Neutral Citation Number: [2021] EWCA Crim 390

Case Nos: 202002927 A1, 202002958 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WINCHESTER
The Hon Mr Justice Jacobs
T20207042

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/3/2021

Before:

THE RT HON THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON LORD JUSTICE HOLROYDE
and
THE HON MRS JUSTICE LAMBERT DBE

- -

Between:

TIMOTHY KEITH BREHMER	**Applicant/ Respondent**
- and -	
REGINA	**Applicant/ Respondent**

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

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Jo Martin QC and Jane Rowley (instructed by **Slater and Gordon Lawyers**) for the **Appellant**
Timothy Cray QC (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 10 March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 18 March 2021.

LORD BURNETT OF MALDON CJ:

1. On 28 October 2020 Timothy Brehmer was sentenced by Mr Justice Jacobs at Salisbury Crown Court to 10½ years' imprisonment for the manslaughter of Claire Parry. The offender had been charged with murder. He had pleaded guilty to manslaughter at the Plea and Trial Preparation Hearing ("PTPH") and later, in his defence statement, advanced the case that whilst guilty of an assault he lacked the intent for murder (unlawful act manslaughter). He was tried for murder. The judge left the partial defence of "loss of control" to the jury. The jury acquitted of murder. It fell to the judge to decide on what basis of manslaughter to sentence the offender: *R v King* [2017] EWCA Crim 128, [2017] 4 WLR 95. The judge was satisfied so that he was sure that the offender had the necessary intent for murder but lost control for the purposes of the partial defence. He sentenced the offender having regard to the definitive guideline of the Sentencing Council for manslaughter following loss of control. He concluded that that the appropriate sentence was one of 12½ years' imprisonment before a discount for the guilty plea to the different type of manslaughter. He applied a discount of a little over 15% which resulted in the sentence of 10½ years' imprisonment.

2. The Attorney General seeks leave to refer the sentence to the Court of Appeal as unduly lenient. For reasons which we will develop we are satisfied that the sentence was unduly lenient and must be raised to 13½ years' imprisonment. An application for leave to appeal against sentence has also been referred to the court.

3. The 41 year old offender was a police officer who had been having an "on and off" extra marital affair for about ten years with Claire Parry, who was a 41 year old nurse with two small children. Her husband knew of the affair and was contemplating leaving her. In early May 2020 Claire Parry decided to tell the offender's wife about the affair. Internet searches had led her to conclude that the offender was a serial womaniser. She told the offender of her intention, but he did not take the opportunity to tell his wife himself. On the evening of 8 May the offender was on a night shift and spoke at length to Claire Parry. He left work at 06.45 on Saturday 9 May and spoke to her again. She was angry and the offender believed that she was on the point of telling his wife about their affair. Claire Parry was due to start a shift at 16.00 that afternoon. She sent the offender a message telling him to meet her at the Horns Inn pub car park at 15.00.

4. The offender found a pretext to leave home and arrived at the car park at 14.30. Mrs Parry arrived at 14.44 and got into the offender's car. At 15.02 a text message was sent from the offender's phone to his wife which read "I'm cheating on you". That was sent by Claire Parry. Calls and texts from Mrs Brehmer in response were ignored. At 15.05 the offender reset his phone thereby removing all personal details. There was a fight in the car but precisely when it started is unknown. The car was parked out of sight of CCTV cameras.

5. At 15.26 the offender was recorded by CCTV walking across the car park to the entrance. He had three knife wounds on his inner left forearm with bloodstains on his shorts and shirt. He spoke to a passing couple and told them he had been stabbed. One phoned the emergency services. He said nothing of Claire Parry. The other looked around the car park and found her body lying half in and out of the driver's door. Her face was blue with blood coming from her mouth. Both witnesses thought

that she was dead. Although her heart had stopped it was restarted and she died in hospital the following day. At the scene, the offender said that it was Mrs Parry who had stabbed him. The penknife used was in fact his and kept in the glove compartment of the car. He was arrested at the scene at 16.44 and conveyed to hospital for treatment for his injuries. There he said he "might" have stabbed himself to get Claire Parry's attention. In interview the following day he accepted that he had stabbed himself.

6. One consequence of his initial lie was that the members of the public were warned by the 999 operator to keep away from the person in the car.

7. The offender's account of what occurred after the text message was sent at 15.02 was that he and Claire Parry continued to talk. She was in the passenger seat and he asked her to get out of the car. When she refused, he said that he tried to hoist her out of the vehicle. It was during this struggle that he had applied pressure to her neck, not realising what he was doing. That resulted in her death. The prosecution's case was that the offender had become angry when the deceased had sent the text message to his wife, at which point he must have strangled her.

8. The evidence of the pathologist confirmed severe injury to the neck with a fractured hyoid bone and damage to the cartilage to the right and left of the larynx. There was deep internal bleeding and bruising in the neck tissues and bruising near the jaw line. There was multiple evidence of asphyxiation. There were two mechanisms that might have caused the injuries: either using the crook of an elbow as a fulcrum or by putting the forearm across the throat. The extent of the injuries was such that the minimum period of compression was between 10 and 30 seconds. It was this that led to asphyxiation and starved the brain of oxygen which killed Claire Parry. There were 31 separate sites of blunt force trauma on her upper body. These were made up of 9 areas of bruising to the trunk, 11 areas of bruising on the upper right arm, 10 areas of bruising and abrasion to the left arm and an area of bruising and laceration in the mouth. The prominent areas of bruising on the arms were consistent with grabbing actions and the injury to the mouth with a blow. It was clear that Claire Parry had fought back hard to resist the violent attack of the offender. The offender gave an account of events which did not explain the neck injuries.

9. The judge referred to the moving victim personal statements in this sad case which gave details of the impact of Claire Parry's death on her children, immediate family and more widely. He concluded that the qualifying trigger for the defence of loss of control was only just met with the consequence that, for the purposes of the guideline, the starting point was 14 years' imprisonment, with a range of 10 to 20 years. He identified two aggravating factors. First, Claire Parry endured significant mental and physical suffering and would have appreciated that the offender was killing her. Secondly, the offender's conduct in the immediate aftermath of his violent attack. He sought to blame Claire Parry and accused her of attacking him with a knife, a lie in which he persisted until the following day. As a policeman, that was especially reprehensible. In mitigation, the judge accepted that the offender was a man of positive good character in serving the public, that he was remorseful, that the offence was not pre-meditated and that as an ex-policeman he could expect a difficult time in prison. He also took account of the current restrictions in prison resulting from the Covid 19 pandemic.

10. Mr Cray QC, on behalf of the Attorney General, advances three grounds in support of the reference.

11. First, the overall seriousness of the case required an initial upward adjustment from the 14 year starting point to ensure that the sentence for manslaughter through loss of control was not disproportionate to the sentence that would have been imposed had there been a conviction for murder. Despite the guideline identifying a starting point of 14 years it would have been right to start at or near the top of the range.

12. In the alternative, and secondly, the judge erred in his balancing of aggravating and mitigating factors. In consequence he arrived at a sentence before discount for plea which was too low by a significant margin.

13. Thirdly, the judge should not have afforded the defendant a 15% discount for his plea. Mr Cray acknowledges that at the sentencing hearing below prosecution counsel conceded that the discount could be 15% or less, but that, he submits was an error. There was a full trial because the offender failed to accept that he had the necessary intent for murder. There should have been no reduction or a much-attenuated discount.

14. Ms Martin QC for the offender submits that it was not open to the judge on the evidence to conclude that the offender had the necessary intent for murder. He was bound to sentence based on the offender's case of unlawful act manslaughter. In the alternative she submits that the judge was correct in his application of the guideline, was entitled to balance the aggravating and mitigating factors as he did and apply the discount for guilty plea.

Discussion

15. The judge approached the question of how to sentence the offender meticulously by reference to *King.* The verdict of the jury left open the possibility of two types of manslaughter, unlawful act or loss of control. If he was sure of one of those types, he was bound to sentence on that basis. If unable to be sure of either, he was bound to sentence on the more favourable basis to the offender. The judge was sure that the offender was guilty of manslaughter by reason of loss of control and was therefore right to sentence him on that basis. There is no doubt that the evidence admitted of that conclusion. It was left to the jury. We are unable to accept Ms Martin's core submission that the judge was bound, on the evidence, either to accept that the offender lacked the intent for murder or be unsure on the issue.

16. The guideline for sentencing in cases of manslaughter by reason of loss of control is one of a suite of four definitive guidelines published by the Sentencing Council, which came into effect on 1 November 2018. They collectively cover the four principal forms of manslaughter.

17. In *R v Long, Bowers and Cole* [2020] EWCA Crim 1729, [2021] 4 WLR 5, at [68] and [69], the court summarised the role of the Sentencing Council and the transparent process, including widespread public consultation, by which it develops a new guideline. At [70] the court quoted the provisions of section 125 of the Coroners and Justice Act 2009, now contained in section 59 of the Sentencing Code introduced by the Sentencing Act 2020:

> "**125 Sentencing guidelines: duty of court**
>
> (1) Every court—
>
> (a) must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and
>
> (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,
>
> unless the court is satisfied that it would be contrary to the interests of justice to do so"

18. When the Sentencing Council develops an offence-specific guideline, it identifies the principal factors by which the seriousness of that type of offence must be assessed and categorised. In relation to manslaughter offences, the principal factors relevant to the assessment of seriousness in a case of manslaughter by reason of loss of control are different from those relevant in cases of manslaughter by reason of diminished responsibility, or manslaughter by gross negligence or unlawful act manslaughter. Hence the publication of four separate guidelines, and the need for a sentencing judge to follow the guideline which is relevant to a particular case.

19. Every offence-specific guideline sets a range of sentences which appropriately reflect the varying seriousness which individual examples of that type of offence can be expected to cover. The effect of section 59 of the Sentencing Code is that a judge must impose a sentence within the guideline offence range unless satisfied, in the circumstances of an individual case, that it would be contrary to the interests of justice to do so. In the present case, Mr Cray QC does not suggest on behalf of the Attorney General that the judge should have sentenced outside the guideline, but rather at the top of the range. Nonetheless, he suggests that the starting point should be moved upwards beyond 14 years.

20. As this case illustrates, one of the factors which may place a case into the highest level of culpability under the guideline for offences of manslaughter by reason of loss of control is that there was "loss of self-control in circumstances which only just met the criteria for a qualifying trigger". The guideline therefore expressly covers cases which come close to murder. The submissions on behalf of the Attorney General suggest a need to avoid undue disparity between sentences for murder and sentences for manslaughter. We agree; but that is what the guidelines for offences of manslaughter do. In developing the four manslaughter guidelines the Sentencing Council considered the provisions of schedule 21 to the Criminal Justice Act 2003 (now contained in schedule 21 to the Sentencing Code), and the consequences of that schedule for the length of the minimum term which an offender would be required to serve if he were convicted of murder, rather than manslaughter, and sentenced to life imprisonment. But the Council also had to consider, in setting the appropriate sentence levels, the important distinctions between murder and manslaughter. For example, in the guideline for offences of manslaughter by reason of loss of control, it had to take into account that the ingredients of the partial defence require not only that an offender meets the criteria relating to the qualifying trigger, but also that a person

of his age and sex, with a normal degree of tolerance and self-restraint and in his circumstances, might have reacted in the same or a similar way. It is therefore to be expected that the sentence for an offence of manslaughter by reason of loss of control will be substantially less than the sentence for a murder in comparable circumstances.

21. The structured approach imposed by the guideline requires a judge, at Step 1, to determine the appropriate offence category. In doing so, the judge is directed to balance the listed characteristics in order to reach "a fair assessment of the offender's overall culpability in the context of the circumstances of the offence". The judge is then required, at Step 2, to use the corresponding starting point to reach a sentence within the relevant category range. If a case does not fall squarely within a category, the guideline permits an adjustment from the starting point before adjustment for aggravating or mitigating features. The guideline then lists factors which may increase or reduce seriousness or reflect personal mitigation. These lists are expressly stated to be non-exhaustive. The sentencer is required to –

> "[i]dentify whether a combination of these or other relevant factors should result in any upward or downward adjustment from the sentence arrived at so far."

22. In a case of murder, schedule 21 sets different starting points for the determination of the minimum term, according to the circumstances of the case. It is possible that a circumstance which would lead to a higher starting point under schedule 21 in a case of murder may arise in a case of manslaughter, though we do not think that will very frequently happen in a case of manslaughter by reason of loss of control. To the extent that such a circumstance does arise, a judge may properly treat it as an aggravating factor when determining, in accordance with the manslaughter guideline, where the appropriate sentence lies in the guideline range. Exceptionally, it might contribute to a conclusion that the interests of justice required a departure from the guideline in that particular case. *Long, Bowers and Cole* was a case in which the trial judge reflected the fact that the victim was a police officer killed in the course of duty in the sentences. Had the offenders been convicted of murder that would have resulted in enhanced minimum terms attached to sentences of life imprisonment.

23. However, we reject the suggestion (implicit in the submissions on behalf of the Attorney General) that if an offence of manslaughter may be regarded as coming close to murder, the sentencing judge should focus on schedule 21 rather than on the guideline. Such an approach would be contrary to the duty imposed on the judge by Parliament through section 59 of the Sentencing Code.

24. We therefore consider the appropriate sentence in the present case by reference to the guideline applicable to offences of manslaughter by reason of loss of control. The judge correctly placed the offence into the highest category of culpability, on the basis that the criteria for a qualifying trigger were only just met. The case fell squarely within that category, and there was no basis for making any adjustment to the starting point before considering the aggravating and mitigating features. The appropriate starting point was therefore 14 years' custody, with a range from 10 to 20 years.

25. The judge then had to consider the aggravating and mitigating factors, to balance those factors against each other and to reach a conclusion whether there should be an

adjustment either upwards or downwards from the starting point before giving credit for the guilty plea.

26. That was what the judge did. He identified as aggravating features the mental and physical suffering of Claire Parry before she lost consciousness and the reprehensible conduct in the aftermath of his attack. He identified as mitigating factors good character, remorse, lack of pre-meditation and the impact of prison both by reference to the offender being an ex-police officer and Covid. He concluded that a balancing of those factors resulted in a significant downward adjustment from the starting point of 14 years to 12½ years before giving credit for the guilty plea.

27. We would make a general observation about Covid related adverse impacts of imprisonment. Over the last year it has been a potent factor in cases involving relatively short sentences, those where there is a question whether a custodial sentence may be avoided and those where the sentence might be suspended. There continue to be restrictions on those in custody which result in long periods in the cell and which limit visits; for how long or with what intensity they will continue is unclear. Nonetheless, the longer the sentence required by the offending the less impact this feature can have.

28. Sentencing for manslaughter, even with the benefit of guidelines, is far from easy. We have considered carefully the circumstances in which Claire Parry lost her life at the hands of this offender. With respect to the judge, we are satisfied that he gave too little weight to the aggravating factors he had identified. The extent of her injuries shows that she was under attack for some time and clearly a period which exceeded the 10 to 30 seconds or more that her neck was compressed. She struggled in a fruitless attempt to protect herself and must have been aware of what was going to happen. The judge said that he "was sure that you did deliberately take Claire Parry by the neck applying significant force with your forearm or the crook of your elbow for a period of time whilst she struggled against you." The offender's conduct and lies after the attack were reprehensible and calculated to deflect attention from what he had done. These aggravating factors have the effect of moving above the starting point significantly before considering the mitigating factors. In respect of the mitigating factors identified by the judge, we observe that lack of pre-meditation is a necessary part of the loss of control defence.

29. Our conclusion is that having weighed all those matters the appropriate sentence before discount for the guilty plea to manslaughter should have been 15 years' imprisonment.

30. The offender entered a plea of guilty to unlawful act manslaughter on 8 July 2020 at the PTPH, which the judge accepted was "effectively, the first opportunity". The judge reduced the sentence by two years, a little over 15%. He considered the position to be similar to that following a *Newton* hearing (where there is a trial before the judge to establish the basis of plea) and gave the appellant broadly half of the credit to which he would have been entitled had his basis of plea been accepted.

31. As we have indicated, Mr Cray accepted that the position may not be "all or nothing" but that if some credit were justified then it should be very limited indeed. He submits that none of the benefits which justify a reduction in sentence were present in this case: there was no reduction in the impact of the crime upon the family of the

deceased; the witnesses still had to give evidence and no time or money had been saved. In short, the public interest had not been served by the guilty plea entered to the offence of unlawful act manslaughter. Although acknowledging that the jury had acquitted the offender of murder, he fell to be sentenced on the basis that he had possessed the requisite intention for murder, even though his culpability was reduced by a short period of loss of control. Mr Cray disputed that the trial was analogous to a *Newton* hearing as all the key facts remained in issue including the offender's state of mind at the time of the killing and whether the fatal occlusion of Claire Parry's airway was a deliberate act or, as the offender contended, an inadvertent part of the general assault.

32. Ms Martin submits that the analogy with a defendant who fails to establish his basis of plea in a *Newton* hearing is apt: the offender had accepted criminal responsibility for the death by his earlier plea and had not sought to raise alternative defences such as self-defence, accident or diminished responsibility. The fact that there was a trial was not of the offender's making because the prosecution was determined to proceed with a trial for murder. On this basis, his plea justified credit and the level of credit given by the judge accorded with the Sentencing Guideline for Reduction in Sentence for Guilty Plea at F2 "Newton Hearings and special reasons hearings". Where an offender's version of events is rejected at a *Newton* hearing the reduction which would have been available at the stage of proceedings the plea was indicated should normally be halved.

33. Section 73 of the Sentencing Code (formerly section 144 Criminal Justice Act 2003) requires the court to take into account in determining what sentence to pass on an offender who has pleaded guilty to an offence both the stage in the proceedings at which the offender pleaded guilty and the circumstances in which the indication was given. The definitive guideline for reduction in sentence for a guilty plea, effective from June 2017, does not directly cover the unusual situation which arose in this case in which the offender pleaded guilty to manslaughter on one legal basis but was to be sentenced on a different basis. The principles in the guideline can nonetheless be applied.

34. The guideline sets out at [B] "Key Principles" the benefits of an early plea of guilty which:

> "a) normally reduces the impact of the crime upon victims;
>
> b) saves victims and witnesses from having to testify; and
>
> c) is in the public interest in that it saves time and money on investigations and trials."

We accept Mr Cray's submission that in this case the offender's plea at the PTPH to unlawful act manslaughter produced none of those benefits. There was a trial which lasted for several days and many witnesses were called, both lay and expert. We doubt that the effect of the offender's plea in July 2020 afforded the family of Claire Parry much solace or comfort. Although Ms Martin submitted that, had the trial been limited to the issue of loss of control, little evidence beyond the offender himself would have been called, we do not accept this. Although we cannot exclude the possibility that a small number of witnesses might not have been required to give oral

evidence, the same questions of the precise circumstances in which Claire Parry was killed and the offender's state of mind at the time of the killing would be central to a trial of murder and to a trial of manslaughter on the basis of loss of control.

35. We also accept that technically the trial was not a *Newton* hearing in which the factual basis for the prosecution case is challenged to the extent that it is relevant to sentencing. However, in our view the judge was correct to consider that the hearing was analogous, or akin, to such a hearing. The offender had accepted criminal responsibility for the killing, albeit on a much more limited basis than that found by the judge at the conclusion of the trial. That said, as the guideline makes clear, an arithmetic *pro rata* reduction is not called for in every case.

36. Having had the benefit of argument which was not available to the judge we conclude that the offender's plea to unlawful act manslaughter did not justify a credit in the order of 15% for two reasons. First, as the guideline expressly says at F2: "where witnesses are called during such a hearing it may be appropriate further to decrease the reduction." This supports a conclusion that a reduction of 15% was excessive. However, we also bear in mind that, unlike a *Newton* hearing where the factual basis for the plea of guilty is in issue, in this case the appellant pleaded guilty in July 2020 on a radically different factual and legal basis from that upon which he was to be sentenced. We accept that some credit is justified because of his acceptance of criminal responsibility but conclude that it should be no more than 10%. In the result the sentence in this case should be one of 13½ years' imprisonment.

Conclusion

37. We grant leave to the Attorney General to make a reference to the Court of Appeal. We quash the sentence of 10½ years' imprisonment and substitute a sentence of 13½ years' imprisonment. The application for leave to appeal against sentence is dismissed.