IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2023] EWCA Crim 974

CASE NOs 202201863/B3 & 202202133/B3

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 14 July 2023

Before:

LADY JUSTICE WHIPPLE DBE
MRS JUSTICE CUTTS DBE
THE RECORDER OF SHEFFIELD
HIS HONOUR JUDGE JEREMY RICHARDSON KC
(Sitting as a Judge of the CACD)

REX
V
ADRIS MOHAMMED

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MR D EMANUEL KC and MISS E FENN appeared on behalf of the Applicant

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J U D G M E N T

LADY JUSTICE WHIPPLE:

Introduction

1. On 18 May 2022 in the Crown Court at Birmingham before His Honour Judge Inman KC, the Recorder of Birmingham, the applicant, then aged 44, was convicted of murder, attempted burglary, two counts of burglary and two counts of fraud by false representation.
2. On 9 June 2022 His Honour Judge Inman sentenced the applicant to life imprisonment for murder with a minimum term of 33 years, less days spent on remand. He handed down concurrent sentences for the other counts on which the applicant had also been convicted.
3. The applicant now renews his application for leave to appeal against conviction for murder. He also renews his application for leave to appeal against sentence. Both applications were refused on the papers by the single judge.

The facts

4. The deceased was David Varlow. He was 78 and lived alone on Manor Lane. On Sunday 24 October 2021 at about 10.44 pm the deceased called the police about an attempted break in at his home. This was the attempted burglary. The police attended and discovered that the back window had been smashed. The police officer's uniform had CCTV attached to it and footage from that camera captured the deceased talking to the police about his life, including that he had a brother in the North East. The police noted that the property had overgrown shrubs and no security lights. It was set back from the road.
5. On 2 November 2021, CCTV footage captured the deceased going out shopping. That was the last time he was seen alive. In the early hours of 3 November the applicant was

seen on CCTV walking towards Manor Lane. The applicant was next seen on CCTV walking back towards Birmingham 40 minutes later at 5.57am. At 6.02am on that morning the applicant used the deceased's bank card at a cashpoint in Spies Lane. The balance was checked which at that time was £19,724.28. Seconds later a withdrawal was made of £250. At 6.12am the applicant got on a bus and headed back towards Birmingham.

6. Over the next few days the applicant used the deceased's card to withdraw cash a number of times. A female identified as Stephanie Wyatt was also seen using the deceased's card.
7. On the evening of 11 November 2021 the applicant and his co-accused named Swan returned to the applicant's property. Approximately 25 minutes later at 12.25am on 12 November they were seen leaving the area again. At 00.33 that morning an unsuccessful attempt was made to use one of the deceased's cards which had by then expired.
8. Between 3 November and 14 November 2021 the deceased's card was used 389 times and a total of around £8,000 was obtained with £13,000 attempted.
9. On 14 November 2021 the deceased's brother called the deceased but got no answer. He tried to call again on 15 November and when there was no answer he contacted the deceased's neighbours who visited the property. When there was no answer the neighbour called the police who attended at 2.45pm on 15 November. The police found papers strewn on the floor in the living room, which included bank details showing an average balance in excess of £13,000. There had been a further search in the bedroom and the mattress had been moved. The deceased was found lying face down on the floor next to an upturned chair. One of his arms was across his back. There was a cord around the back legs of the chair and there was a knife on the floor nearby.
10. A post-mortem examination found that the deceased's heart was in very poor condition

and he was liable at any stage to a heart attack. It was said that the stress caused by the burglary and being tied up had in all likelihood caused a heart attack.

11. The deceased had died sometime between 3 and 11 November 2021, although it was not possible to say when. There was no evidence of blunt force trauma or that he had been beaten. However there were injuries to his ankles and wrists which indicated he had been bound. The marks on his left ankle were consistent with having been bound with a telephone cable which was found and as had been wrapped around his ankle twice. There were more indentations on the right ankle along with hypostasis and sparring. Sparring occurs when dead. The pathologist stated that those findings meant that the deceased had been tried up whilst he was alive and had been untied once he was dead.
12. The applicant's DNA was found on the knife and on the inside of the finger holes on the scissors found at the scene, along with DNA of the deceased and at least two others with regards to the knife and one other with regard to the scissors. The applicant's DNA was also found on the cable tied to the chair, along with the deceased's and one other person's.
13. The applicant was arrested on 19 November 2021. He answered three questions effectively denying involvement with the burglaries and death, and thereafter answered no comment.
14. At trial the prosecution case was that the applicant had attempted to burgle the deceased's property on 24 October 2021. When he returned days later to burgle the deceased again, the applicant had tied the deceased so securely to a chair that he knew it would be impossible for the deceased to free himself and he did so knowing that no one would come to help the deceased or to check on him. The deceased would have pleaded with the applicant not to be tied up and left and would have made it clear that he would not be found or helped. By restraining him and leaving him in these circumstances the applicant

intended that the deceased should die and he knew the deceased was dead when he returned on 11 November to steal another card. Even if he only wanted to restrain the deceased for as long as possible to enable him to use the card, it was virtually certain that an elderly man tied up for eight days or more would die or suffer really serious injury.

15. The defence case was that the applicant had not been involved. He said he did not go into the property and that the prosecution witnesses had lied. The DNA experts could not say how his DNA was left on the items. The applicant said it was his co-defendant Swan who had gone into the property and come out with the card and PIN number. Alternatively, he argued that the jury could not be sure that he had the requisite intention for murder. The deceased, he said, may have died from the heart attack before the applicant left the house and therefore the applicant knew or had believed at the point that he left the house that the deceased was already dead, or perhaps the deceased had lied and had said that somebody would come to visit the house in order to put the applicant off and that the applicant had thereafter believed that the deceased would be visit and would be found. By the visit to the property on 11 November, the applicant must have realised that the deceased had died but it did not mean he intended him to die when he had been left on 3 November. His case on this version of events would lead to a verdict of guilty for manslaughter but not murder.

16. The issues for the jury were, first of all, factual: was the applicant involved? And secondly, intention: if the applicant was involved, did the applicant intend to kill or cause really serious harm to the deceased?

Conviction

17. We deal first with the application so far as it relates to conviction. Mr Emanuel KC and Miss Feen appear for the applicant and represented him at trial. They advance two

grounds of appeal against the conviction for murder, arguing that manslaughter should be substituted. There is no application in relation to the other counts on which the applicant was convicted.

18. They argue, first, that there was no evidence upon which a jury could be sure that the applicant had the requisite *mens rea* for murder and as such the judge should have acceded to the submission of no case to answer. This is ground 1. Secondly, they argue that the judge's directions on the *mens rea* for murder were flawed because they failed to direct the jury that they had to be sure that (a) the deceased was still conscious after he had been tied up and (b) the deceased was still alive when the applicant left the house and the applicant believed that the deceased was still alive when he left the house. This is ground two. These grounds were expanded in written and oral submissions before us today.

19. The Crown's arguments are set out in a helpful Respondent's Notice. The Crown submits that the judge was correct to reject the submission of no case to answer. There were sufficient inferences to be drawn as to murderous intent. The Crown submits that the judge's summing-up was correct because it was not an essential ingredient of the prosecution case and of the offence itself that the deceased was alive when the applicant left the house. If the jury found the defendant tied the deceased up with murderous intent, the prosecution said that it did not matter when he died.

20. We wish to thank all counsel for the considerable assistance that this court has been given.

Ground 1

21. The applicant argues that there were realistic scenarios which the jury could not exclude on the evidence before them, which scenarios were not consistent with an intention to kill

or cause really serious harm to the deceased. In light of those scenarios, it is said that the judge should have acceded to the submission of no case to answer on the murder charge. The scenarios can perhaps be summarised as follows. First, that the deceased died at or shortly after the point that he was tied up and was already dead or at least dying when the applicant left his house. That scenario was consistent, so it has been argued before us, with an intention on the part of the applicant to tie him up for only a short time, possibly only while the applicant burgled the house or perhaps simply in order to get his PIN number. That intention, in other words to tie up for a short time, was said to be inconsistent with an intention that the deceased should die by being left, quite simply because he was already dead by the time the applicant left the house. So it was argued that the intention on that scenario was something short of that required for murder. Alternatively, if the deceased was alive at the point that the applicant left the house, it was argued that the jury could not be sure that the applicant's intention was to leave him there until he died because it was possible that the applicant had hoped or expected someone to come to the deceased's house before he died or perhaps that he had not cared either way. Mr Emanuel suggested there were strands of evidence which supported this alternative scenario. He argued that the jury could not be sure that the applicant knew or intended that no one would come, which was how the prosecution argued their case on intent for murder.

22. These arguments were all articulated before the judge at the point that the submission of no case to answer was made. That ruling was delivered on 6 May 2022. It is a careful ruling which pays close attention to the evidence and the arguments. As the judge emphasised, the evidence indicated that the deceased had been alive at the point he was tied to the chair on 3 November 2021. The pathologist could not say when death had

occurred after that, simply that it had occurred at some point between 3 and 15 November. The pathologist also said that the deceased was dead by the time his ligatures were cut away, which was on 11 November when he was released from the chair by the applicant and fell to the ground where he was eventually found. The medical evidence suggested that from the moment of onset of a heart attack, which was likely to have occurred around the point of the most intense part of the trauma, death would have taken at least 30 minutes to occur and was more likely to have taken around one hour.

23. The judge concluded, having considered all the evidence that had been adduced by the prosecution, that it would be open to a jury to infer that the purpose of binding someone in the way that the deceased was bound was to stop them alerting anyone else. That is at page 8A. Further, it would be open to a jury to conclude that the deceased would have been petrified when he was tied up and would have said to the applicant that if he was left in that position no one would find him for a very long time and possibly not until 14 November, which was when his brother was due to call; it would be open to the jury to take the applicant's use of the card over the succeeding days as evidence of his intention to leave the deceased to die; it would be open to the jury to conclude that the applicant's failure to summon help when he returned to the deceased's house on 11 November (or indeed at any time) shows that he knew or expected the deceased to be dead and that finding him on 11 November came as no surprise.

24. By his ruling the judge concluded:

> "The jury, therefore, on that evidence could perfectly properly conclude that the defendant tied Mr Varlow to the chair, having got the information that he needed, knowing that he would not be found -- and indeed, they would be entitled to find, knowing that he would not be found until 14 November -- and left him there with the intention that he should die there."

25. The judge rejected Mr Emanuel's submission that the jury could not be sure that the alternative propositions (or scenarios) had not occurred. The judge said the jury could be sure of the prosecution's case theory and that there was "ample evidence" to support the prosecution's case that the deceased had been tied up and left to die.

26. We find no fault with the ruling. It was plainly open to the judge to conclude that the jury could be sure that when the applicant tied up the deceased, the applicant intended him to die there. It was plainly open to the judge to conclude that the jury could properly reject the defence arguments about the applicant's intention being something less than or different from that. They could reject those arguments safely and on the evidence about what happened before, during and after the deceased was tied up, although the point in time when the jury had to be satisfied that the applicant had the intention for murder was at the point he was tied up.

27. There was, in our judgment, evidence to support the prosecution's case and a solid basis on which a reasonable jury properly directed could reject the possibility of all the defence scenarios and conclude that they were speculative, fanciful or simply did not occur. This was very much jury territory. The judge was right in his analysis.

28. We agree with the single judge and we refuse permission to appeal on this ground of appeal.

Ground 2

29. The predicate of ground 2 is that the judge was required to direct the jury that the deceased remained conscious after he was tied up and was still alive when the applicant left the house, as the applicant knew or believed. We do not accept that predicate. The precise time of death was not the issue for the jury. The issue for the jury was the applicant's intention in tying the deceased up and then leaving him in that state on 3

November 2021. The state of the applicant's mind was the proper focus of the judge's comments in the exchanges in court cited by the applicant in his grounds - see for example pages 22 and 23 of the applicant's grounds where extracts from the transcript are set out.

30. The judge considered very carefully how he was to approach this aspect of the case. The question posed for the jury which is of relevance is question 5 on the route to verdict, set out at page 14A of the relevant transcript:

> "Are you sure that by tying up Mr Varlow and leaving him in that state [the applicant] intended to kill him or cause him really serious injury?"

31. The judge did not need to include the question that was proposed by the defence, going to the applicant's belief or otherwise that the deceased was alive when he left his house on 3 November. This was not properly part of the route to verdict. That point, on analysis, was simply an argument forming part of the defence case to the effect that the applicant might have left the deceased already dead. If that was what had occurred in fact then it was suggested that that would be consistent with the applicant not intending to cause death or serious injury at all but rather with a lesser intention simply to tie the deceased up M for a short time, perhaps while the applicant burgled the deceased's house or perhaps in order to extract the PIN number for the cards from him.
32. The judge set out that line of argument in the legal directions: see paragraphs 31 and 32 and see the transcript of his summing-up at page 9. The jury was well aware of that argument, but it was just an argument. The judge was right not to include it as a step on the route to verdict.
33. In the event the jury rejected that argument. The jury plainly considered that it lacked

any cogent support in the evidence. They were sure of the prosecution's case.

34. We therefore agree with the single judge. We refuse leave for this ground of appeal.

Sentence

35. We therefore turn to the submissions on sentence. In passing sentence, the judge noted that the applicant was a professional burglar and much of his lifestyle was spent in a drugs den in Birmingham. There was no significant mitigation. He had many convictions for burglary, although none for violence. The judge imposed a life sentence for the murder alongside concurrent sentences on the other counts.

36. The judge's starting point for the minimum term was 30 years because this was a murder for gain. There were significant aggravating factors: the fact that the deceased was elderly and vulnerable, the fact that the applicant had gone back to change the position of the body, the fact that there was a further burglary and an earlier attempted burglary of the deceased's home and the terrible nature of the killing and suffering inflicted on the deceased. The applicant showed no remorse. There was an intention to kill. The applicant had an extensive record of offending.

37. So far as mitigation was concerned, the judge accepted that there was no premeditation at the point the applicant commenced the burglary but there was a degree of premeditation in the way the applicant had killed the deceased. He imposed a minimum term of 33 years with concurrent sentences for the other offences.

38. In their grounds of appeal the defence argue that the minimum term imposed was manifestly excessive for four reasons. They are that the judge was wrong: first, to sentence on the basis that there was an intention to kill and that therefore the applicant was not entitled to the mitigation of an absence of intention to kill; secondly, to sentence on the basis that there was some element of premeditation and that therefore the applicant

was not entitled to the mitigation of an absence of premeditation; thirdly, to conclude that the short-lived nature of any suffering was not relevant to the sentencing exercise; and fourth, to conclude that the presence of an intention to cause suffering could amount to an aggravating feature.

39. The judge had presided over the trial and was familiar with the evidence. He was plainly entitled to conclude so that he was sure that the applicant had intended to kill the deceased. It is not difficult to see how on these facts the judge reached that conclusion.

40. We reject the various points raised in the grounds of appeal. The act of tying the deceased up was deliberate and involved some pre-planning and the judge was entitled so to conclude. It is unknown how long the deceased remained alive and conscious. The judge was entitled to conclude that he might not have died quickly. It is one of the troubling features of this case that the timing of death is uncertain and may have been slow. The way the deceased was treated must have caused him great suffering. That undoubtedly increased the seriousness of the offence.

41. Standing back, we see no reason to conclude that the sentence imposed was overly long. To the contrary, in our judgment a longer minimum term could have been imposed for this appalling and cruel murder of a defenceless old man in his own home. In agreement with the single judge we refuse permission to appeal against sentence.

Conclusion

42. This application is refused.

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

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