



Neutral Citation Number: [2022] EWCA Crim 1064

Case No: 202102271 B4 AND 202101177 B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BIRMINGHAM
Mr Justice Jeremy Baker
T20207114

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2022

Before:

LORD BURNETT OF MALDON,
LORD CHIEF JUSTICE OF ENGLAND AND WALES
MRS JUSTICE MCGOWAN
and
MR JUSTICE HENSHAW

Between:

Regina
- and -
Emma-Jayne Magson

Respondent

Appellant

Claire Wade QC and Paramjit Ahluwalia (instructed by Aitken Harter Solicitors) for the
Appellant

Mary Prior QC and Paul Prior (instructed by The Crown Prosecution Service) for the
Respondent

Hearing date: 8 June 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on 29 July 2022.

Lord Burnett of Maldon CJ:

Introduction

1. The issue in this appeal against conviction is whether the direction given to the jury on the question of self-defence was adequate and whether the judge should have included the “householder defence” enacted by section 76(5A) and (8A) of the Criminal Justice and Immigration Act 2008 (“the 2008 Act”).
2. On 5 March 2022 the appellant was convicted of the murder of James Knight following a trial before Jeremy Baker J and a jury in the Crown Court sitting in Birmingham. She had previously been convicted of murder on the same indictment following a trial in 2016. That conviction was overturned on appeal in 2020 and a re-trial was ordered. On 29 March 2022 the appellant was sentenced to life imprisonment with a minimum term of 17 years, less 136 days served on remand.
3. She appeals against her conviction by leave of the single judge and renews her application for leave to appeal against the length of the minimum term. The sole ground of appeal against her conviction is that the trial judge directed the jury on the elements of common law self-defence but failed to sum up on the statutory modification of the “householder defence”.

The Statutory Householder Defence

4. The common law test of self-defence has two elements. The first is subjective: did the defendant believe, or may she have believed, that it was necessary to use force to defend herself from attack? The second part is objective: was the force used by the defendant reasonable in all the circumstances as she believed them to be?
5. The second part of the test was amended to accommodate the “householder defence” by sections 76(5A) and (8A) of the 2008 Act. The statute provides a gloss on the second question:

“76 Reasonable force for purposes of self-defence etc.

...

- (5A) In “a householder case”, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

...

- (8A) For the purposes of this section “a householder case” is a case where—

- (a) the defence concerned is the common law defence of self-defence,

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is forces accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.”

The Facts

6. The appellant and James Knight met in the autumn of 2015. Their relationship was volatile. The appellant lived at 25 Sylvan Street, Leicester. James Knight’s brother, Kevin, lived a few houses away in the same road. As soon as the relationship began James Knight moved into the appellant’s home where she lived with her daughter. He would leave for short periods after arguments.
7. On 26 March 2016 they went out separately with their own friends. They had both been drinking and Mr Knight had taken cocaine. They met in a bar but because he was acting aggressively, he was asked to leave. Police were called and spoke to him. He was allowed to leave and both got a taxi back to Sylvan Street. They had a violent argument in the taxi. The appellant kicked Mr Knight and they were both told to get out. They continued the journey on foot and were seen and heard to be arguing loudly. At one point Mr Knight pushed the appellant to the ground.
8. The Crown’s case was that when the appellant and Mr Knight reached 25 Sylvan Street, she entered alone. He banged on the door for ten minutes asking to be let in (albeit the door was in fact unlocked). The appellant then armed herself with a knife, opened the front door, and stabbed him.
9. The appellant’s account was that she and Mr Knight initially entered the house together. He then accused her of having an affair with a friend of his who he then phoned. Mr Knight then left the house by the front door and she went to shut it after him. However, before she had a chance to close the door, he kicked it open, re-entered the house and kicked her so that she fell to the floor. Then, as summarised by the judge in his summing up:

“She told you that she got up and walked into the kitchen in order to go and get a drink. However, before she was able to do so, James Knight put one of his hands around the front of her neck and pushed her backwards against the front of the sink. Emma Magson described that her left hand was trapped behind her back and her body was leant backwards over the sink. She told you that she couldn't move and felt a rush of what she described as pins and needles to her body. She told you that she felt as though she couldn't breathe and she thought he wasn't going to let her go, therefore she reached out with her right arm over her left shoulder to grab an object out of the sink which she used to hit James Knight. She told you that when she did so, she didn't intend to cause him really serious harm and just wanted to stop him.”

10. After being stabbed, Mr Knight tried to make his way to his brother's address but collapsed in the street. He was bleeding heavily from a stab wound to his chest. Neighbours came to offer help. The appellant told them that he had been beaten up by bouncers in the centre of Leicester; that he was drunk and had been taking drugs, but that he was fine. She repeated that account to another of Mr Knight's brothers, Jack. After the collapse Mr Knight's brother, Kevin, helped him back into the appellant's house. He did not realise that his brother was badly injured but believed that he needed to sleep it off.
11. At 03.00 on 27 March the appellant called 999 and said that Mr Knight had arrived at her home and collapsed, having previously been fine. The emergency services explained the ambulance might be delayed but the appellant said that did not matter. By the time the police attended, the appellant had changed her clothes. She told the officers that she did not know that Mr Knight had been stabbed or was injured.
12. The medical report showed that Mr Knight had been stabbed to the left upper chest area. The blade had passed through the pleural cavity into the upper lobe of the left lung and cut through the trunk of the pulmonary artery. The pathologist concluded that the deceased could have survived for a period of about 45 minutes; his condition would have deteriorated until his eventual collapse and death.
13. The appellant was arrested. A scientific examination of the house was undertaken. No damage was found to the locks on the front door. There were marks to the door and no signs of disturbance in the house. Pooled and dripped blood was seen in the sitting room at the front of the house. It was not possible to provide scientific evidence to show where in, or outside, the house the wound had been inflicted.
14. The knife was found at 16.00 on 27 March in a bin at 19 Sylvan Street. The appellant had placed it there before the police attended the scene. On arrest the appellant was found to have bruises to the front of her neck and one to the front of her left thigh. She had acrylic nails and hair extensions but with no damage. When interviewed the appellant made no comment. After charge she gave a prepared statement along the lines of her account at trial. Her defence statement was to similar effect. It said that Mr Knight had tried to throttle her over the sink and she acted from fear.
15. The judge gave the jury written directions on the law, including the law on self-defence, including that:

“an individual who is or who obviously believes that she is about to be assaulted is not expected to weigh to a nicety the exact measure of necessary action, and if you consider that what the accused did was only what she honestly and instinctively thought was necessary in order to defend herself, then that would be strong evidence that her use of force was reasonable in the circumstances.”

Ground of Appeal

16. The sole ground of appeal against conviction advanced by Miss Wade QC on the appellant's behalf is that the judge erred in not summing up the issue of self-defence based on sections 76(5A) and (8A) of the 2008 Act. Miss Wade submits that the

appellant was a householder and that if the jury concluded that Mr Knight had entered as a trespasser or had become a trespasser after the appellant had refused to let him into the property, then she was entitled to rely on the householder defence.

17. Miss Wade, among other things, highlights the fact that in the course of his subsequent sentencing remarks, the judge said:

“Once back at 25 Sylvan Street I am sure that you decided not to let James Knight enter your home, as a result of which he started to kick the front door, whilst you were heard shouting by one of the neighbours that you were not going to let him inside”.

18. The judge’s sentencing remarks also indicated that he was not satisfied that it could necessarily be determined that the applicant had taken the knife to the front door and stabbed Mr Knight there, as opposed to elsewhere in the property (the difference being relevant to whether the appellant had brought the weapon to the scene for sentencing purposes). Miss Wade submits that those findings indicate that Mr Knight was a trespasser, thus entitling the appellant to the householder defence direction. Miss Wade recognises that she and her team did not appreciate at the second trial that the householder defence could be in play. She also accepts that the different legal team who had represented the appellant at the first trial had also overlooked this issue and that the appellant had not suggested that she believed Mr Knight to be a trespasser. Nonetheless, she submits that the judge should have directed the jury in accordance with section 76(5A) of the 2008 Act and his failure to do so renders the conviction unsafe. She relies on the account of the neighbour hearing the appellant saying that she would not allow the deceased to come into the house, and the appellant’s own evidence that she did not want the deceased in the house when he had been using cocaine, as he undoubtedly had on this night.
19. Mrs Prior QC, for the Crown, argues that the householder defence never arose in this case because the deceased was not a trespasser, either in law or in fact. She submits that the couple, despite arguments and violence on the way home, had entered the house together and it was in the contemplation of both that the deceased would spend the night there. She points out that each had used violence towards the other in the past and on that night; there was evidence that the appellant had kicked the deceased in the taxi, and that he had pushed her to the ground as they were walking home.

Legal Framework

20. We have set out the statutory provisions. In *R (Collins v Secretary of State for Justice)* [2016] EWHC 33 (Admin) [2016] 2 W.L.R. 1303, Sir Brian Leveson P noted that if the degree of force used by a householder was disproportionate, he or she may or may not be regarded as having acted reasonably in the circumstances: the statutory provisions simply mean that force is not by law *automatically* unreasonable in householder cases simply because it is disproportionate, provided it is not grossly disproportionate: see paras [33] and [34]. That approach was approved by this court in *R v Ray* [2017] EWCA Crim 1391 [2018] 2 W.L.R. 1148, describing the common law position as having been “slightly refined” by the statute in householder cases to the extent that even if the degree of force used was disproportionate, it might nevertheless be reasonable, depending on the circumstances of the case as the defendant believed them to be: para [26].

21. In *R v Cheeseman* [2019] EWCA Crim 149 [2019] 1 W.L.R. 3621, the question arose whether the householder defence applied where the deceased had entered the appellant's room in an army barracks with the appellant's consent, but then became violent and refused to leave when asked, thereby potentially becoming a trespasser. This court emphasised that – as appears from the wording of section 76(8A)(d) itself – the question is not whether the victim was or became a trespasser as a matter of law, but whether the defendant believed him to be a trespasser.

Discussion

22. The statutory gloss on the common law approach to self-defence was enacted in response to cases arising when householders had used violence having been confronted by intruders in their own homes. In such cases there is usually no issue but that the defendant believed the intruder to be a trespasser; but the legislation is not limited to those types of case. As *Cheeseman* makes clear, the householder defence engages two factual questions. First, whether the defendant was *not* a trespasser when force was used; and secondly whether the defendant believe the injured person to be a trespasser.
23. In the present case, notwithstanding the judge's remarks when sentencing, it was not part of the appellant's case that she believed the deceased to be a trespasser. She was not asked about that in either trial. That is perhaps unsurprising in circumstances where Mr Knight had lived with her for months and, as she said in evidence, had a key to the house. It was his home. There will be cases where the circumstances of events give rise to an inference that a householder believed an intruder to be a trespasser when using force in self-defence. There would be no need or purpose in solemnly asking the defendant householder a question to confirm it. Yet there does need to be an evidential basis for the defence to arise. Here, in our view, it was absent. That, no doubt, explains why the point did not occur to two separate experienced and skilled criminal defence teams nor to two experienced trial judges. Critically, there was no evidence or suggestion that it was any part of the appellant's thinking that the deceased was a trespasser at the time of the stabbing. Absent that, there was no evidential basis on which the householder defence could arise.
24. In any event, we are satisfied that a refinement of the direction on self-defence given by the judge to reflect the householder defence could have made no difference to the outcome of this case. The appellant's evidence was that she picked up and used a knife while Mr Knight was throttling her against the kitchen sink. That was a description of a violent attack which threatened her life. If the jury had believed that the appellant's account was or may have been true then, realistically, they would have been bound to acquit her. The jury's verdict indicates that the Crown satisfied them that there was no truth in that account. Accordingly, the conviction was safe in any event.
25. For these reasons, the appeal against conviction is dismissed.

Application for Leave to Appeal Sentence

26. The sentence was one of life imprisonment with a minimum term of 17 years less 136 days served on remand. As this was a conviction following a re-trial the sentencing judge was bound by Schedule 2§2(1) of the Criminal Appeals Act 1968 not to impose

a more severe sentence than that imposed following the original conviction. He noted that, were it not for that provision, he would have imposed a longer minimum term.

27. Leave to appeal against sentence was refused by the single judge. Miss Wade renews her application for leave before this court on the same grounds namely:
 - i) The minimum term imposed was manifestly excessive in that the learned judge did not give sufficient or any credit for the following mitigating factors:
 - a) domestic abuse other than discrete incidents of violence;
 - b) the effect of that abuse on the applicant who suffered from a borderline personality disorder;
 - c) childhood trauma; and
 - d) remorse.
 - ii) The learned judge made some findings of fact to the criminal standard which were not consistent with the evidence.
 - iii) There was more than one possible interpretation of the facts as to where the incident had happened and in what circumstances. The learned judge indicated that he could not be sure of salient matters but nevertheless made findings that were adverse to the applicant.
28. It is agreed that the judge was bound to take a starting point of 15 years under Schedule 21§5 to the Sentencing Act 2020. He took that starting point because he found in the appellant's favour that she had not taken the knife to the scene.
29. As aggravating factors, he identified the appellant's previous convictions for offences of violence. He found that the violence in the relationship over the previous months was principally inflicted by the appellant on Mr Knight and that she had also used violence towards previous partners. Her use of violence was almost always precipitated by alcohol and she had been drinking on the night (as had Mr Knight, who had also taken cocaine). The judge found that the appellant's actions in the 45 minutes or so between the stabbing and the death were motivated by a desire to exculpate herself rather than to seek help for her badly injured partner.
30. In mitigation, he found that there had been no planning and there was no evidence of an intention to kill. He took account of the violence inflicted on the appellant by Mr Knight shortly before the stabbing and gave weight to the separation from her child; to her recent miscarriage; to her unstable upbringing; and to the violence she had suffered in a previous relationship.
31. The judge had available to him the evidence and the impact statements of the bereaved family, in particular dealing with the effect on Mr Knight's children. He considered a significant amount of material provided by the defence about the appellant's difficult childhood and the potential effect on her mental health of her experiences as a child and as an adult. He accepted the fact of a mild degree of borderline personality disorder but found on the evidence in the trial and the expert material before him that the cause of

the appellant's acts of violence was properly to be attributed to her excessive consumption of alcohol.

32. The judge acknowledged the efforts that the appellant had made while in custody to learn how better to control her temper when in drink. He found on her evidence in the trial and generally that she had not expressed any real remorse for causing the death. He did not view that as an aggravating factor: rather it was a regrettably absent feature that might have provided some further mitigation.
33. The essence of the complaint on factual findings advanced on the appellant's behalf by Miss Wade is that the judge was not entitled to make findings of fact which were to the effect that she was the dominantly abusive partner in the relationship. In his sentencing remarks the judge said that he was sure that, until the week before his death, Mr Knight had not been physically violent although he had struck the appellant during that week and pushed her earlier during the evening leading to the stabbing. He was sure that it was the appellant who had been responsible for physical violence over time during the relationship. There was evidence of violence by the appellant in previous relationships. He was sure that "without any justification, [she] made a conscious decision to fetch a steak knife from the kitchen and used it to inflict the fatal wound..." and that she "was motivated by anger when [she] stabbed him..." Miss Wade also submits that the judge's finding of an absence of remorse was not justified. She advanced other detailed criticism of the judge's sentencing remarks.
34. We agree with the single judge that the findings of fact were open to the judge on the evidence that he and the jury had heard. There is no arguable basis for suggesting that they were not. He had heard all the evidence including the bad character evidence concerning the appellant and her own evidence.
35. The issue of the appellant's violence was relevant to the question of sentence and it was incumbent upon the judge to make findings. He was entitled to find that the appellant was violent when drunk, that she had been the aggressor in the past, and that apart from the most recent incidents between her and the deceased, she had used violence towards him.
36. The judge set out how he reached his sentence in detailed and careful remarks. He took account of the relevant factors, particularly the history of abuse including the appellant's childhood trauma and her personality disorder and all the available mitigation. There is no arguable basis for suggesting that the sentence the judge imposed was manifestly excessive. In those circumstances we refuse the renewed application to appeal against sentence.

Disposal

37. The appeal against conviction and renewed application for leave to appeal against sentence are both dismissed.