Neutral Citation Number: [2021] EWCA Crim 1997

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2021/01573/B2, 2021/01646/B2

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 16th December 2021

LADY JUSTICE MACUR DBE

MRS JUSTICE YIP DBE

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

R E G I N A

- v –

OSITA ALAGBAOSO

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Mr M M Hossain QC and Miss S Selby appeared on behalf of the Appellant Osita Alagbaoso
Mr L Lynch appeared on behalf of the Applicant Hassan Tejan

Mr R Barraclough QC appeared on behalf of the Crown

J U D G M E N T

Thursday 16th December 2021

LADY JUSTICE MACUR:

1. The appellant, Osita Alagbaoso (now aged 19), appeals against his conviction for murder with the leave of the single judge.

2. On 11th February 2021, in the Crown Court at Maidstone, he pleaded guilty on re-arraignment to wounding with intent to do grievous bodily harm (count 1). He then stood trial in respect of the murder of another victim (count 2). On 28th April 2021 he was convicted.

3. On 23rd November 2021, he was sentenced on count 1 to 54 months' detention in a young offender institution, which was overtaken by the sentence on count 2 of custody for life, with a minimum term of 20 years (less 616 days spent in custody on remand).

4. A co-accused, Joseph Matimba, was acquitted by the jury of both wounding with intent to do grievous bodily harm (count 1) and murder (count 2). Prior to trial, however, he had pleaded guilty to perverting the course of public justice in that he accepted that he had helped the appellant to change clothes following the murder. He was sentenced to 18 months' detention in a young offender institution.

5. The appellant is represented by Mr Hossain QC and Miss Selby. The respondent is represented by Mr Barraclough QC.

The Facts

6. The appellant was aged 17 years at the time of the offence. He suffers from a severe speech and language disorder. Prior to trial he was assessed as having a low level of intellectual functioning. Therefore, he was assisted at trial by an intermediary.

7. The appellant and the deceased, Jaydon McFarlane (who was aged 19 years at the time), had originally been friends. Both had been part of a street gang called "Young Trap Bosses". Towards the end of 2019 there had been a falling out between the appellant and the deceased. They broke company, together with their own respective friends.

8. There was considerable background evidence regarding various incidents between the two groups between January and March 2020. Specifically, in so far as they included the appellant and the deceased, on 25th January 2020 the victim threatened the appellant by voice message. In response, the appellant taunted the victim. On 26th January 2020, there were messages from the victim to the appellant, including "14 inches waiting for you". On 31st January 2020, a video captured the appellant and others in Ashford town centre being aggressive and pushing one of the victim's friends. On 13th March 2020, the victim attempted to contact the appellant. Just before 7 pm there was a missed call from the victim to the appellant's mobile phone. Another followed almost immediately from the victim to the appellant which lasted 32 seconds. There was then another call, which lasted 13 seconds. In the following two minutes, a further 11 attempts were made to call the appellant by the victim. None were answered. The victim then sent a text message saying, "Pussy" and then made three further attempts to call the appellant.

9. The prosecution adduced evidence before the jury about the appellant's threatening and violent behaviour towards other individuals and the existence of violent rap lyrics found on a mobile phone in his possession. For his part, the appellant adduced a series of agreed facts which reflected examples of violence, the possession of offensive weapons, and dealing in Class A drugs by the deceased and his associates.

10. The offence of wounding with intent to do grievous bodily harm had occurred on 25th January 2020. Kaseem Ibrahim was in Ashford town centre Memorial Gardens. The appellant appeared and demanded money. The bottom part of his face was covered, and he was dressed in black. He was in the company of four or five other males who were similarly dressed. The appellant pulled out a 14-inch knife and tried to stab Ibrahim. Ibrahim fled, but the appellant chased him, stabbed him in the thigh, and attempted to stab him further. As we have previously indicated, the appellant pleaded guilty to this count on the indictment prior to trial.

11. The evidence in relation to the murder was to a large extent captured by CCTV. At 12.10 pm the appellant was seen in Hoppers Way. It subsequently became clear that he was in possession of two knives, a kitchen knife, and a Rambo-style knife. Messages on his mobile phone around this time suggested that he was dealing drugs.

12. At around the same time, the deceased was also dealing drugs. At 12.24 pm the appellant walked towards his co-accused's property in Arlington Road when he saw Jaydon McFarlane. CCTV footage captured him jogging across the road towards the deceased, with his hands in his jacket pockets. Jaydon McFarlane had just completed a drugs deal. An eyewitness described the appellant as "lunging" towards the deceased and moving his arm backwards and forwards in a stabbing motion. Jaydon McFarlane fell into the road with the appellant pushing him from behind.

13. The appellant stabbed Jaydon McFarlane twice with the kitchen knife. The fatal wound went through the chest cavity and into the left lung. The knife broke, leaving the blade in Jaydon McFarlane's clothing. He, however, managed to get up and run off, pursued by the appellant who had by then pulled out of his pocket the Rambo-style knife, although it was not used in a further assault upon Jaydon McFarlane. After running across a small car park, Jaydon McFarlane collapsed onto a grassy bank, where he was subsequently found and pronounced dead by attending ambulance crew. The appellant had left the area by this stage.

13. Shortly after, the appellant and co-accused were captured on Ashford High Steet, moving towards the KFC Restaurant. Two minutes later they entered the disabled toilets. When they re-emerged minutes later, the appellant was wearing different clothing.

14. In his subsequent interview, the co-accused admitted wearing more than one pair of trousers when he left his house in order to give one pair to the appellant.

15. Sometime later, the appellant sent the co-accused two images. One was a person rapping with a message and a gang symbol. The other, an image of the victim lying dead, was uploaded onto social media at 13.45. There is no evidence that it was the appellant who took the photograph of the victim.

16. That same afternoon there were messages between the appellant and his partner in which he suggested that someone called Sam was responsible for the stabbing.

17. The appellant's knives were recovered on 14th and 15th March 2021. The kitchen knife blade, with blood on it, was recovered from the victim's clothes.

18. A post-mortem examination showed that the fatal wound was approximately 17 centimetres deep. It had passed through and into the left lung, injuring two areas of bone on the way. The pathologist's opinion was that such an injury would have required moderate to severe force to inflict. She said that severe force meant "as hard as possible, equivalent to a

hard punch".

19. The appellant was arrested at his home address. In three subsequent interviews he answered, "No comment".

20. In his Defence Case Statement he denied committing the offences. He gave an account in respect of count 1 which, in view of his guilty plea to count 1 on the indictment, was obviously false.

21. As regards the count of murder, he indicated that he had carried a kitchen knife with him for his own protection as a result of the threats he had been receiving from the deceased and his associates. When Jaydon McFarlane saw the appellant, it was he who started to draw a Rambo-style knife from his waist, and the appellant perceived that he was about to be attacked. Therefore, the appellant launched a pre-emptive attack upon Jaydon McFarlane with the kitchen knife believing that his life was in danger. Jaydon McFarlane had fallen to the ground, the appellant had lost his balance and stumbled over him. He accepted causing two wounds to with the kitchen knife, including the fatal wound, but did not recall the sequence in which the wounds were caused. The events had happened at great speed and the shock of the incident, and his learning difficulties had made it difficult for him to reconstruct events. He had picked up the Rambo knife after it had fallen to the ground during the incident. He said that he did not intend to kill Jaydon McFarlane or to cause him grievous bodily harm. He had received a number of threats from the deceased and others during the period leading up to 14th March, including threats that he would be attacked with a knife and that an associate of the deceased had put a price on his head. He was aware that Jaydon McFarlane carried and used knives, and he had seen one of his associates with guns. He also understood that Jaydon McFarlane had attempted to attack his co-accused with a knife and it was as a result of these fears and threats that he had carried a kitchen knife with him on 14th March.

22. In cross-examination the appellant admitted to killing the deceased. He said that he had acted in lawful self-defence. He had received many previous threats and had been subjected to violence. He also believed that Jaydon McFarlane was reaching for a knife. He denied any intention to kill or cause the victim grievous bodily harm. He said that he was scared and paranoid because of the violence and escalating threats of violence. He believed those threats and thought that his life was in danger. It was in that context that when he saw Jaydon McFarlane and he thought that he was pulling a knife, he had run across the road and stabbed him. He only did so because he thought that the deceased was ‘going for’ a knife, and he wanted to "hurt him". He agreed that he had taken out the Rambo knife because the first one had broken, but he said that he had not used it. He repeated his intention had been "to hurt him", that is Jaydon McFarlane.

23. It was the prosecution case that the appellant had not acted in lawful self-defence. The prosecution relied upon the rival gang membership of the appellant and the victim; the appellant's plea to wounding with intent to cause grievous bodily harm upon; his carriage of knives; the recovery from his phone of images of himself and others brandishing knives and weapons; his lies told; and his silence in interview.

24. At trial, Mr Hossain QC, on behalf of the appellant, argued that, despite the primary issue of self-defence, the judge should leave an alternative verdict of manslaughter to the jury on the basis of lack of intent to cause grievous bodily harm and also loss of control. Having considered the submissions of both the defence and prosecution submissions on the point, the judge disagreed. He ruled as follows:

> "3. In relation to lack of intent, there is no dispute as to the relevant principle which can be put shortly: manslaughter should be left to the jury 'whenever ... it arises as a viable issue on a reasonable view of the evidence': see *R v Coutts* [2006] UKHL 39; [2006] 1 WLR 2154, per Lord Rodger at paragraph 85; also, *Hodson* [2009] EWCA Crim 1590. Equally, the lesser alternative verdict of manslaughter should not be left if that verdict can properly be described in its legal and factual context as trivial, or insubstantial, or where any possible compromise verdict would not reflect the real issues in the case (Archbold 4-533). In oral submissions Mr Hossain QC also referred me to paragraph 12 of *Coutts* where it was said that the objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged.
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> 4. It is also agreed that the issue is very much fact specific, although that did not deter the parties from referring me to the facts of some of the cases cited. I should say that I have not found the fact that manslaughter has been left or not left to the jury on the particular facts of other cases particularly helpful in addressing the issue on the very particular facts of this case.
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> 5. The defence maintain that in this case the threshold has clearly been crossed, on the basis of [the appellant's] evidence, that an alternative verdict of guilty to unlawful act manslaughter is a realistically available verdict and that the issue of what [the appellant] intended should be left to the jury to decide.
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> 6. The Crown say that on the basis of the evidence of the CCTV, the nature of McFarlane's injuries and [the appellant's] own account, including his avowed intention to hurt McFarlane, any suggestion that he did not intend GBH should be dismissed as fanciful."

The judge went on a little later:

> "20. [The appellant] maintains that he was acting in self-defence. Insofar as it is suggested that his agreement with [counsel for the co-accused] that he 'didn't really know what he was doing' is evidence suggestive of a lack of specific intent, any such suggestion is belied by his own evidence, both in chief and confirmed in cross-examination subsequently, of exactly what he did intend.
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> 21. On his own account his intention was to hurt McFarlane. Moreover, that was his express intention as he ran across the road. And the means which he duly adopted to achieve his avowed aim were to push him to the ground and stab him (twice.) It is to be noted that, whilst [the appellant] said in cross-examination that he did not intend to kill McFarlane, he

> never qualified his description of his intention to hurt McFarlane, save only that he said that he formed that intention only because he thought that McFarlane was intending to hurt him. In particular he did not suggest that he only intended to inflict, say, a flesh wound. That is hardly surprising (and would have appeared absurd) given the nature of the wounds which he did inflict, and the force required to inflict the one which killed McFarlane.
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> 22. In the circumstances I am quite satisfied that it would be fanciful to suggest that when he stabbed McFarlane, he was intending to cause anything less that really serious harm.
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> 23. In the circumstances I have no hesitation in concluding that, on any reasonable view of the evidence, an alternative verdict of not guilty to murder (by reason of any lack of intent) but guilty to manslaughter is not a viable option and so should not be left to the jury."

25. There is a single ground of appeal. It is that the judge should have left the alternative count of manslaughter to the jury on the basis of lack of intent to kill or to do grievous bodily harm. In those circumstances it is unnecessary to refer to the judge's ruling in relation to loss of control. We note that in his ruling on loss of control he covered much of the evidential basis of the case against the appellant.

26. In his submissions before us today, Mr Hossain refers us to the judge's summary of the appellant's case to the jury at the outset of his legal directions: that the appellant said that he had acted in self-defence and had had no intent either to kill or to cause grievous bodily harm. In those circumstances, and in view of the prosecution cross-examination of the appellant in which he was never asked directly as to whether or not his intent to hurt encompassed an intent to cause grievous bodily harm, then it was clear that the possibility of the lesser offence of manslaughter should have been left to the jury. It was an issue obviously raised in the evidence and it cannot be described, as the judge did, as "fanciful". Mr Hossain submits that the judge was wrong to remove from the jury the option of returning a verdict to the lesser offence and that, (we paraphrase), his own subjective view of the evidence as to the appellant's intention should not have prevented the jury from considering the matter.

27. Mr Hossain QC has taken us to various parts of the transcript of the appellant's evidence to demonstrate that the appellant denied murder because of his belief in the necessity to strike first in self-defence, but also because he intended to hurt Jaydon McFarlane, but not necessarily to kill or to cause grievous bodily harm. He raises the rhetorical question: were the jury not entitled to consider whether or not this was a question of recklessness, rather than intent, since the injuries, both as to their location in the body and their nature, do not answer the question?

28. In response, Mr Barraclough QC invites us to the view that this question depends upon the judge's "feel of the case". He reminds us that every case is fact specific and that there is no automatic requirement to leave the lesser offence to the jury if it does not realistically reflect the evidence, whatever the contention of the defendant as to intent.

29. Mr Barraclough QC reminds us that the jury had not only the evidence of CCTV

coverage in the moments before, and the eyewitness account of the attack, but there was also the background evidence regarding the use of knives. He refers in particular to the injuries caused, their location, nature, and extent. Having regard to the whole of the evidence, he submits it is implausible that the appellant did not intend, at the least, to cause grievous bodily harm. This was a case of self-defence or not.

30. Mr Barraclough QC has also taken us to the transcript of the appellant's evidence in cross-examination on the question of intent (although never directly raised in terms). When asked what he meant to do when he stabbed the deceased, the appellant said to hurt. He was asked what "hurt" he intended without success, but that the appellant had used this same expression when referring to his stabbing of Ibrahim, and in that case had admitted intent to commit serious bodily harm. Since the appellant accepted that not only did, he stab the deceased, but also that he meant to do him harm, it is obvious in the circumstances established by the evidence that the harm he intended was to cause really serious harm; any other explanation is fanciful.

31. Mr Hossain QC does not challenge the judge's refusal to allow evidence to be called regarding the ability of the appellant to answer questions in cross-examination or the manner in which he did so, but he draws our attention, as well he might, to aspects of the appellant's cross-examination when answers demonstrated his youth and difficulties in expression, rather than any sense of resistance to the natural flow of questions. We have carefully considered whether the fact that this appellant's youth and intellectual difficulties, means that an inherent inability to aptly articulate his intention means that the judge was unreasonable not to leave the lesser verdict to the jury.

32. In our view it is unfortunate that the appellant was not asked directly in age-appropriate fashion as to his intent. His intermediary was there to assist. Having regard to the appellant's trial evidence as a whole, we are satisfied that he was able to answer straightforward questions congruently and to understand the nature of the questions that were necessarily asked of him.

33. We confirm that the judge's subjective opinion should never determine a plausible evidential issue of intent. We do not accept as a general proposition that these cases are determined by a judge's "feel of the case". However, we are satisfied that in this case the judge made an objective assessment of all of the evidence. We are satisfied that his decision not to leave the alternative count of manslaughter to the jury was reasonable having regard to the appellant's own evidence in the context of all of the evidence. The appellant accepted that he meant to do harm, he was reaching for a weapon as he approached the deceased, he attacked the deceased and stabbed him twice and chased after him, and there was evidence of earlier threats to kill or do serious harm.

34. We do not need to decide whether other judges would have taken a different view or to contemplate the facts of authorities in which they did or should have done so. If the evidence objectively analysed indicated that the lesser alternative verdict would not reflect the true issues in the case, then the judge cannot be faulted. He had a duty to assist the jury in focusing their mind upon the true issue in the case, that of self-defence. We cannot fault the judge's reasoning on the specific facts of this case.

34. We do not intend by this judgment to suggest that in every case of 'self-defence' that the alternative count of manslaughter by reason of lack of intent should not be left to the jury to decide. Quite clearly, as Mr Hossain QC submits, there will be cases where evidence of the surrounding circumstances is capable of establishing that a defendant said to be acting in self-defence, even when using what are undoubtedly deadly weapons, may have not had an intent

to cause at least grievous bodily harm. We are satisfied that this was not such a case.

35. We are satisfied that this conviction is safe. Accordingly, we dismiss the appeal.

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

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