



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 70
HCA/2018-000642/XC

Lord Menzies
Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MENZIES

in

APPEAL AGAINST SENTENCE

by

FRAZER ANGUS NEIL

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: McConnachie QC, T Lenaghan; BCKM, Edinburgh
Respondent: Prentice QC (sol adv) AD; Crown Agent

26 June 2019

[1] The appellant was convicted at Glasgow High Court on 1 November 2018 by a majority verdict of the jury of a charge in the following terms:

“(003) on 11 February 2017 at Flat 6, 131 Hutchison Road, Edinburgh you FRAZER ANGUS NEIL did assault Hannah Dorans, your ex-partner, formerly of 77 Kippielaw Road, Dalkeith, struggle with her, restrain her, penetrate her vagina with your penis, strike her on the head and body and by means to the Prosecutor unknown otherwise inflict violence on her, seize her by the neck and compress same,

place a cord or similar ligature around her neck and tighten same, restrict her breathing and strangle her and you did murder her.”

[2] The diet was adjourned for sentence until 29 November 2018 for preparation of a criminal justice social work report and a psychiatric report. On that date the appellant was sentenced in respect of the above charge to life imprisonment, backdated to 8 January 2018 and with a punishment part of 19 years.

[3] The appellant appealed against both conviction and sentence, but leave to appeal against conviction was refused.

The evidence

[4] The trial judge in her report to this court explains that the Crown position at trial was that this was a planned killing with deliberate intention to kill on the part of the appellant. The agreed cause of death was compression of the neck and in the evidence of the pathologist this resulted from strangulation by the use of a ligature. The appellant admitted that he killed the deceased but stated in evidence that he had complete memory loss and could not say what happened. The defence case was directed to the possibility that the appellant killed the deceased during consensual sexual intercourse involving the sexual practice of erotic asphyxiation. The appellant accepted if this is what happened then he acted in the face of obvious dangers and he must have been reckless in causing death. On this basis the defence invited the jury to convict of culpable homicide.

[5] The appellant and the deceased were in a relationship for about 5 years and lived together, prior to the deceased finishing the relationship on 29 January 2017. On this date the deceased moved out and returned to live with her parents. The killing took place within the flat of the appellant on 11 February 2017.

[6] Several witnesses spoke to the appellant being dominant, controlling and possessive of the deceased. The appellant controlled her email and Facebook account and was in charge of her finances. In the period leading up to 11 February 2017 there was a large number of text message exchanges, some of which suggested that the appellant was jealous and possibly angry that the deceased was seeing a work colleague. On 2 February he sent a text to the deceased with a photograph of her favourite jacket apparently being cut up. Some of the text messages sent by the appellant to the deceased indicated that he could not cope with, or refused to accept, the breakup. They varied from expressions of love, along with threats to kill himself, to statements suggestive of wanting to harm the deceased. The tone of the texts varied from asking questions to making demands and from cajoling to bullying. The Crown relied upon these messages to show the build-up to the killing and they suggested they were apparently designed to reassert control and latterly, to get the deceased to come to his flat alone.

[7] On the morning of 11 February 2017 the appellant telephoned the police and confessed that he had killed the deceased. He repeatedly said "I've killed her" and "I didn't mean to do it". He also said he had "strangled her". There was also evidence led that on 10 February 2017, the day before the killing, and after the deceased had agreed to come to the flat, search terms were entered on the appellant's computer consisting of the words "culpable homicide", "diminished responsibility", and "sentence".

Submissions for the appellant

[8] Senior counsel accepted that the trial judge was entitled to reach the view that this was a crime involving premeditation, having regard in particular to the computer searches referred to above, and the series of text messages leading up to 11 February 2017. However,

the jury had made important deletions to the charge, including the words “force her onto a bed”, “remove her trousers and underwear” and “rape her”, together with reference to section 1 of the Sexual Offences (Scotland) Act 2009. It was clear that the appellant was unable to cope with his rejection by the deceased and with the fact that she had brought their relationship to an end.

[9] At the time of sentence the appellant was aged 25 and had never been in trouble before; he had no previous convictions of any sort, and there was no suggestion of previous domestic violence. He had demonstrated remorse, and there was some evidence to suggest that he had attempted to resuscitate the deceased - on the bed where the body of the deceased was found there was also found a “shock box” to stimulate the heart and a blue oxygen mask and tube for the purpose of supplying oxygen, which had traces of the deceased’s DNA around the mouth piece. The appellant telephoned the police and said that he was responsible for her death, and had never wavered from that position. He appeared to understand the impact which his action in killing the deceased would have had on her family and friends, and the pain which they must have suffered.

[10] The criminal justice social work report indicated that the appellant had been diagnosed with epilepsy in 2012, and had suffered seizures in custody; he also suffered from depression. He had a good employment history, mostly connected with caring work; he had been a volunteer for the St Andrews Ambulance First Aid Service; he had worked as a nursing assistant at the Royal Edinburgh Hospital for 2 years, and then worked in care homes and as a support worker for Spire Healthcare. The psychiatric report indicated that he had traits of Dissocial Personality Disorder including a low tolerance to frustration and a low threshold for discharge of aggression, with some traits of a Narcissistic Personality Disorder. He was assessed as being at high risk of completed suicide.

[11] In summary therefore, senior counsel submitted that the appellant was a first offender with a previous good character and good work history, who suffered from physical and mental health problems, and who had demonstrated remorse for what he had done on 11 February 2017. He accepted that the trial judge had to take account of all the circumstances surrounding the offence, and the evidence that it was premeditated, but in balancing those factors the trial judge fell into error. A punishment part of 19 years was excessive and resulted in a miscarriage of justice.

[12] By way of comparison, senior counsel referred us to *HM Advocate v Boyle and others* 2010 SCCR 103, and in particular the guidance given at para [14] and the circumstances set out at paras [24], [26] and [27]. *Boyle* received a punishment part of 20 years, and *Maddox* a punishment part of 18 years; both had previous convictions (unlike the present appellant), and the court described the circumstances as “redolent of the medieval horrors of execution by burning. It is difficult to envisage more cruel or sadistic treatment of another human being.” Neither had shown any remorse for his crime. The third respondent, *Kelly*, pled guilty to a premeditated murder of a very vulnerable victim perpetrated for the purposes of robbery and aggravated by steps taken to conceal the crime; on appeal the court decided that the appropriate initial figure for the punishment part would have been 22 years, with a discount of 3 years for the early plea, giving a specified period of 19 years. Senior counsel also referred us to *HM Advocate v AJV* 2015 SCCR 50. In that case the appellant was a first offender aged 46 who killed his wife about 24 hours after he discovered that she had been having an affair. He inflicted four stab wounds, three to her front and one to her back. Senior counsel did not suggest that the circumstances of *AJV* were identical to the present case, and importantly *AJV* was not a premeditated attack. In that case, the trial judge fixed the punishment part at 12 years, taking into account the

respondent's good character, his excellent work record, that he had been a model husband and father and the stress he was under as a result of the deceased's conduct. The appeal court held that the sentence, although undoubtedly lenient, was not unduly so.

[13] In all the circumstances of this case, and having regard to the punishment parts imposed in the two cases referred to above, senior counsel submitted that a punishment part of 19 years in the present case was excessive.

Submission for the Crown

[14] The advocate depute relied on the cases referred to only for such principles as might be derived from them, and submitted that in all the circumstances of the present case, and in particular having regard to the evidence of the pathologist as to the post-mortem examination, summarised at para (30) of the trial judge's report, it could not be said that a punishment part of 19 years was excessive.

Decision

[15] We do not consider that much assistance can be derived from looking at other cases of murder in which punishment parts have been imposed. Every murder is a terrible crime, and it is neither appropriate nor productive for this court to carry out an exercise of balancing the awfulness of one murder against the awfulness of another. Although the court in *HM Advocate v Boyle* gave some guidance to sentences, it is important to bear in mind what was stated there:

“[17] The foregoing are guidelines and should be treated as such. The circumstances in which murders are committed and the circumstances of offenders vary substantially. It is important that sentencers should retain sufficient discretion in selecting a punishment part as to allow them to take the particular circumstances appropriately into account.”

[16] In the present case we are satisfied that the sentencing judge did indeed take the particular circumstances appropriately into account. As was accepted by senior counsel for the appellant, she was entitled to take the view that this was a premeditated murder, and it is clear from the terms of the pathologist's evidence that the appellant compressed the neck of the deceased for a relatively long time. Moreover, there were injuries to the neck which suggested blunt force injury, distinct from the use of a ligature; these injuries were deep in the neck and indicated the use of severe force - extremely high force - but this did not contribute to the cause of death. This was a premeditated murder involving prolonged compression of the neck and the use of extremely high force. It is clear from her report that the sentencing judge took account of the deletions from the libel, that the appellant was 25 years old with no history of violent offending, and who had been in employment and made a contribution to society by undertaking voluntary work in a caring role. She also took account of his epilepsy and mental health issues. We are unable to conclude that she fell into any error in balancing these factors. We are not persuaded that a punishment part of 19 years was excessive in all the circumstances of this case. Accordingly this appeal must be refused.