IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2018/03579/C3
Neutral Citation No: [2020] EWCA Crim 1798

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 16th December 2020

B e f o r e:

LADY JUSTICE CARR DBE

MRS JUSTICE YIP DBE

HIS HONOUR JUDGE KATZ QC
(Sitting as a Judge of the Court of Appeal)

R E G I N A

- v –

FARIEISSIA SURAYAH SHABIRAH MARTIN

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Miss Clare Wade QC and Miss Claire Mawer (instructed by Birnberg Peirce Ltd) appeared on behalf of the Appellant

Mr Ian Unsworth QC (instructed by the Crown Prosecution Service Appeals and Review Unit) appeared on behalf of the Respondent

J U D G M E N T
(Approved)

Wednesday 16th December 2020

LADY JUSTICE CARR:

Introduction

1. This is the appeal of the appellant, Farieissia Martin, now 27 years old, against her conviction for murder on 28th May 2015 following a trial before Dove J ("the Judge") and a jury in the Crown Court at Liverpool. She was sentenced in the following month to life imprisonment with a minimum term of 13 years specified under section 269(2) of the Criminal Justice Act 2003 (less time spent on remand). Leave to appeal and a necessary extension of time of over three years was granted by the full court in December 2019.

3. The deceased, Kyle Farrell ("the deceased"), was the appellant's former partner. In the very early morning of 21st November 2014 the appellant wounded the deceased fatally to the heart with a kitchen knife. The appellant and the deceased were both 21 years old at the time and had been in an on-off relationship for some five years, a relationship which had produced two young children.

4. The appellant's defence at trial, which the jury rejected, was that she had acted in lawful self-defence and did not have the necessary intent to kill or to cause grievous bodily harm; alternatively, that she had a partial defence of loss of control under s. 54 of the Coroners and Justice Act 2009 ("s. 54") ("the 2009 Act") based on her fear of serious violence at the hands of the deceased, alternatively, attributable to things done or said to her which constituted circumstances of an extremely grave character and caused her to have a justifiable sense of being seriously wronged.

5. The appeal is based on fresh expert psychiatric and psychological evidence which the appellant seeks to adduce under s. 23 of the Criminal Appeal Act 1968 ("s. 23") to the effect that the appellant was suffering from post-traumatic stress disorder ("PTSD"), traumatic amnesia, and mild depressive order at the time of the incident. It is submitted that the fresh evidence supports a further partial defence of diminished responsibility under s. 2 of the Homicide Act 1957, as amended by s. 52 of the 2009 Act ("s. 52"), and also provides significant further support for the partial defence of loss of control.

6. We announce at the outset that we propose to allow the appeal, to quash the conviction for murder and to order a retrial. In the circumstances our reasons will be short.

7. Reporting restrictions under s. 4(2) of the Contempt of Court Act 1981 have been in place. Whether or not and, if so, to what extent they need to be continued beyond this judgment is something to be considered at the conclusion of this hearing.

The Fresh Evidence

8. The appellant seeks permission to rely on reports from Dr Anagnostakis, a consultant forensic psychiatrist, and Dr Clifford, a specialist clinical and research psychologist. There is also a statement from a prison link worker putting the evolution of the appellant's accounts in context.

9. The respondent has commissioned reports in response, which are also before the court, from Dr Cumming, a consultant forensic psychiatrist, and Dr Watts, a consultant clinical neuropsychologist.

10. The experts of like disciplines have provided joint statements to the court. The parties agree that there is no material clinical disagreement between them.

Grounds of Appeal.

Ground 1: diminished responsibility: the fresh psychiatric evidence, informed by the psychological evidence, supports the proposition that at the time of the killing the appellant was suffering from an abnormality of mental functioning which arose from a recognised medical condition, namely PTSD, which impaired the appellant's ability to exercise self-control and was a significant contributory factor to the killing. Had the evidence, together with the expert evidence on traumatic amnesia, been available at trial, the appellant would have been afforded the partial defence of diminished responsibility

11. Miss Wade QC, who did not appear below, submits that the fresh expert evidence was "obviously capable of assisting the appellant" on a partial defence of diminished responsibility, availing her of a defence that had not been considered. The appellant was suffering from an abnormality of mental functioning arising from PTSD, a recognised medical condition, that substantially impaired the appellant's ability to exercise self-control and caused or was a significant contributory factor in causing the appellant's acts at the time of the killing.

Ground 2: loss of control: the fresh expert evidence supports the proposition that at the time of the killing the appellant had lost her self-control within the meaning of the partial defence of loss of control. In particular the fresh constituting a diagnosis of PTSD is relevant and admissible to the "qualifying trigger" and the loss of control. It is also relevant to the circumstances of the appellant as defined by s. 54(3) because her dissociative symptoms played a part in the killing and were additional to her capacity for tolerance and self-restraint. Had the evidence been available at the time of trial it would have enabled the appellant actively to rely on the partial defence

12. Miss Wade submits that the PTSD was potentially relevant to the qualifying trigger under s. 55 of the 2009 Act, namely a fear of serious violence from the deceased and/or the (cumulative) history of things done and/or said which "constituted circumstances of an extremely grave character" and caused the appellant to have a "justifiable sense of being seriously wronged". According to Dr Anagnostakis the appellant would have had a:

> "lower threshold for high arousal levels, anxiety and disassociation at the material time. All of these factors together with the fear any person would have experienced under similar circumstances, as well as the disinhibiting effect of alcohol and the depressive disorder would have had an impact on her ability to exercise self control and judgment".

13. Had the evidence been available, submits Miss Wade, the fact that the appellant was suffering from PTSD and traumatic amnesia could have been included in the judge's directions to the jury.

14. Further, whilst the appellant in her final police interview referred to the deceased as having gained "control" by accretion – a position adopted in her defence – the role of coercive control in the context of loss of control was not explored fully at trial. A handwritten statement made by the appellant whilst in custody in or around January 2015 contained a far more detailed description of domestic abuse and a far fuller account of a coercive controlling relationship. Not until the decision until *R v Challen* [2019] EWCA Crim 916; [2019] WLUK 736 was the role of coercive control "seriously considered" by criminal practitioners as a framework for understanding domestic abuse.

15. In summary, on behalf of the appellant it is said that, although loss of control was left as an option for consideration by the jury, it was not presented in a manner which did justice to

the appellant's case. The jury was left with an incomplete picture, and the coercive control context was not explored. The circumstances of what were said to be the "routine rapes" in the relationship were not led in evidence at all, a significant omission. As a result, it is said that the Judge was unable fully to analyse the relevance of significant aspects of the abuse and rather left to provide a mere historical recital of the facts (contrary to *R v Humphreys* [1995] 4 All ER 1008).

Grounds of Opposition

16. In the light of the experts' joint statements, Mr Unsworth QC for the respondent has indicated that this is an unusual, if not a unique, case. He acknowledges realistically that the court might take the view on the facts that the appellant's conviction is unsafe. He confined his oral submissions to the need for a retrial and did not develop or expand on his written submissions relating to the safety of the conviction.

17. In those written submissions it was said that the bar for admitting fresh evidence on appeal is a high one. The grounds of appeal failed to recognise the evidence called at trial and available at the time of trial. The appellant did adduce evidence of a violent relationship. Her primary defence was self-defence. The jury was directed as to the question of loss of control; and the need to obtain medical evidence in relation to diminished responsibility or loss of control did not arise.

Application to Adduce Fresh Evidence

18. Since the appeal does not get off the ground without leave being granted to the appellant to rely on the fresh expert evidence, it is logical to address that application first.

19. S. 23 provides, so far as material, as follows:

> "(1) For the purposes of an appeal … under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –
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> …
>
> (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.
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> …
>
> (2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –
>
> (a) whether the evidence appears to the court to be capable of belief;
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> (b) whether it appears to the court that the evidence may afford any ground for allowing the appeal;
>
> (c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

…"

19. The test is therefore whether the interests of justice require the fresh evidence to be admitted, but the four factors identified in section 23(2) require particular consideration.

20. As was stated in *R v Challen* [2019] EWCA Crim 916 at [54]:

> "As this court has observed frequently, any available defences should be advanced at trial, and if evidence, including medical evidence, is available to support a defence it should be deployed at trial. As a general rule, it is not open to a defendant to run one defence at trial and when unsuccessful, to try to run an alternative defence on appeal, relying on evidence that could have been available at trial. This court has set its face against what has been called expert shopping. Nor is it open to an appellant to develop and sometimes embellish their account to provide material upon which a fresh expert can base a new report and diagnosis."

21. Here the fresh expert evidence appears to be capable of belief. Secondly, subject to discrete reservations which we address in a moment, the evidence would have been admissible at trial: there is no suggestion that the experts in question are anything other than suitably qualified and have discharged their obligations faithfully and in compliance with the relevant Parts (Part 19, 19A and 19B) of the Criminal Procedure Rules 2020.

22. Our reservations, which do not render inadmissible the other opinions expressed by either expert, relate to certain paragraphs in the reports of Dr Anagnostakis and Dr Clifford, (in particular paragraph 4.30 of the final report of Dr Anagnostakis, and paragraph 9.8.3 of the report of Dr Clifford where the experts appear to us to have crossed the line of permissible comment).

23. The admissible evidence might also afford a ground for allowing the appeal on the basis that, as developed further below, it may demonstrate that the appellant's conviction was unsafe either in the sense that it may provide material additional support for the partial defence of loss of control, as advanced before the jury, but also may give rise to an additional and separate partial defence of diminished responsibility.

24. As for whether or not there is a reasonable explanation for the failure to adduce the evidence in the proceedings, Miss Wade contends that it cannot be said that the appellant herself is to blame for the lack of evidence at trial. Trial counsel indicated that the principal defence being advanced was one of self-defence. He stated that the need for expert medical evidence did not arise. Loss of control was not suggested. However, the fact, of course, remains that the judge did put the issue of loss of control before the jury.

25. Further, in the handwritten statement to which we have already referred, the appellant alleged that she had been raped by the deceased on more than one occasion and had been the victim of domestic abuse. It is right to say that the appellant did not before trial refer to a

rape that she now says occurred when she was 15 years old. However, the fresh expert evidence identifies the mental health difficulties of the appellant at the time of the killing and whilst in custody. Dr Anagnostakis also states that there is a recognised psychological difficulty in someone disclosing that he/she has been a victim of sexual abuse as part of a "symptom cluster known as avoidance". The relevant material has therefore developed over time.

26. This does not, therefore, appear to be a case of "expert shopping" or an obvious case of false embellishment of the type rightly deprecated in the authorities. Dr Watts, for example, has expressed the view that the appellant's descriptions and presentation have psychological consistency and coherence and that the results of validity testing did not suggest deliberate fabrication of symptoms. However, we emphasise that this is not to say that the prosecution would not be entitled, subject to any directions of the court, to challenge, if it thought appropriate, the veracity of some or all of the appellant's post-trial assertions at any retrial.

27. Finally, there is no material prejudice to the respondent in admitting the evidence. The prosecution has had (and has availed itself of) the opportunity to commission and adduce evidence in response to the fresh expert evidence, which further evidence we will also receive.

28. In all the circumstances we consider it both necessary and expedient in the interests of justice for the fresh expert evidence to be adduced on this appeal.

The Substantive Appeal

29. On the basis that the fresh evidence is accordingly now admitted, we turn to consider the substantive merits of the appeal. The question is whether the fresh expert evidence renders the conviction unsafe. It is not sufficient that there now exists material which the jury did not have and which might have affected their decision. The responsibility for deciding whether the fresh material renders the conviction unsafe is on this court which must make up its own mind. We must consider the nature of the issues before the jury and such information as we can gather as to the reasoning process through which the jury will have passed. (Here of course the issue of diminished responsibility was not before the jury at all.) Whilst we are likely to ask ourselves what impact the fresh material might have had on the jury, that is not the primary question. The important question for us is whether the fresh material causes us to doubt the safety of the verdict of guilty: see *R v Ahmed* [2010] EWCA Crim 2899 at [24].

30. The fresh material causes us to doubt the safety of the verdict of guilty and we are satisfied that it renders the conviction for murder unsafe. Put shortly, the fresh expert evidence provides a proper basis for a defence of diminished responsibility to be advanced on behalf of the appellant. Equally, the diagnoses of PTSD and dissociative behaviour: (i) could lend support to the proposition that at the time of the killing the appellant lost her self control; (ii) could go to the gravity of the trigger for loss of control; (iii) could be relevant to the question of whether a person of the appellant's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the appellant, might have reacted in the same or a similar way to the appellant; (iv) could explain the appellant's reported loss of memory at the moment of the killing, either as a part of a dissociative state linked to PTSD, and/or a state of intense emotional arousal leading to impaired encoding, and/or state dependent effects; and (v) could provide context for the appellant's undoubted lies to the police.

31. Whilst the defence of loss of control was put before the jury, the defence would have been substantially strengthened by the fresh expert evidence. We accept the overarching submission that the appellant's account at trial was underinclusive and not fully contextualised and that, because of the presentation at trial, the Judge was not in a position to

do other than rehearse the historic individual incidents of which there was evidence.

Conclusion

32. For these reasons we allow the appeal and quash the appellant's conviction for murder.

33. That leaves the question of whether or not we should ourselves substitute a conviction for manslaughter, as Miss Wade invited us to do this morning, or whether it appears to us that the interests of justice require the appellant to be retried (see s. 7 of the Criminal Appeal Act 1968).

34. Miss Wade submits that the expert evidence, whilst not conclusive, is powerful. The appellant's accounts have been consistent and the experts have considered her reliability. She has served six years of the minimum term of 13 years. We are told that the appellant would always have accepted a conviction for manslaughter based on loss of control, though Miss Wade confirms that no plea to that effect was ever offered. The appellant has not seen her children, now 7 and 8 years old, since lockdown due to the current Covid-19 pandemic, some nine months or so ago.

35. Mr Unsworth submits that the evolutionary nature of the matters now before the court by definition means that they are untested. Loss of control is not a psychiatric defence, but ultimately a matter for a jury. If the conviction is unsafe, there are compelling grounds for the fresh evidence to be heard and evaluated by a fresh jury.

36. The decision whether to order a retrial requires an exercise of judgment involving consideration of the public interest and the legitimate interests of the defendant. The former is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution could be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant would call for consideration of the time passed since the alleged offence and any penalty already paid. If the court is satisfied that fresh evidence received or available to be received under s.23 is true and conclusive of the relevant issues, no retrial will be ordered.

37. The fresh expert evidence is not conclusive, and so much is conceded by Miss Wade. Whether the defence of loss of control or diminished responsibility is established would always be questions for a jury. Moreover, the fresh expert evidence is predicated on the appellant's self-reporting, something which the prosecution has not been able yet to test. A jury could accept all, none or some of that evidence. The jury's findings in that regard could impact materially on the availability or strength of either partial defence under consideration.

38. We take into account the time spent by the appellant in prison to date and the fact that she has been separated from her young children. However, she faces the most serious charge of murder. There is no question that there cannot be a fair trial in which the appellant's account now and the fresh expert evidence can be properly tested and considered by a jury.

39. We consider that the interests of justice require a retrial and we therefore order that the appellant be retried on the offence of murder.

40. We direct that a fresh indictment be served in accordance with Criminal Procedure Rules 10.8(2) not more than 28 days after this order. The appellant must be re-arraigned on the fresh indictment within two months. The retrial should place at a Crown Court to be determined by a Presiding Judge of the Northern Circuit.

41. We will now hear any further submissions, including any further submissions on the

question of reporting restrictions.

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

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