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Neutral citation No. [2023] EWCA Crim 35

IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202203323/A2



Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 13 January 2023

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE MORRIS

MR JUSTICE SWEETING

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

REX

V

JOSEPH BARKER

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MS C PATTISON appeared on behalf of the Attorney General.

MR P KELEHER KC appeared on behalf of the Offender.

J U D G M E N T

LORD JUSTICE DINGEMANS:

Introduction and grounds of the application

1. This is the hearing of an application by His Majesty's Solicitor General for leave to refer a sentence which he regards as unduly lenient.
2. The respondent, Joseph Barker, was born on 16 May 1999 and is now aged 23 years. He was acquitted of the murder of Kai Davis but convicted of Mr Davis's manslaughter on 14 October 2022, following a trial which lasted a little over 3 weeks in the Crown Court at Kingston before HHJ John Lodge and a jury and on 19 October 2022 Mr Barker was sentenced to imprisonment for 11 years by the judge.
3. It is submitted on behalf of the Solicitor General that the judge erred by concluding that the sentence of 11 years reflected the multiple aggravating factors and the overall seriousness of the offence committed by Mr Barker. It is submitted that the judge should have increased the starting point by more to reflect the aggravating factors and should not have discounted it by as much as he did to reflect the mitigating factors and that the sentence was, it was submitted, substantially too short.
4. It is submitted on behalf of Mr Barker that the judge was best placed to make the factual findings that he did and the sentence was a proper sentence given the findings made by the judge. The aggravating features had been fairly reflected by the judge and the mitigating factors were there to be seen. The sentence was not lenient or unduly lenient.

Factual circumstances

5. The unlawful killing of Mr Davis took place on 21 August 2021. On the evening of 20 August 2021 Mr Barker had travelled to Kingston with others. Mr Myles was in possession of a knife which he was prepared to use should the opportunity present itself. Mr Barker did not know that Mr Davis (who was known as "KD") would be in Kingston

that evening. There was no pre-arranged plan to meet up with or attack Mr Davis at that stage of the evening. Details of the events are shown in the graphic stills and CCTV evidence which we have seen on the Digital Case System.

6. Mr Barker, together with others including Mr Myles, decided to go to a nightclub in Kingston called Pryzm. Before entering Pryzm Mr Barker, Mr Myles and another male, Mr Baker-Perez, deposited two knives in the Weston Park alleyway. They knew that there were stringent entry procedures at Pryzm and that knives could not be taken inside.
7. Mr Davis did not go to the Pryzm Nightclub that night. He travelled to Kingston with his friend, Brendon Baxter. There they met Olivia Baxter (Mr Baxter's sister and Mr Davis's former partner). Ms Baxter left Mr Davis who remained in Kingston with Mr Baxter. They were stood amongst a group of people who had congregated around the Wilko store following the closing of the Pryzm Nightclub.
8. After leaving the Pryzm Nightclub in the early hours of 21 August 2021 Mr Myles and Mr Baker-Perez met outside a hair salon on Clarence Street on the opposite side of the road to the Wilko store. After a short time they were joined by Mr Adams and Mr Barker. Mr Adams whispered in the ear of Mr Myles, and the prosecution case was that Mr Adams had told Mr Myles that Mr Davis was outside the Wilko store. Mr Myles together with Mr Barker, Mr Adams and Mr Baker-Perez walked along Clarence Street past the Wilko stores. Mr Myles together with two others, that is Mr Barker-Perez and Mr Adams, entered Weston Park alleyway and it is at that time that they must have retrieved the two knives that had been left there earlier. Mr Myles, Mr Barker-Perez and Mr Adams returned to a metal archway at the top of the Old London Road close to the Wilko store. Mr Barker was stood by the archway and was a short distance from the doors of the Wilko store where Mr Davis and Ms Baxter were standing. Mr Barker had

by now obtained a hooded top from another person which was, as has been pointed out in the submissions to us today, used as a disguise for what happened next. The judge inferred at this stage that Mr Barker must have been given a knife. Mr Barker and Mr Myles were now each armed with a knife. A short time later Mr Myles obtained a hooded top as well. Mr Barker and Mr Myles pulled the hoods over their heads. Mr Barker-Perez then walked in the direction of the Wilko store and was followed by Mr Barker, Mr Myles and Mr Adams. Mr Barker and Mr Myles went through the group towards the doors where Mr Davis and Mr Baxter were stood. Mr Barker and Mr Myles approached the doors of Wilko and one of the two said "KD?", effectively confirming, it was said by the prosecution, that they had the correct target.

9. CCTV footage from the Wilko store demonstrated that any confrontation with Mr Davis lasted no longer than 3 seconds. In fact Mr Myles stabbed Mr Davis once to the chest and then ran away along Clarence Street. Mr Myles discarded the knife down a drain on a quiet side street. The knife was recovered during the investigation. Mr Davis ran away from the doors of Wilko. He was chased a short distance by Mr Barker who then stopped and returned to the large group of people by Wilko store. Less than 2 minutes later Mr Barker walked across the road and then a confrontation took place between Mr Barker and persons not associated with Mr Davis. At this stage Mr Barker had a knife in his hand, which he held by his side. He discarded that knife and it was later received by security staff from Pryzm who seized it.
10. Mr Barker and Mr Myles met up a short time later by the Cromwell Street bus station in Kingston. Mr Barker removed the hooded top and discarded it. They were then joined by Mr Barker-Perez and another individual and they returned towards the area of the Kingston railway station. Mr Barker-Perez returned to the area around Wilko where he

met Mr Adams. By now Mr Davis had collapsed. Mr Adams was aware of that and having had a brief conversation with Mr Adams, Mr Barker-Perez re-joined Mr Barker and Mr Myles and ultimately the three of them took a taxi away from Kingston.

11. Mr Davis had sustained a single stab wound to the chest. He was given emergency medical assistance at the scene of his collapse and in hospital. The injuries were so serious that his death followed. He was pronounced dead at 5.47 on 21 August 2021.
12. A post mortem was carried out which showed that the stab wound had penetrated the chest to a depth of 7 to 13 centimetres. Mr Davis had other injuries, mainly abrasions to his face, hands and legs but those were likely to have been caused by the collapse to the ground.
13. Mr Barker left his home address and stayed with relatives before he was arrested. The clothing that he was wearing that night and his mobile telephone were not recovered by the police. Mr Myles left his home address and travelled to the Portsmouth area for two nights and the hooded top that he was wearing was also not recovered.
14. Mr Barker was arrested. When interviewed by police he provided a short statement denying that he had stabbed Mr Davis. Mr Barker did not answer any questions in interview. He was charged and Mr Myles and Mr Adams were also charged. Mr Baker-Perez had fled the jurisdiction before he could be arrested.
15. At the trial Mr Myles was convicted of murder. Mr Barker was acquitted of murder but convicted of manslaughter and Mr Adams was acquitted of all offences.

The sentence

16. The judge had available Sentencing Notes from the prosecution and defence. There were victim personal statements from Mr Davis's sisters describing the impact of the death of Mr Davis which had had on each of them and their family. Reference was made to the

role played by Mr Davis and the lives of his niece and daughter and the death of Mr Davis had had a particular serious effect on the family because of earlier bereavements. There were also character references about Mr Barker showing his qualities as a loving father and being a kind and caring person.

Sentencing remarks

17. The judge said that the jury were given clear directions on manslaughter in the form of a Route to Verdict. They must have concluded as follows: Mr Barker participated in an unlawful attack on Kai Davis in that he intentionally assisted or encouraged Mr Myles, or was in a position to assist, if it became necessary. Mr Barker did not intend that Mr Myles would act with intent to cause death or really serious bodily harm to Mr Davis. Finally, a reasonable person would have concluded that there was a risk of some harm to Mr Davis. The judge said:

"It is clear from [Mr Barker's] acquittal for murder, that he did not intend that Ben Myles would use the knife, if necessary, to [inflict] death or really serious bodily harm [to Mr Davis]."

18. The judge recorded that the attack had involved the use of a weapon and Mr Barker knew that there was going to be an attack. He had a knife in his possession at the time of the attack and he knew that Mr Miles had a knife in his possession. The judge also recorded that Mr Barker had not drawn or used the knife that he was carrying during the incident. He had dropped it soon after. He had changed his clothing. He knew of the trip to Weston Park where the two knives were recovered and was present when Mr Myles changed his clothing, indicating that there was some planning. In fact the judge said:

"On these facts, the prosecution invite me to conclude that the factor I have

set out above, namely that death was caused in the course of [an] unlawful act which carried a high risk of death or really serious bodily harm, which ought to, was, ought to have been obvious to the offender, is so extreme that I should raise the category to one of Category A. I am not able to make that finding, I conclude that the case stays within Category B, albeit with aggravating factors."

19. The judge rejected the submission that Mr Barker had come into the possession of the knife after the fatal stabbing of Mr Davis, and the judge made a finding in relation to culpability, where he said that:

"In this case I am satisfied Joseph Barker knew there was to be an attack, he had changed his clothing. I am satisfied that he knew Ben Myles had a knife at the time of the attack. He knew of the trip to Weston Park, and was present when Ben Myles changed his clothing."

20. The judge referred to the Unlawful Act Manslaughter Definitive Sentencing Guideline and stated:

"In my judgment, this case falls within Category B, indicating high culpability. The guideline sets out, death was caused in the [course] of an unlawful act which carries a high risk of death or really serious bodily harm, which was or ought to have been obvious to [Mr Barker]."

This is one of the factors indicating high culpability.

21. The judge took a starting point of 12 years' imprisonment from the Sentencing Guideline, noting there was a category range of 8 to 16 years. The judge identified aggravating factors which increased the seriousness of the offending and merited an upward adjustment of 2 years from the starting point of 12 years' imprisonment to 14 years' imprisonment. Those aggravating factors were: the use of a weapon; there was some planning because clothing was changed, and the judge said he could not say there was a lack of premeditation. This was not a spontaneous attack but the judge did not find premeditation in the sense of the Guideline saying he was not able to make that finding.

The judge identified mitigating factors which merited a downward adjustment of 3 years' imprisonment from 14 years' imprisonment to 11 years' imprisonment being age (which at the time was 22 years) and lack of previous convictions. The judge disregarded a youth conditional caution which Mr Barker had and positive good character set out in the references. The sentence was therefore 11 years' imprisonment. A different and substantially more severe sentence was passed on Mr Myles who was convicted of murder.

The decision

22. In our judgment, the judge, who was the trial judge and who had seen all of the evidence at the trial (although Mr Barker had not given evidence) was best placed to make the findings that he did about the relevant category for the purposes of the Sentencing Guideline. This is common ground. In our judgment, the judge was also entitled to make the findings that he did in relation to aggravating factors. The Solicitor General is right to identify that there is an overlap between the category ranges for culpability A which is *very high culpability* and culpability B which is *high culpability*, but that does not mean that the judge was entitled to treat this as a culpability A offence when he had found that it was a culpability B offence.
23. So far as the other aggravating factors identified by the Solicitor General are concerned, the Solicitor General points to the fact that Mr Barker was armed with a knife. That is true and the judge specifically referred to it and identified that in relation to his sentencing remarks. The Solicitor General refers to the fact that the death occurred in the context of an offence that was planned or premeditated. It is right that there was a planned or premeditated attack on Mr Davis, and that was an important finding made by the judge, but it is also important and indeed only fair to Mr Barker to note that the judge

carefully identified what was planned or premeditated so far as Mr Barker was concerned, on the basis of the jury's findings. There is no basis to interfere with these findings.

24. So far as location and timing of the offence is concerned, the judge referred specifically to those factors when setting out the circumstances of the offence. The offence was committed under the influence of alcohol. It is plain that there had been drinking that night and indeed that was common ground at the trial but, in our judgment, the submission made on behalf of Mr Barker that that did not very much affect the culpability found by the judge was a proper submission to make. The judge noted that it had been submitted that this offence was committed as part of a group. In fact there was a group that walked towards Mr Davis but the verdicts show, on the basis that it was only Mr Myles who was convicted of murder, that it was only Mr Myles who had the requisite intention to kill or cause really serious bodily harm and indeed it was Mr Myles who appears to have carried out the stabbing without the knowledge of the others, at that stage.
25. Reference was also made on behalf of the Solicitor General to post-offence conduct and the judge referred to all those factors in his sentencing remarks. Finally and importantly, the Solicitor General refers to the need for deterrence for knife crimes of this sort. That is an important submission but the Sentencing Guidelines already take account of the need for deterrence for knife crime by specifically identifying the statutory and other aggravating factors including the offence involved the use of a weapon. In our judgment, it is not possible to go outside the Sentencing Council Guidelines simply because of the need for deterrence. Mr Barker was convicted of manslaughter and not murder.
26. It is common ground that the judge had identified the right mitigating factors which were

age, no previous convictions and positive good character. Therefore that leaves us with the Solicitor General's overarching submission which was the judge should have put the sentence up by more than the 2 years that he did and should not have reduced the increased sentence of 14 years by the 3 years that he did. In our judgment, that is a submission which is not well founded in this case. That is because the judge was the person who had seen and heard all of the trial and was best able to identify the aggravating and mitigating factors at the relevant time. This was a sentence which was within the range provided in the Guidelines based firmly on the findings of fact which were properly made by the judge.

27. In these circumstances, we are unable to say that this is a sentence that was unduly lenient. We have not been able to identify any failing on the part of the trial judge in the sentencing exercise and therefore refuse leave for the Reference.

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

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