IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT EXETER

MR JUSTICE SAINI T20237013

CASE NO 202303675/A4

[2024] EWCA Crim 1232

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 4 October 2024

Before:

LORD JUSTICE WARBY

MR JUSTICE MARTIN SPENCER

HIS HONOUR JUDGE DREW KC
(Sitting as a Judge of the CACD)

REX
V
BRIAN JEWELL

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MS MARTIN appeared on behalf of the Appellant.

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. This is a renewed application for leave to appeal against sentence by Brian Jewell (now aged 20).

2. On 3 August 2023, after a trial in the Crown Court at Exeter before Saini J and a jury, he was convicted of the murder of Stephen Cook. At the same time, he was convicted of having an article with a blade or point in a public place, contrary to section 139(1) of the Criminal Justice Act 1988. The bladed article was a knife with which the applicant had killed Mr Cook. On 25 September 2023, the applicant was sentenced by the trial judge for those offences and for three other unrelated offences to which he had earlier pleaded guilty.

3. For the murder, the judge passed the mandatory sentence of detention in a young offender institution for life, specifying a minimum term of 20 years minus 236 days spent on remand in custody. There was no separate penalty for the bladed article offence. For offences of unlawful wounding and assault occasioning actual bodily harm, contrary to the Offences Against the Person Act 1861, the judge imposed concurrent sentences of 12 months and 15 months' detention respectively. No separate penalty was imposed for an offence of criminal damage committed at the same time as the wounding.

4. The applicant, through his trial junior counsel, Ms Martin, now seeks leave to challenge the minimum term as manifestly excessive, following the refusal of leave by the single judge.

5. The murder took place in Sidwell Street Exeter city centre on the evening of Saturday 28 January 2023. We adopt the judge's summary of the facts.

6. For some time, the applicant had been living rough in and around the city centre. He had befriended another homeless person called Victor Nelson, who gave evidence at the trial. Together they had formed a makeshift home or some form of camp in wooded ground near Exeter St David's railway station.

7. On Friday 27 January, the applicant obtained a knife from Taunton Leisure which a friend had bought for him. It was an 8.5 inch Opinel locking knife. The judge accepted that this was initially bought for the purposes of bushcraft and to help the applicant with matters such as preparing kindling but there was also, the judge found, a subsidiary purpose in his having this knife, that was self-protection as a vulnerable homeless person and, as the judge put it:

> "... that is why you had it in your possession when in the city centre that evening."

8. On Saturday 28 January, the applicant and Nelson stole bottles of vodka from Marks & Spencer with a view to selling them. Mr Cook appears to have been one of the purchasers. The applicant had the knife in his coat pocket that evening having left his other possessions elsewhere in the city centre. At around 8.00 pm, outside a BetFred shop in Sidwell Street, the applicant saw Mr Cook strike another man. Mr Cook was also living rough and he was drunk, as was clear from CCTV footage. The applicant did not

know Mr Cook other than in passing as a fellow person living rough but did know him to have a reputation for violence. Cook's lengthy criminal record showed him to be a man of violence. The applicant had no grudge against Mr Cook and until the violence broke out that evening it had been a relatively friendly and chatty time outside the bookmakers.

9. Having seen Mr Cook strike this other person, the applicant intervened and asked Mr Cook why he had hit him. A fight began. The judge said it was clear that the applicant and Nelson were on one side and Cook on the other. Punches and kicks were exchanged on all sides. The applicant and Mr Cook fell into the doorway of Betfred during the fight with the applicant on top. After the intervention of a shop manager, the fight moved outside the shop and Mr Cook, clearly angered, broke a bottle and attacked the applicant with it. He slashed the applicant's face with the bottle causing a very nasty injury. The applicant, who still had the Opinel knife in his pocket, opened it while it was concealed within his pocket. It had, said the judge, a locking mechanism which made opening it far from easy. During the fight, the applicant stabbed Mr Cook once with the knife. This was the fatal wound. Although Emergency Services attended, Mr Cook died at the scene.

10. The applicant and Nelson left. The applicant hid the knife in a nearby building. He did not however try to run away but was picked up in the city centre a short while later. The knife was discovered by the police the following day following assistance from Nelson.

11. In his first two interviews the applicant made "no comment", in a third and final interview he provided a prepared statement in which he said that he had been scared by

Cook's behaviour and "threw a pre-emptive strike". He said that he had used the knife believing the use of force was necessary to defend himself and that the degree of force that he used was reasonable in the circumstances, and that was his defence at trial. His defence to the bladed article charge was that he had a good reason to have the knife with him.

12. The wounding offence and the criminal damage were committed before the murder against the applicant's father. On 25 May 2021 the two were at the father's home in Exeter. The applicant became angry at something to do with the food that he was cooking and suddenly punched his father in the face then, as he fell, stabbed him in the back of the head and in the back with a sharp object. When the father shut the applicant out of the room, the applicant struck the door with such force as to break the bolts. At the time of this offending the applicant was 17. He pleaded guilty on 21 October 2022.

13. The assault offence was committed on 8 February 2023 (after the murder), when the applicant was on remand in custody at Her Majesty's Prison Exeter. The victim was a prison officer named Darren Garnsworthy. The officer asked the applicant to return to his cell after a welfare review meeting and placed his hand on the applicant's arm. The applicant responded by swearing at the officer, telling him not to touch him and by forcefully head-butting him. This caused significant swelling and required prolonged examination and treatment. The applicant pleaded guilty to that offence on 5 September 2023, that is to say after his conviction for murder.

14. Sentencing the applicant, the judge dealt first with the murder. As to the minimum term,

he accepted the Crown's submission that the case fell within paragraphs 4(1) and 4(2) of Schedule 21 to the Sentencing Act 2020 because the applicant had taken the knife to the scene intending to have it available to use as a weapon and had used it in committing the murder. He did not, said the judge, have a reasonable excuse for possessing the knife which could have been left behind with his other possessions when he went out that evening. Accordingly, the starting point was 25 years. The judge rejected a submission that the applicant's age should be reflected in a lower starting point, concluding that it fell to be taken into account as a mitigating factor.

15. There were three aggravating factors. First, there was the applicant's seven previous convictions for 15 offences which included assault occasioning actual bodily harm, resisting and obstructing the police, criminal damage and assaults. The judge regarded the significance of these as tempered by the fact that this offending took place in part at times when the applicant was facing serious personal challenges having been in care for a substantial part of his childhood. Secondly, the murder was committed when the applicant was on bail for the wounding of his father. Thirdly, there was the attempt to conceal or dispose of the knife.

16. There were seven main matters of mitigation. There was no intent to kill, nor was there any premeditation. There was considerable provocation. The offence was committed in circumstances of excessive self-defence - that being the finding inevitably of the jury. The applicant's age of 19 was described as "highly significant", particularly in the context of his very challenging childhood. He had co-operated with the police on arrest and he had expressed remorse in some detail as set out in a pre-sentence report. There

was further personal mitigation recorded in the pre-sentence report and advanced in the submissions of leading counsel.

17. The judge considered the overall impact of this mitigation to be substantial such that the minimum term would have come down to 19 years, with no separate penalty for the bladed article offence, that being taken into account in the starting point. The judge however had to take account of the other offending. For that, he identified the appropriate sentences as the ones we have mentioned but to take account of totality increased the minimum term by the lesser period of 1 year.

18. Two grounds of appeal are advanced on the applicant's behalf by Ms Martin.

19. First, it is said that it was "*open to the court to sentence under schedule 21 paragraph 5 not paragraph 4(1), thus producing a starting point of 15 years not 25*", to which the mitigating factors could then have been applied to produce a significantly shorter minimum term.

20. It is not in dispute that the applicant took the knife to the scene - plainly he did. The nub of the argument advanced in support of this ground of appeal is a challenge to the judge's finding that when he took the knife to the scene, he intended to have it available to use as a weapon within the meaning of paragraph 4. Ms Martin acknowledges that a knife is used as a weapon even when it is used defensively. She accepts also that the case law shows that a person comes within paragraph 4 of Schedule 21 if he takes a knife to the scene of expected disorder with the misguided purpose of using it to defend himself and

then uses it to commit a murder. Ms Martin has submitted however that, on the judge's findings in this case, the applicant had mixed reasons for the possession of the knife, one of which was lawful and proper. She emphasises that he was not expecting violence when he went to the scene and that he only produced the knife when under attack.

21. Secondly, and in the alternative, Ms Martin submits that what she describes as the mixed reasons for the possession of the knife, together with the applicant's young age and the other mitigating factors should have had a much greater impact, leading to a minimum term that was significantly below the 19 years imposed before adjustment for the other offending.

22. In our judgment, the first ground of appeal must be rejected as untenable for two related reasons.

23. First, counsel's submissions about mixed purposes focus on the applicant's reasons for acquiring the knife on Friday 27 January. These, on the judge's findings included using it for bushcraft and the like. The relevant question however is why the applicant took the knife with him when he went to what became the scene of murder in Sidwell Street in Central Exeter on Saturday 28 January. At that time he had no need of the knife for any domestic purpose. He was not engaged in, nor was he planning any form of bushcraft. He went out to steal spirits for sale to raise money. His purpose in having the knife with him then was, as the judge found, to use it defensively if the need arose. There is and can be no challenge to that finding of fact. In those circumstances and in the light of the authorities, the case is firmly within paragraph 4 (1) and 4(2). The judge was not only

entitled but, as we see it, bound by statute to take the 25-year starting point.

24. Secondly, and cumulatively, counsel's submissions are at odds with the jury's verdict on the bladed article offence. Count 3 on the indictment charged the applicant with having the knife with him in Sidwell Street on 28 January 2023, that is at the time of the killing. As the judge observed in sentencing, the jury rejected the applicant's defence that he had any good reason for possessing the knife in that public place that evening.

25. It follows that the judge adopted the correct starting point.

26. As for the second ground of appeal, this relies in part upon the submission we have already rejected, that the applicant had mixed reasons for having the knife with him at the time of the murder. The other matters relied upon were all taken into account in the judge's careful sentencing remarks. The judge had presided over the trial and plainly had a keen appreciation of the specific features of what was an unusual case. Those features included the unfortunate personal background of this applicant, of which the judge took full account. No error of principle has been alleged, nor are we able to see any arguable basis for criticising the judge's evaluation of the weight to be attributed to the matters he took into account in his overall downward adjustment of the starting point for the minimum term.

27. For these reasons, we find ourselves compelled to dismiss this renewed application.

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

Lower Ground, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk