IN THE COURT OF APPEAL

CRIMINAL DIVISION

CASE NO 202202480/B4

NCN: [2024] EWCA Crim 349

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 26 March 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE CALVER
THE RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Sitting as a Judge of the CACD)

REX
V
A.Z.R.

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MR F FITZGIBBON KC and MR F McGRATH appeared on behalf of the Appellant
MR J EVANS KC appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: This is a case in which an order under section 45 of the Youth Justice and Criminal Evidence Act was made in relation to both the appellant and his co-accused at trial. That order will continue, meaning that he cannot be identified until he and the co-accused reach the age of 18. Any report of this case will anonymise him. He will be identified as AZR.
2. On 18 July 2022 before Her Honour Judge Munro KC and a jury sitting in the Central Criminal Court, the appellant was convicted of murder. At the date of his trial he was 16, his 17th birthday being the following October. His co-accused, to whom we shall refer as A, was also convicted of murder. This appeal against conviction is brought by the appellant with the leave of the full court. He has a single ground of appeal, namely that the trial judge erred in failing to leave to the jury the partial defence of loss of control. She concluded that no sufficient evidence of loss of control had been adduced in the course of the trial for the jury to be required to consider the defence. The appellant argues that she was wrong to reach that conclusion.
3. The events which led to the appellant's conviction occurred on 23 April 2021 when he was aged fifteen-and-a-half. On the afternoon of that day the appellant and A went to a flat in Star Lane, East London where A's grandfather lived. The grandfather owned a sword stick. When they left the appellant and A took the sword stick with them. It was the appellant who carried it. They walked to the nearby Barking Road where they met two other young men. They were standing on the pavement as a group of four when they were approached by a 15-year-old named Hyams and a 14-year-old named Fares Maatou.
4. There was a history of bad blood between the appellant and A on the one hand and people associated with Hyams on the other. In March 2020, A had been the victim of a stabbing which had caused some significant injury. In April 2021 the appellant had been

in a fight with a boy who had had a knife, in the course of which he suffered a small cut which did not require medical attention. A and the appellant believed that these incidents involved people associated with John Hyams. Neither of them knew Fares Maatou and there was no suggestion that he had been involved in any previous trouble.

5. What happened between the appellant, A, Hyams and Maatou was captured on good quality CCTV. We have been able to watch the footage a number of times. The incident unfolded as follows. Hyams and Maatou were standing together on the pavement of Barking Road in East London. There came a point where Hyams walked along the pavement towards the group which included the appellant and A. Maatou rode behind him on an electric scooter. Hyams came face to face with A. Within a second or so, A pushed Hyams away and then punched him. At the same time Maatou (who was standing nearby) let the scooter on which he had arrived fall to the ground. Hyams then moved forward. Although not easy to pick out on the CCTV, he was holding a small knife. He pushed the knife towards the appellant. The appellant in the event suffered no injury, probably because the knife hit the appellant's mobile phone which was in a pocket. As this happened, Maatou was standing nearby. He had had something in his hand. On the CCTV footage it appeared to be a mobile telephone. Whatever it was, he put it into his pocket. Otherwise Maatou did nothing and had nothing in his hand.
6. After the thrust with the knife, Hyams moved backwards. Maatou also moved backwards, slightly behind Hyams. At this point the appellant drew the sword out of the stick. That involved unscrewing the top and pulling the sword out of the walking stick. He dropped the stick, which was picked up by A. Both of them moved forward quite quickly towards the retreating Hyams and Maatou. Hyams moved away past Maatou, leaving Maatou nearest to A and the appellant. Maatou himself continued to back away.

The appellant used the sword to lunge at Maatou. A attacked Maatou by striking him with the stick. There were three apparent lunges by the appellant with the sword. The first two missed Maatou. The third and final blow occurred when Maatou had fallen to the pavement. His back was to the appellant. The appellant stabbed Maatou with severe force. The blow with the sword penetrated Maatou's shoulder blade and caused fatal injury to the lungs and pulmonary artery. Notwithstanding his grievous injury Maatou was able to get up but he collapsed not along afterwards. He died at the scene. The appellant and A ran and went off in different directions.

7. The appellant was arrested five days later. On arrest he said: "It was self-defence. It was him or me."

8. Prior to his interview he was shown the CCTV. In the course of the interview he said this:

> "... as you can see on camera the, the other boy that was with the boy on the scooter he had a knife in his hand and he tried to lunge that for me in my stomach so therefore ... I panicked, like, cos I didn't wanna get stabbed again like last week, the week before that I got stabbed in my arm and I do think it was by the same people, so I didn't wanna get stabbed that's why I was walking around with a knife ... in fear for my life ... he tried stab me first so I panicked, I need to protect myself and that's when I didn't, I didn't, I, and plus I didn't know if his friend was armed as well, I only knew one of them was armed, I don't know, I don't know but other, I don't know but the other if he had a knife on him, I don't know if he had a knife on him or not so ... I, I was just, I was just in heat of the moment and I panicked ... and I just stabbed one of them."

9. The appellant later repeated that he had panicked. He said he was in shock and that he feared for his life. He did not know what was going to happen. Had he been calmer he would have gone off.

10. The appellant's defence statement said this in relation to the nature of his defence:

> "The accused was acting in self-defence throughout."

11. Under the heading "Matters of law" this appeared:

> "It is submitted that in the course of the trial the jury may need a direction in accordance with sections 54 and 55 of the Coroners and Justice Act 2009. It is understood that the qualifying trigger may be the defendant's fear of serious violence from Fares Maatou against him."

12. In the event, the appellant did not give evidence at the trial. The only prosecution witnesses were police officers through whom the CCTV evidence and the interview material was adduced. A did give evidence. The history of bad blood to which we have referred came from what the appellant said in interview and A's evidence in the trial.

13. During the trial written submissions were made on behalf of the appellant that the judge should leave the defence of loss of control to the jury. The judge considered those submissions at the conclusion of the evidence. She concluded that insufficient evidence had been adduced to raise the defence. She provided a written ruling which we summarise as follows. She noted that the appellant had never said that he lost his self-control. He had not given evidence at trial. His case was that he acted in a considered way, arming himself with a sword and stabbing Maatou because he believed that Maatou had a knife and was going to attack him. It was not a frenzied attack, rather a measured one in respect of which the question was whether the Crown had disproved lawful self-defence. The judge noted that the fact that the appellant had armed himself with a weapon did not mean that he could not rely on a loss of self-control. However, she said there was ample other evidence negating any loss of control by the appellant. His

interview made it clear that the defence was self-defence. The CCTV evidence established that, prior to stabbing Maatou, the appellant had checked to see if he had been injured by Hyams. Only when he had done that did he unscrew the sword from its sheath and remove it. When Hyams retreated out of reach, the appellant turned his attention to Maatou. He delivered controlled blows with the sword, in particular to Maatou's back.

14. The judge concluded there was no evidence whatsoever of a loss of control. In interview the appellant had described acting out of panic, out of shock, out of fear in the heat of the moment. None of those untested emotions equated to a loss of self-control. In any event there was no qualifying trigger. There was no evidence that the appellant had any cause to fear serious violence from the unarmed Maatou. On the CCTV Maatou had done nothing to use or threaten any violence. The appellant's assertion that he feared Maatou may have a knife could not support the proposition that the appellant did have or might have had a fear of serious violence.

15. The defence of loss of control appears in section 54 of the Coroners and Justice Act 2009. The relevant parts read as follows:

> "(1) Where a person ('D') kills or is a party to the killing of another ('V'), D is not to be convicted of murder if —
>
> (a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control
>
> (b) the loss of self-control had a qualifying trigger, and
>
> (c) A person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.
>
> ...
>
> (4) Subsection (1) does not apply if, in doing or being a party to

the killing, D acted in a considered desire for revenge.

(5) On a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under subsection (1), the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

(6) For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply."

16. The term "qualifying trigger" is defined in section 55 of the 2009 Act. The part of section 55 which is relevant for our purposes is as follows:

> "(2) A loss of self-control had a qualifying trigger if subsection (3), (4) or (5) applies.
>
> (3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person."

It is not suggested that any other qualifying trigger applied in this case.

17. On behalf of the appellant, Mr Fitzgibbon KC began his submissions by referring us to *Coutts* [2007] 1 Cr App R 6 which establishes that in any case a judge should leave to the jury any obvious alternative offence of which there is evidence to support. *Coutts* is still good law. However, we consider that, in the context of the defence of loss of control under the 2009 Act, more recent authority directed specifically to the test to be applied by the judge in such a case is of greater relevance. The best exposition of the principles is to be found in *Goodwin* [2018] EWCA Crim 2287. The factors set out in *Goodwin* require repetition in the context of this case:

(i) The required opinion of the trial judge is to be formed as a commonsense judgment formed based on an analysis of all the evidence.
(ii) If there is sufficient evidence to raise an issue with respect to the defence of loss of control, it is to be left to the jury whether or not the issue has been

expressly advanced as part of the defence case at trial.
(iii) The appellate court will give due weight to the evaluation 'the opinion' of the trial judge who will have had the considerable advantage of conducting the trial and hearing all the evidence and having a feel of the case. The appellate court will not readily interfere with that judgment.
(iv) However, that evaluation is not to be equated with an exercise of discretion so that the appellate court is only concerned with whether the decision was within a reasonable range of responses on the part of the trial judge. Rather, the judge's evaluation has to be appraised as being either right or wrong.
(v) The 2009 Act is specific that evidence must be 'sufficient' to raise an issue. It is not enough if there is simply some evidence which falls short of that definition.
(vi) The existence of a qualifying trigger does not necessarily connote that there will have been a loss of control.
(vii) For the purpose of forming his or her opinion the trial judge, whilst of course entitled to assess the quality and weight of the evidence, should not reject evidence which the jury could reasonably accept. It must be recognised the jury may accept the evidence which is most favourable to a defendant.
(viii) The statutory defence of loss of control is very different from and more restricted than the previous defence of provocation.
(ix) A much more rigorous evaluation on the part of the trial judge is called for than was previously the case under the law of provocation.
(x) The statutory components of the defence are to be appraised sequentially and separately. Thus, if the defence falls at the first hurdle it falls altogether.
(xi) Each case is to be assessed by reference to its own particular facts and circumstances.

18. In the context of this case, we emphasise the following: the judge's conclusion must be based on a common sense reading of all the evidence; the trial judge will have had the advantage of the feel of the case upon hearing all of the evidence; the evidence must be sufficient to raise the issue, the mere existence of some evidence not being sufficient; a rigorous evaluation of the evidence is required.

19. Before us, the principal submission is that sufficient evidence of loss of self-control came from what the appellant said in interview, coupled with the circumstances apparent from the CCTV. The appellant was 15 at the time of the incident and when he was interviewed. When the appellant said that he panicked, that was sufficient to raise the

issue. Whether the jury would accept it would be a matter for them. It was an error for the judge to say that panic could not equate to loss of self-control. In his written submissions Mr Fitzgibbon noted that the dictionary definition of "panic" is "an excessive or unreasoning feel of alarm or fear leading to extravagant or foolish behaviour". Thus, he argued someone who is panicked by definition has lost self-control.

20. With great respect to Mr Fitzgibbon, reliance on a dictionary definition without reference to the context in which the term was used by the appellant is inappropriate. That is the opposite of the rigorous approach that is required. When the appellant said that he was panicked, this was in the context of Hyams stabbing him and his need to protect himself. He did not know if the other one, namely Maatou, had a knife. In the heat of the moment he panicked and stabbed Maatou. In the context of the appellant's interview, panic did not mean loss of self-control. Rather, it was the language used to explain what might otherwise have seemed to be aggression going well beyond any concept of self-defence. That is confirmed by the use of the phrase "in the heat of the moment". What the appellant did not say at any stage was that he had lost control. His actions as seen on the CCTV footage were not those of someone who had lost self-control. After the movement from or attack by Hyams, the appellant checked that he was uninjured. He then unscrewed the sword and drew it out of the stick. Those were the actions of somebody who was in control. We are quite satisfied the judge was correct to rule as she did on that point.

21. If that is correct then that is the end of the appellant's appeal. If any one of the factors in section 54(1) is absent the defence cannot succeed. The judge went on to consider whether there was a qualifying trigger. We are satisfied that she was correct to conclude that there was no qualifying trigger. The appellant said that he did not know whether

Maatou had a knife. He could not have feared serious violence from Maatou. In so far as Maatou had ever put his hand anywhere close to a pocket, he did not do that as the appellant advanced with the unsheathed sword. Maatou was backing away. When the fatal blow was struck he was lying on the ground. No reasonable jury considering the CCTV footage would have been able to find that the appellant might have feared serious violence from Maatou.

22. Although the judge did not mention section 54(4) of the Act, the CCTV footage in our view shows the appellant acting out of a desire to revenge the attempt by Hyams to use the knife against him. Since Hyams was too far away, he turned his attention to Hyams' friend. That individual had caused no danger to the appellant. He was not putting the appellant at risk of serious injury.

23. The judge did not consider the final limb of the test within section 54(1) of the 2009 Act. Mr Fitzgibbon argued that that in itself was an error. We disagree. The judge having dismissed the appellant's case on the first two limbs of the defence, it was unnecessary for her to move onto the third. It likewise is unnecessary for us to do so. We would be engaging in a speculative exercise which would be wholly unnecessary.

24. It follows that we are quite satisfied the judge was entirely correct in refusing to leave the defence of loss of control to the jury. The appeal is dismissed.

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