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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 21st July 2020

LORD JUSTICE HOLROYDE

MR JUSTICE JAY

and

THE RECORDER OF NOTTINGHAM
(His Honour Judge Dickinson QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

TOMASZ DYBICZ

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Mr J Pickup QC appeared on behalf of the Appellant

Mr P Moulson QC appeared on behalf of the Crown

J U D G M E N T

Tuesday 21st July 2020

LORD JUSTICE HOLROYDE:

1. Maksym Polomka was stabbed to death in the early hours of Boxing Day 2018. The appellant was convicted of his murder, and sentenced to life imprisonment with a minimum term of 21 years, less the 195 days during which he had been remanded in custody awaiting his trial. He was also convicted of having an offensive weapon, for which he was sentenced to four years' imprisonment. He now appeals against his convictions by leave of the single judge. He also renews his application for leave to appeal against sentence, which was refused by the single judge.

2. Two children were concerned in the proceedings below. An order was made to protect their identities whilst they are under the age of 18. That order remains in force. In relation to the proceedings in this court we make a similar order, pursuant to section 45 of the Youth Justice and Criminal Evidence Act 1999. Accordingly, nothing may be published which may identify either child as a person concerned in these proceedings.

3. It is sufficient for present purposes to give a brief summary of the facts. For convenience, and meaning no disrespect, we shall for the most part refer to persons by their surnames.

4. Late on Christmas Day 2018, and in the early hours of the following morning, a group of persons, including Polomka and his partner Ms Putilo, gathered at the appellant's house in Leeds for a party. Most of those present were drinking alcohol, and some, including the appellant, used cocaine.

5. At around 3am, Polomka and Ms Putilo had a heated argument about when they would go home. Others intervened and moved Polomka away. There was then a confrontation in the kitchen between two groups. The appellant, his brother Krystof Dybicz and his friend Stragowski were in one group. Polomka, and his friends Gutferski and Grabowski were in the other group. Another man, Piotrowski, was also present. The two groups exchanged punches. The appellant struck Polomka on the leg with an extendable baton, which Gutferski then took from him. Both the appellant and Stragowski brandished kitchen knives and made threats. Polomka and others then left the house.

6. The appellant and Stragowski, each armed with a knife, followed them outside. A further fight began, in the course of which Polomka was stabbed a total of eight times. The fatal wound was a stab to the neck which transected the left jugular vein, causing catastrophic bleeding. There were other stab wounds to the body and the leg. It was not possible to say scientifically whether all the wounds had been caused by one knife or more than one knife. One knife was recovered from the kitchen, but the scientific evidence was that this was unlikely to have been used.

7. An ambulance was called but, sadly, the efforts to save Polomka's life were in vain and he died in hospital a few hours later.

8. The appellant was arrested at his home. The shirt which he had been wearing was found in a bed under the bedding: it was torn and stained with blood, later identified as that of Polomka, Gutferski and Grabowski.

9. The appellant was interviewed under caution four times. Before the first interview his solicitor read a short, prepared statement in which the appellant said that he denied the offence of the

murder of Polomka. A further statement was read before the second interview, in which the appellant said that he was not involved in causing any of the injuries to Polomka. The statement accepted that he could be forensically linked to the scene, but only because he had tried to assist Polomka as he lay injured. Throughout the interviews the appellant replied "No comment" to almost all of the many questions he was asked.

10. The appellant and Stragowski were jointly charged with murder. The prosecution case was that they had both taken part in attacking Polomka with knives. Each of them was separately charged with an offence of having an offensive weapon, namely a knife, in a public place, namely the street outside the appellant's home. In June 2019 they stood trial in the Crown Court at Leeds before His Honour Judge Bayliss QC and a jury.

11. The prosecution called as witnesses a number of those who had attended the party, and a number of neighbours who had witnessed some of what happened in the street. Unsurprisingly, there were differences between the accounts given by these witnesses. In addition, both Ms Putilo and Piotrowski gave oral evidence which differed significantly from their respective statements, in particular in relation to the acts they alleged on the part of the appellant. There was, however, evidence which the jury could accept as supporting the prosecution case that both defendants had taken knives from the house into the street and used them to attack Polomka. No one alleged that Krystof Dybicz had carried a knife or stabbed Polomka. No one alleged that Polomka, Gutferski, Grabowski or Piotrowski had been armed with any weapon.

12. The appellant gave evidence to the effect that he had been involved in the fights inside and outside the house but that he did not at any stage have a knife and did not play any part in the stabbing of Polomka. He said that he was a friend of Polomka, and had not intended him to suffer any serious injury. He had not seen Stragowski with a knife and did not see how Polomka had come to be on the ground, fatally wounded. He explained the blood on his own shirt by saying that he had tried to help Polomka as he lay injured.

13. Stragowski also gave evidence. He admitted having held a knife inside the house, but he too denied carrying or using a knife in the street.

14. At trial, as in this court, Mr Moulson QC appeared for the prosecution and Mr Pickup QC for the appellant. Mr Moulson began his cross-examination of the appellant by asking why the appellant had refused to answer virtually every question asked of him in interview. The appellant replied to the effect that he had been in shock and unable to think, because he had learned that his partner had been arrested and their young child had been "taken away", and he did not know what was happening to them. A little later, Mr Moulson asked why the appellant had made no reply when asked by the police who had been at the party. The appellant repeated that he was in shock and did not know what was going on. Mr Pickup objected that the appellant had already given his answer as to why he had not answered any questions, that he had said earlier in his evidence that he had received and acted upon advice from his solicitor, and that further cross-examination was therefore inappropriate. The judge permitted further questions. Mr Moulson put a specific allegation that the appellant was "pursuing a policy of no names", a policy which it was later suggested he had agreed with his co-accused Stragowski.

15. Much later in the cross-examination, the appellant was asked about his understanding of the caution. Mr Moulson indicated that he proposed to go through some of the questions asked in interview, to which Mr Pickup again objected. The judge indicated that it was permissible for the appellant to be questioned about specific opportunities he had had to give his account, but that the questions should be confined to topics in respect of which the prosecution would be inviting the jury to draw an adverse inference. Mr Moulson then indicated that a list of the relevant topics

would be drawn up and agreed between counsel. He limited further questioning to asking why the appellant had not said who was involved in the stabbing, even though he had asserted that his partner was not involved.

16. An agreed list was subsequently provided to the jury of the matters upon which the appellant now relied, about which he had been questioned in interview and had answered "No comment".

17. Before closing speeches and summing up, the usual discussion took place between the judge and counsel with a view to identifying the appropriate directions of law. Mr Pickup rightly accepted that a direction, tailored to the circumstances of the case, should be given about possible inferences from silence in interview.

18. The judge provided the jury with written directions of law and a written route to their verdicts. He read these documents to the jury in the course of his summing-up, and added some words to the legal directions as he did so.

19. The grounds of appeal against conviction relate to the judge's directions in respect of section 34 of the Criminal Justice and Public Order Act 1994. No criticism is made of any of the other directions which he gave.

20. So far as is material for present purposes, section 34 provides:

> "34. **Effect of accused's failure to mention facts when questioned or charged**
>
> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused —
>
> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings;
>
> …
>
> being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, … subsection (2) below applies.
>
> (2) Where this subsection applies —
>
> ...
>
> (d) the court or jury, in determining whether the accused is guilty of the offence charged,
>
> may draw such inferences from the failure as appear proper."

21. The Judicial College's Crown Court Compendium, at section17.1, gives helpful guidance to judges as to the appropriate legal directions in relation to that provision. It includes a specimen direction. It is paraphrased, but importantly is not quoted verbatim, in the section of Archbold to which detailed reference has been made in submissions.

22. The grounds of appeal against conviction are:

> (1) The judge failed to direct the jury in accordance with the specimen direction, and in particular failed to direct them: (i) that they may only draw an inference adverse to the appellant if they were sure that the prosecution case was such "as it appeared to the appellant (and in this case his solicitor) at the time of the interview that it called for an answer"; and (ii) that they should consider the explanation given by the appellant for his failure to answer questions, including legal advice, and unless they were sure it was not the genuine reason for failure they should not draw any adverse inference.
>
> (2) The judge failed to give the jury any proper guidance as to the "circumstances prevailing at the time" and failed to direct the jury that in deciding whether the appellant could reasonably have been expected to mention facts later relied on at trial, they should take into account things such as the appellant's age (29) and good character; that he had been arrested for murder; that his girlfriend had been arrested and he did not know the whereabouts of his young daughter; and that he was a foreign national and had a limited understanding of English.
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> (3) The judge wrongly permitted the prosecution in cross-examination of the appellant to rehearse questions asked of the appellant in interview, contrary to his right to remain silent and when he had given evidence that he made no reply on the advice of his solicitor.
>
> (4) The judge wrongly directed the jury that the appellant now relied on a fact, namely that "whoever caused the deceased's injuries was nothing to do with him", not previously mentioned when questioned, when in fact before his second interview on 27th December 2018 the appellant had in a prepared statement asserted that he was not involved in causing any fatal injury to the deceased.
>
> (5) The judge in summing-up failed to remind the jury of the critical evidence of the neighbours, much of which supported the account given by the appellant and contradicted the account given by Polomka's partner and by Piotrowski.
>
> (6) By reminding the jury as to questions asked in cross-examination of the appellant as to his failure to answer questions, the judge negated the purport of the section 34 direction, which was unfair and prejudicial.

23. The respondent submits that the judge's directions were correct in law and appropriately tailored to the evidence in the case.

24. We are grateful to both counsel for their written and oral submissions. We have reflected on those submissions, and have considered the cases of *R v Argent* [1997] 2 Cr App R 27, *R v Green* [2019] EWCA Crim 411, [2019] 4 WLR 80 and the very recent decision in *R v Black* [2020] EWCA Crim 915.

25. It was clearly necessary, in the circumstances of this case, for the jury to be directed as to

the boundaries within which they might permissibly take into account, as providing some support for the prosecution case, the appellant's failure to mention in interview any of the matters on which he relied in his defence at trial. As *Green* confirms, a judge is not obliged to adopt verbatim the terms of the specimen direction, although a failure to do so may carry the risk that an important matter may be omitted. The issue in this case is therefore not whether the judge repeated the precise words of the specimen direction, still less whether he repeated the precise words of the paraphrase in Archbold. Rather, it is whether the terms in which the judge directed the jury were correct in law and sufficient in the circumstances of the case.

26. In *Argent* the court identified six formal conditions which had to be met before a jury could draw an adverse inference from a defendant's failure to mention in interview something which he later relied on at trial. The sixth of those conditions is that the failure must be to mention a fact which, in the circumstances existing at the time, the defendant could reasonably have been expected to mention when questioned. Lord Bingham CJ, giving the judgment of the court, said this at page 33:

> "The time referred to is the time of questioning, and account must be taken of all the relevant circumstances existing at that time. The courts should not construe the expression 'in the circumstances' restrictively: matters such as time of day, the defendant's age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances; and those are only examples of things which may be relevant. When reference is made to 'the accused' attention is directed not to some hypothetical, reasonable accused of ordinary phlegm and fortitude but to the actual accused with such qualities, apprehensions, knowledge and advice as he is shown to have had at the time. It is for the jury to decide whether the fact (or facts) which the defendant has relied on in his defence in the criminal trial, but which he had not mentioned when questioned under caution before charge by the constable investigating the alleged offence for which the defendant is being tried, is (or are) a fact (or facts) which in the circumstances as they actually existed the actual defendant could reasonably have been expected to mention.
>
> Like so many other questions in criminal trials this is a question to be resolved by the jury in the exercise of their collective common-sense, experience and understanding of human nature."

27. The judge gave detailed directions on the issue of inferences to be drawn from silence. They covered about three pages of the document which he gave to the jury. He substantially followed the terms of the specimen direction. In some respects he departed from it in terms which were more favourable to the appellant. He explained to the jury that the inference which they were invited by the prosecution to draw was that the defence now put forward by the appellant was false. He directed them that if they did draw any such conclusion, they must not convict the appellant either wholly or mainly on the strength of it, but may take it into account as some additional support for the prosecution's case when deciding whether his evidence about the facts on which he now relied was true. He directed them that they may draw such a conclusion only if they thought it fair and proper and were satisfied about three things: that the appellant could reasonably in the circumstances have been expected to mention the facts on which he now relied; that the only explanation for his failure to answer the questions asked by

the police was that he had no answer which he believed would stand up to scrutiny in interview, or that he had since tailored his account to fit the prosecution's case or to add to his defence; and that they were sure that, apart from his failure to mention those facts, the prosecution case against him was so strong at the time of his interviews that it clearly called for an answer by him. The judge went on to remind the jury of the explanations which the appellant had given for his decision not to answer questions in interview, and to give a detailed direction about the relevance of legal advice. Later in his summing-up the judge reminded the jury of the submissions of counsel on this topic, and fairly summarised the arguments on both sides.

28. With all respect to the judge, there are in our view two features of his directions which can be criticised. First, when directing the jury about the first of the three things about which they must be satisfied, the judge referred only to the fact that the appellant had been cautioned: he did not in that paragraph of his direction refer to matters such the appellant's concerns for his partner and child or his limited command of English, although he did remind the jury of such matters in a later paragraph. Secondly, when summarising in very general terms the matters on which both defendants now relied, but which they had not mentioned in interview, the judge included that both had said in evidence that whoever had caused Polomka's injuries was nothing to do with either of them. That was not an accurate summary so far as the appellant was concerned, because in his second prepared statement he had said that he was not involved in causing any of Polomka's injuries.

29. We do not accept the other criticisms made in the grounds of appeal. In particular, we do not accept that the judge should not have permitted cross-examination about the appellant's reasons for choosing not to answer questions. A defendant who puts forward a general explanation, or explanations, for his failure to answer questions does not thereby impose an automatic bar on any cross-examination about specific failures to mention particular matters now relied upon. Everything depends on the facts and issues in a particular case. A judge when summing up will be obliged to identify to the jury the specific matters which it is alleged the defendant failed to mention, and the inference or inferences which they are being invited to draw from that failure. It may therefore be appropriate, and indeed necessary, for the prosecution to investigate details in cross-examination of a defendant. The prosecution may, for example, intend to make a specific allegation, which must accordingly be clearly identified to the defendant. In this case, the allegation that the defendants had agreed a policy of not naming any names was an example of that. A defendant may sometimes put forward different explanations for failing to mention particular facts. Judges must of course be careful, as the judge was here, to ensure that the cross-examination is relevant to the issues in the case, does not tend to contradict or undermine the right to silence, and does not become oppressive or unfair. In the present case, the judge was in our view correct to permit such cross-examination as he did permit, and correct to ensure that irrelevant matters were not pursued.

30. Nor do we accept that the directions given by the judge were deficient in relation to whether the prosecution case appeared sufficiently strong to call for an answer. The argument on behalf of the appellant is that at the time of the first and second interviews, such statements as had by then been taken from witnesses showed that the appellant had gone to the assistance of Polomka and did not include any allegation that he had stabbed Polomka. But even if that is a correct summary of the position, it does not assist the appellant. First, the appellant had been arrested on suspicion of murder and was from the outset of the interviews being asked whether he had handled a knife or caused injury. The solicitor representing the appellant at interview did not raise any concern about the extent of pre-interview disclosure or suggest that the questions were improperly fishing for information when there was no basis for accusing the appellant.

31. Secondly, in the second interview the appellant was specifically asked about his torn and

bloodstained shirt, and he said that it was possibly Polomka's blood because he had been wearing that shirt when trying to help him.

32. Thirdly, there was neither cross-examination of prosecution witnesses nor defence evidence as to what information was in the possession of the police at the time of each interview, and we find it difficult to see how the judge can be criticised for failing to say more than he did about this aspect of the case.

33. Fourthly, it is acknowledged that by the time of the third and fourth interviews, statements had been taken from witnesses who alleged that the appellant had brandished a knife at Polomka outside the house. The appellant himself did not suggest that there was any material change in his own understanding of the situation he faced, and we cannot see how it would have assisted either the appellant or the jury for the judge to have expanded his direction to include an analysis of each distinct stage of the interviewing process.

34. We therefore have to consider whether the criticisms which we have accepted as legitimate render the convictions unsafe. In the circumstances of this case, we are satisfied that the judge accurately and sufficiently directed the jury as to all matters relevant to their assessment of whether there was a case calling for an answer and whether in the circumstances then prevailing the appellant could reasonably have been expected to mention all or any of the matters summarised in the agreed list. In particular, and in our view crucially, the jury can have been in no doubt about the need for them to take into account the appellant's explanations for not replying to most of the questions, and can have been in no doubt as to the need to consider the difficulties which he faced in terms of his limited command of English, his uncertainty as to what was happening and his anxiety about his partner and child, and to consider the important fact that he was relying on legal advice.

35. As to the judge's error in suggesting that the appellant had not previously said that someone else must have inflicted the injuries, we are confident that the jury would not have been misled by it. We note that the list of relevant matters not mentioned did not include any such suggestion. We also note, although it is not a decisive point, that it was not thought necessary at the time to invite the judge to correct or add to his direction.

36. The prosecution case against the appellant was in our view a strong one, and the inference to be drawn from his failure to mention facts was but one aspect of it. We are not persuaded that it was of central importance, as is now suggested.

37. In those circumstances, we are satisfied that the convictions are safe.

38. We turn to the renewed application for leave to appeal against sentence. The judge in his sentencing remarks rightly referred to the fact that the murder had not only ended one life but had also harmed many others, as the personal statements of Polomka's partner and family vividly showed. He found, on the evidence, that the appellant, as well as Stragowski, had brandished a knife inside the house, and had taken the knife with him when he followed those who had left the house, intending to use it. He accepted that there had been no initial plan to use knives, which were taken up as matters escalated. However, once the other men had left the house, they posed no threat at all, but the appellant and Stragowski had chosen to follow them outside and confront them again. They had both stabbed Polomka.

39. The judge concluded that the case fell within paragraph 5A of Schedule 21 to the Criminal Justice Act 2003. The starting point for the minimum term was, therefore, 25 years' custody. He found no aggravating features. He took into account as mitigating features that the appellant

had intended to cause serious injury, but not to kill; that the attack was to an extent spontaneous; and that the appellant had no previous convictions. He imposed the minimum term of 21 years to which we have referred.

40. The grounds of appeal against sentence realistically accept that the statutory starting point of 25 years applied, but contend that the minim term was excessive in all the circumstances. It is submitted in particular that it is important to avoid an inflexible approach to the starting point, bearing in mind that if the stabbing had occurred inside the house the starting point would have been 15 years. Reliance is placed in this regard on *R v Kelly* [2011] EWCA Crim 1462, [2012] 1 WLR 55 and *R v Dillon* [2015] EWCA Crim 3, [2015] 1 Cr App R (S) 62.

41. That point of principle is well established, and we have no doubt the judge had it well in mind. But of course, even if the stabbing had taken place inside the home, there would have been a substantial increase above the starting point of 15 years to reflect the use of a deadly weapon. Moreover, in this case the judge was entitled to take the view that there was a significant difference between a hypothetical use of the knife inside the house and what in fact happened in the street. The difference was not, as has been submitted, simply a matter of a few metres. In the house, the appellant had already used one weapon (albeit a much less deadly one) to strike Polomka; and he had already brandished a knife, which was followed by Polomka and others leaving the house. The appellant, at that point, can have had no reason to think that either Polomka or any of the other men was armed. The confrontation inside the house had ended. If the appellant had simply stayed indoors, Polomka would be alive today. As it was, the appellant went out into the street armed with a knife which he intended to use. He did in fact use it in a joint attack, two men with knives against one unarmed victim.

42. We would add that although the judge accepted there was no intention to kill, that factor could provide only limited mitigation in the circumstances of a joint attack with knives. The most significant mitigation, accordingly, was the appellant's previous good character, which the judge clearly took into account. The judge might have found an aggravating feature in the fact that the appellant had consumed both alcohol and a controlled drug before committing the offence.

43. The judge had heard all the evidence at trial, and was in the best position to assess the appellant's culpability. We can see no basis on which it could be argued that the minimum term of 21 years was manifestly excessive. It was a stiff sentence, but it did not fall outside the range properly open to the judge.

44. For those reasons, grateful though we are to Mr Pickup, the appeal against conviction is dismissed and the renewed application for leave to appeal against sentence is refused.
