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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2022/03367/A1
[2023] EWCA Crim 202



Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 9th February 2023

B e f o r e:

THE VICE-PRESIDENT OF THE COURT OF APPEAL, CRIMINAL DIVISION
(Lord Justice Holroyde)

MR JUSTICE COTTER

SIR NIGEL DAVIS

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

MATTHEW BANKS

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Mr T Little KC appeared on behalf of the Attorney General

Miss R Upton appeared on behalf of the Offender

J U D G M E N T
(Approved)

Thursday 9th February 2023

LORD JUSTICE HOLROYDE:

1. Matthew Banks, to whom we shall refer as "the offender", pleaded guilty to the manslaughter of his four week old son Leo. On 21st October 2022, in the Crown Court at Winchester, he was sentenced by Cutts J to three years and eight months' imprisonment.

2. His Majesty's Solicitor General believes that sentence to be unduly lenient. Application is accordingly made, pursuant to section 36 of the Criminal Justice Act 1988, for leave to refer the case to this court so that the sentencing may be reviewed.

3. The offender and his partner have a daughter who was approaching her second birthday when Leo was born in November 2017. The offender therefore had some experience of caring for a very young child.

4. Leo, when born, was a healthy baby, but when he was about one month old he developed a cold and was unsettled at night.

5. On the night of 15th/16th December 2017 the offender was in sole charge of Leo whilst his partner slept. At some point during the night he shook Leo forcefully, causing a constellation of serious injuries. He took no action to alert his partner or to seek help. When his partner woke in the morning, he merely said that he had had a bad night with the baby. He said nothing about the shaking, even when his partner rang for medical help. Nor did he say anything at the hospital to which Leo was taken, with the result that initial medical investigations proceeded on an incorrect basis.

6. Over the next couple of days, scans revealed the extensive injuries to Leo's brain. When

asked by his partner whether he knew what had happened, the offender claimed that it must be a medical problem. Some days later, in response to a further question, the offender told his partner that he had taken Leo with him to the toilet and that Leo's head may have struck the doorframe.

7. The offender and his partner were told that there would be an investigation into Leo's injuries and that they could have only supervised contact with their children. In response, the offender affected anger. His partner, understandably, was distraught.

8. It was not until 12th January 2018 – nearly four weeks after the incident – that the offender told his partner that he may have shaken Leo whilst winding him. He said that Leo was crying so much that he was not breathing properly and that he had shaken him to shock him and stop him crying. He said that he had been tired and frustrated, and that it was an accident. A few days later, Leo was discharged from hospital to the care of his maternal grandmother.

9. In a voluntary interview with the police on 22nd January 2018, the offender gave an account of trying to wind Leo, who was crying hysterically and went rigid. He said that whilst Leo was on his knee, he had shaken him backwards and forwards "forcefully" and "quite vigorously". He had then changed Leo's nappy and had found him unresponsive, making odd whining noises and jolting his limbs.

10. Later, in April 2018, the offender told a social worker that he was responsible for Leo's injuries. He said that he had forced Leo into a sitting position, causing his head to fling backwards and forwards like whiplash.

11. It was not until about six months after the fatal incident that the offender's partner was

permitted to resume unsupervised contact with her children.

12. Leo remained seriously ill and was frequently re-admitted to hospital. Sadly, he died on 25th March 2020, 26 months after the injuries had been inflicted.

13. Expert evidence, accepted by the judge, showed that the level of shaking necessary to cause such injuries would have been well outside what would be considered normal handling, and that immediately afterwards the baby would have demonstrated altered consciousness and would clearly have been unwell.

14. The offender was aged 29 at the time of the shaking. He had no previous convictions.

15. At the sentencing hearing, the judge had the assistance of a pre-sentence report and a psychiatric report, both of which spoke of the offender having had a difficult childhood and having suffered from anxiety as a teenager. In the opinion of the psychiatrist, he was suffering from a recurrent depressive disorder, which was of moderate severity at the time of sentencing. He was taking antidepressant medication for that disorder. There was no evidence of any psychotic symptoms.

16. The judge also considered Victim Personal Statements from Leo's mother and grandmother. The former vividly described her anguish at being unable to hold Leo in hospital and of being separated from both her children for a long period. The latter described the stress she had suffered in caring for her two grandchildren, whilst also trying to support her daughter.

17. The offender had written a letter to his deceased son, expressing his remorse. A testimonial from a friend described his caring side.

18. Counsel then appearing for the prosecution had provided a sentencing note in which he submitted that the offence fell into category C of the Sentencing Council's definitive guideline for offences of unlawful act manslaughter. Miss Upton, then as now representing the offender, agreed with that categorisation.

19. In her sentencing remarks, the judge noted that the offender knew about babies and their needs and knew that Leo was fragile and vulnerable. She said that he had known immediately that he had hurt Leo, but had failed to seek assistance. She referred to his failure to tell the truth, even though suspicion fell as a result on his blameless partner.

20. The judge placed the offence into category C on the basis that Leo's death was caused by an unlawful act which involved recklessness as to whether harm would be caused. The starting point was therefore six years' custody, with a range from three to nine years. She referred specifically to two aggravating factors: Leo's vulnerability by reason of his very young age; and the fact that the offender, whilst not actively blaming others, had stood by whilst a shadow was cast over his partner.

21. The judge identified a number of mitigating features: the offender had been a loving and caring father; he had no previous convictions; and he had had a difficult time during the long period between his initial admissions of responsibility and his prosecution some four years later. She accepted that he felt shame, regret, distress and remorse, and had accepted that he would never be forgiven by those who loved Leo. She took into account, to a limited extent, the offender's depressive disorder and difficult childhood. She accepted that he had not intended to harm Leo and had acted in a fleeting moment when tired and less able to cope. But, she added:

"... it is obvious to anyone that behaving in the way that you did to Leo would create a very serious risk of harm and no matter how you felt you were in charge of a helpless infant."

Balancing those factors, the judge concluded that the appropriate sentence, before reduction for a guilty plea, would have been five years six months' imprisonment. Allowing full credit for the plea, she imposed the sentence of three years eight months' imprisonment to which we have referred.

22. On behalf of the Solicitor General, Mr Little KC submits that the sentence was unduly lenient, in particular because the judge wrongly categorised the offence, failed to take into account all the aggravating factors, and gave too much weight to the mitigating factors. Relying on the authority of *R v Stewart* [2016] EWCA Crim 2238, [2017] 1 Cr App R(S) 48, he seeks to depart from the approach taken by prosecuting counsel below. He emphasises the vulnerability of a tiny baby to sustaining really serious injury if shaken. He argues that the offence should for that reason have been placed into category B; or, at the very least, the judge should have made an initial upwards adjustment from the category C starting point, before considering aggravating and mitigating factors. He notes that, in the course of her sentencing remarks, the judge referred to a number of aggravating features of the case, but identified only two for sentencing purposes. He submits that the judge thus failed to give any or any sufficient weight to two further important aggravating factors: Leo's suffering before death, and the offender's breach of what Mr Little describes as "the responsibility/trust reposed in a parent". He further submits that the absence of premeditation should not have led to any significant reduction in sentence, and that the judge should, in any event, have found that the aggravating factors somewhat outweighed the mitigating factors.

23. For the offender, Miss Upton contends that the sentence was not unduly lenient. She submits that the judge rightly placed the offence in category C, because it was properly

regarded as a case falling between the higher and lower categories of culpability. She goes on to submit that the judge carefully considered all relevant features of the case and reached a conclusion with which this court should not interfere.

24. We are very grateful to both counsel for their written and oral submissions. Having reflected on them, we reach the following conclusions.

25. The guideline treats all cases of manslaughter as involving harm of the utmost seriousness, and the sentence levels in the guideline take the loss of life into account. It identifies four levels of culpability. It lists characteristics which indicate each of those four levels, but enjoins the sentencer to avoid an overly mechanistic approach and to balance the characteristics to reach a fair assessment of culpability in the circumstances of the offence. One of the factors indicating level B high culpability, on which Mr Little relies, is that "death was caused in the course of an unlawful act which carried a high risk of death or grievous bodily harm which was, or ought to have been, obvious to the offender".

26. The category C, medium culpability characteristic on which Miss Upton particularly relies is that death was caused in the course of an unlawful act which involved recklessness on the part of the offender as to whether harm would be caused. It should also be noted that at step 2 of the guideline, the rubric to the grid showing starting points and category ranges, says:

"Where a case does not fall squarely within a category, adjustment from the starting point may be required before adjustment for aggravating or mitigating features."

27. The judge faced a difficult sentencing process. We are very conscious that in this court we have had the benefit of submissions which specifically seek to depart from the approach

adopted by prosecuting counsel below. As we have noted, the judge stated that it was obvious that the offender's conduct would create a very serious risk of harm. We respectfully agree. Having regard to Leo's very young age and inability to control the movements of his head, to the expert evidence and to the offender's own admissions, the level of force involved in the shaking must have come very close to justifying a finding that there was an obvious high risk of death or grievous bodily harm. We are not, however, persuaded that the judge was required to place the offence into category B. Although it was close to the borderline, the judge was entitled to conclude that a fair assessment of the offender's culpability put the case into category C.

28. However, because we regard the level of culpability as coming close to category B, we accept the submission made in this court that the judge should have reflected the level of force used by the offender against his helpless son by making an initial upwards adjustment to the guideline starting point, before then considering the aggravating and mitigating factors.

29. We accept that there were a number of mitigating factors to which the judge rightly gave significant weight. With all respect to the judge, however, we cannot agree that those factors outweighed the several serious aggravating features so as to necessitate an overall downwards adjustment of sentence.

30. Whilst we accept Mr Little's submissions as to the significance of the breach of responsibility/trust reposed in a parent in circumstances such as this case, we think it implicit in the sentencing remarks that the judge had that aspect well in mind when passing sentence. Moreover, as Mr Little realistically recognised, care must be taken to avoid any element of double counting when considering the position of the parent in a case such as this.

31. It does seem to us, however, that the judge failed to give sufficient weight to the other

aggravating factor mentioned by Mr Little. The injuries inflicted by the offender resulted in a period of more than two years when Leo was seriously ill and moved in and out of hospital. For the first six months of that period he was largely deprived of the comfort of his mother; and throughout that period his young life was blighted by the injuries inflicted on him. Those features, in our view, added substantially to the seriousness of the offence. When added to the factors mentioned by the judge, the aggravating features outweighed the mitigation, and there should have been a further upwards adjustment to the sentence.

32. Even giving as much weight as we can to the mitigating factors, we conclude that the sentence could not have been less than eight years' imprisonment, before making the reduction of one-third for the guilty plea. We apprehend that as a result of legislation recently brought into force by Parliament, the effect of increasing the sentence to that level is that the offender will be required to serve two-thirds, rather than one-half, of his sentence before being released on licence. Nonetheless, in our view, the sentence imposed by the judge was not only lenient, but unduly so.

33. For those reasons, we grant leave to refer. We quash the sentence imposed below as being unduly lenient, and we substitute for it a sentence of five years and four months' imprisonment.

34. We understand that Leo's mother and grandmother – and it may be other family and friends – have been observing this hearing remotely. We offer them our condolences.

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

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