-mouth resuscitation but that it had not worked. Officers observed that there was various drugs paraphernalia in the flat. They also saw that the applicant had placed candles in front of the bedroom door and had a tee-shirt rolled up underneath it in an attempt to block the smell.
- 10 The applicant was originally arrested for supply of Class A drugs and taken into custody. The pathologist examined Mr Scott and confirmed that there were no physical injuries or evidence of any significant natural diseases. It would not have been possible to establish with any certainty whether there were drugs in his system due to the condition of his body at the time.

- 11 An entomologist concluded, as a result of examination of the fly larvae found on Mr Scott's body, that it was likely that they would have been present from as early as 10 June. It was the prosecution case that Mr Scott died at the flat sometime between 7 and 10 June and had therefore been there for 18 to 21 days before the police discovered the body.
- 12 CCTV footage from the vicinity of the applicant's flat was obtained for the period from 8 June onwards. It showed the applicant coming and going on his daily business to and from the flat on a regular basis from that date up to and including the day of his arrest.
- 13 A volunteer at a local night shelter, who knew the applicant from her work there, saw the applicant out in Neath one evening between 22 and 25 June and said that it was clear to her at that point that the applicant was back on drugs. According to her, he seemed to be withdrawn and shaky and told her that he wanted to talk about something terrible which had happened and did not know what to do, but needed someone to speak to. He did not, however, reveal to her what the issue was.
- 14 In interview, the applicant gave a prepared statement, stating that he had been friends with Matthew Scott for about ten years. In June, they had met in town, on a date which he could not specify, and had gone back to the applicant's home and taken heroin. Mr Scott had said that he wanted to sleep so the applicant left him where he was and went to watch a film. When the applicant checked on Mr Scott later, he saw he was unresponsive. The applicant tried to resuscitate him by using a Narcon spray but that had not worked. As a result, the applicant said that he had had a panic attack and was in denial. He said that he had slept very little since the event. His memory was unclear about the timescale involved, because of his drug and alcohol addiction. Following that prepared statement, he made no comment to further questions put in interview.
- 15 In recounting his recollection of events to the author of the pre-sentence report, he was asked why he had not contacted emergency services, when he was unable to rouse Mr Scott. He was unable to answer this question other than to say that he was scared. He explained that his response to Mr Scott's dead body lying in his flat was to take more drugs "in order to block things out".
- 16 When sentencing, the judge had a short format pre-sentence report, which revealed that prior to the offence, the applicant had ceased to engage with alcohol and drugs agencies and had stopped taking his medication. Since the offence, his life had changed for the better. From October 2022, he had been living in supported accommodation and had re-engaged with the community drug and alcohol team. He was reportedly testing negative for substances. He was also engaging with the mental health team where his medication was under review. The author of the report considered that a custodial sentence might mean that he would lose his place in supported housing upon release. That would be a considerable backward step in the author's view, in his returning to temporary accommodation in local hostels, where, without the current support, he would be far more vulnerable. The author suggested that a suitable community sentence could include a curfew as a punitive element and a rehabilitative activity requirement to continue his rehabilitation.
- 17 The judge also had a statement from the team leader managing the applicant's new supported housing, attesting to the progress he had made, and expressing the view that it would be devastating to see the applicant lose his tenancy as a result of going to prison, given the positive changes he had been making.

- 18 The applicant had a few minor and irrelevant convictions, the last of which occurred in 2003 and had given rise to a drug treatment and testing order.
- 19 There was a statement from Mr Scott's ex-partner speaking to the impact of the offence for herself, for the two sons and for wider family members. There was also a statement from the two sons. Those statements testified to the very considerable distress caused when Mr Scott was missing and the harrowing consequences for the family of the subsequent discovery of what had happened. They also spoke of the misery of being unable to view the body due to the extent of decomposition, and to the smell emanating from the coffin which had ruined the funeral.
- 20 The prosecution provided the judge with a schedule of nine reported cases. These were: *R v Hunter, Atkinson and Mackinder* (1973) 57 Cr App R 772; *R v Swindell* (1981) 3 Cr App R (S) 255; *R v Parry and McLean* (1986) 8 Cr App R (S) 470; *R v Skinner (Patrick and Ian)* (1993) 14 Cr App R (S) 115; *R v Godward* [1998] 1 Cr App R (S) 385; *R v Lang (Jack Thomas)* [2001] EWCA Crim 2690, [2002] 2 Cr App R (S) 15; *R v Sullivan (Frank)* [2003] EWCA Crim 806, [2003] 2 Cr App R (S) 91; *R v Gale (Colin)* [2018] EWCA Crim 120, [2018] 4 WLR 132; and *Attorney-General's Reference (R v Tarbox)* [2021] EWCA Crim 224, [2021] Cr App R (S) 36.
- 21 The judge treated the most helpful of these as *R v. Parry and McLean*. In that case, the deceased, a drug addict, died whilst staying the night at the flat of the two appellants. They decided to hide the body to avoid attracting attention to themselves and for fear of going to prison. They tied the hands behind the back, wrapped the body in a carpet and plastic, and drove it to a remote location near a disused quarry where they rolled it down a wooded slope. They initially told the police that they had no idea of the location of the deceased or what had happened. However, the body was discovered some four or five weeks later, as a result of McLean eventually telling the police what had happened, and leading them to the location. The sentences of three years for Parry and two and a half years for McLean were upheld on appeal. The six-month difference reflected the fact that McLean had led the police to the body.
- 22 The judge referred to the harrowing consequences for Mr Scott's family and to the personal mitigation involved in the applicant's vulnerability, his genuine remorse and his steps to re-engage with his alcohol and drugs problem. The judge treated an appropriate sentence after trial as one of three years' imprisonment, which he reduced to two years, giving full credit for the guilty plea. He rejected a submission that the sentence should be suspended, saying that the seriousness of the offence was such that appropriate punishment could only be achieved by immediate custody.
- 23 Mr Allchurch, who represented the applicant below and in this court, argues that the length of the sentence was manifestly excessive and that the sentence should have been suspended. With a respondent's notice prepared by Ms Cutter, who also appeared below, the Crown has drawn our attention to two further cases, which were not before the judge when sentencing: *R v. King (Diane Susan)* (1990) 12 Cr App R (S) 76 and *R v. Peddar* [2002] Cr App R (S) 36.
- 24 We have considered each of the 11 cases to which we have been referred. A number of principles emerge from them.

(1) The offence of preventing a lawful and decent burial, like the similar common law offence of obstructing the coroner in the execution of their duty, is a serious one, which, save in exceptional circumstances, requires a custodial sentence. The harm

involved usually includes the indignity and degradation caused to the deceased; the misery caused to the deceased's family and friends, resulting from anxiety whilst the person is missing, subsequent knowledge of the degrading circumstances following death, and the impact on the ability to have a decent funeral and burial; risks to health; and the prevention of an appropriate and timely investigation into the circumstances and cause of death. The offence involves a serious affront to public standards of decency.

(2) Where the crime has been committed with the intention of preventing an investigation into the cause of an unnatural death, for example, where the death is one for which the offender or another is responsible, the offence will fall at the more serious end of the scale, because it involves a deliberate obstruction of the course of justice and justifies a deterrent element (*Godward*). In such cases, sentences of the order of five to six years may be appropriate to mark the gravity of the offending before considering other aggravating and mitigating factors (*Skinner, Lang*).

(3) Where there is no such intention, but the body has been deliberately concealed and the police misled, sentences of about three years will be appropriate to mark the gravity of the offending before considering other aggravating and mitigating factors (*Hunter, Swindale, Parry and McLean, Godward, Sullivan*). Where there is no deliberate concealment, but merely a passive failure to report the death, the starting point will be in the range of 18 months to two years (*King, Peddar*). Other relevant factors relating to the offending will include the length of time for which the body remains undiscovered; conduct which assists or delays the discovery of the body; and the impact on the deceased's friends and family.

- 25 The cases which we have found of most assistance on their facts are *King* and *Peddar*. In *King*, a drug addict had permitted another older addict to stay at her property, where he died during the night. She panicked when she found him dead and did not contact the police, because there was an outstanding warrant for her arrest, as a result of her being in breach of an existing community order. She put the body, wrapped in a duvet, in a back bedroom, where it remained for some six weeks before she confessed to a friend what had happened, as a result of which the body was discovered. She pleaded guilty. She showed deep regret. Her sentence of 21 months was reduced to one of 12 months. This suggests that the starting point is likely to have been in the range of 18 months to two years.
- 26 In *Peddar*, the appellant and the deceased had been taking heroin at the appellant's flat. The appellant woke up the next morning to find the deceased dead. He became frightened and stayed away from the body because his wife had died from a heroin overdose. The body remained undiscovered for some six weeks. This court treated the sentence of 18 months, which had been imposed following a guilty plea, as appropriate for the offending, but reduced it to 12 months to reflect the offender's particular personal mitigation.
- 27 In this case, the applicant did not intend to obstruct an investigation into the circumstances or cause of an unnatural death for which he or another was responsible; there was no intention to obstruct the course of justice; and he did not take any active steps to conceal the body. When the police arrived, he did not seek to mislead them.
- 28 There are a number of aggravating features. It is not clear whether Mr Scott was already dead when he was first found by the applicant to be unresponsive and, therefore, it is impossible to say that the applicant's failure to call for emergency assistance played any part in Mr Scott's death. Nevertheless, that failure is a feature which aggravates his culpability. His reported attempts at resuscitation indicate that, at the lowest, he was not sure that

Mr Scott was dead when he discovered him to be unresponsive. Moreover, he failed to take the opportunity to alert the police or others to the fact of Mr Scott's death and the location of the body on the many occasions on which he left the flat going about his daily business. He had the opportunity to do so, when he saw the worker, and was clearly agitated and wanted to speak about it but failed to take that opportunity. His initial reaction may have been one of shock or panic, but that cannot have lasted over the period of weeks in which he was living his normal life. His explanation to the author of the pre-sentence report that he was in fear lacked the coherence of being able to say of what it was that he was afraid. The impact on the victim's family was considerable. There was also an unpleasant health risk to those in the betting shop below. The body might have remained undiscovered for much longer had it not been for the police enquiries.

- 29 There was also significant personal mitigation. The applicant was himself vulnerable as a result of his lifestyle. He expressed himself to be devastated and showed genuine remorse. Since the offence, he had re-engaged with the community drug and alcohol team and engaged with the mental health team, where his medication was under review. What we have been told today about his time in prison confirms that that progress has continued. He has been, by all accounts, a model prisoner and has continued his engagement with his former drug and alcohol difficulties with success.
- 30 Taking all those matters into account, in our view, an appropriate custodial sentence after a trial would have been one of 18 months' imprisonment, which with full credit for the guilty plea becomes one of 12 months' imprisonment. The judge was led into error in taking what must have been a figure in excess of three years as his starting point, before allowance for personal mitigation, by not having had cited to him the cases of *Peddar* and *King*, which we have found of most assistance. This is not a case like *Parry and McLean*, on which the judge principally relied, in which there had been a concealment by removal of the body to a remote place, where it was intended to remain undiscovered, and an initial misleading of the police in their enquiries; rather this case involves a passive failure to report the death.
- 31 Mr Allchurch renewed the argument before us that the sentence should have been suspended, emphasising the positive steps taken by the applicant to turn his life around in the period since the offence, suggesting a real prospect of rehabilitation.
- 32 Although those arguments were attractively presented, we agree with the judge that the seriousness of the offending is such that only an immediate period of imprisonment could be justified. Custody has no effect on any family members, and the considerations which were prayed in aid in respect of the applicant himself are all matters which we have taken into account by way of mitigation in relation to the length of sentence.
- 33 Accordingly, we quash the sentence of two years and substitute a sentence of 12 months' imprisonment. To that extent, the appeal is allowed.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.