

ENGLAND AND WALES / JUDGMENT

Burgess, R. v

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- 200706316/D1 Neutral Citation Number: [2008] EWCA Crim 516 IN THE COURT OF APPEAL CRIMINAL DIVISION Royal Courts of Justice Strand London, WC2A 2LL Date: Friday, 8th February 2008 B e f o r e: SIR IGOR JUDGE (PRESIDENT OF THE QUEEN'S BENCH DIVISION) MR JUSTICE DAVIS MR JUSTICE DAVID CLARKE
- ----- R E G I N A v LEE BURGESS JEFFREY BYRAM
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave International Limited A Merrill Communications Company 190 Fleet Street London EC4A 2AG Tel No: 020 7404 1400 Fax No: 020 7831 8838 (Official Shorthand Writers to the Court)
- ----- Mr J Weate (Solicitor Advocate) appeared on behalf of the Applicant Burgess Mr P Williams appeared on behalf of the Applicant Byram Mr R Mansell appeared on behalf of the Crown
- ----- J U D G M E N T SIR IGOR JUDGE: These two cases were listed and heard consecutively yesterday. They appeared to raise features common to what are sometimes described as "change of law cases". For the reasons which will now appear both applications were made out of time and we ordered appropriate extensions and gave leave to appeal against conviction on one or other counts on the relevant indictments. On two different dates, in May 2005 and then in March 2006, Jeffrey Byram pleaded guilty at Leeds Crown Court to three counts: count 1, manslaughter, count 2, administering a poison, 6 months' imprisonment consecutive and count 3, administering a poison, 6 months' imprisonment concurrent. This is his appeal against his convictions on counts 1 and 3, advanced on the basis that his guilty pleas were tendered on an erroneous understanding of the legal principles which applied to this case, which it was appreciated at the date when he pleaded guilty were in the process of being prepared for argument and in due course analysis in the House of Lords in R v Kennedy. In theory, Byram could have pleaded not guilty, pending the decision of the House of Lords and hoped for a resolution of the issue before his trial. Or again in theory, he could have pleaded guilty as he did and then immediately sought leave to appeal against conviction and urged the postponement of the hearing until the outcome of the process of certification by the Court of Appeal (Criminal Division) in Kennedy was completed. For obvious reasons both possibilities would have

been undesirable. Instead, having pleaded guilty, once the decision of the House of Lords became known, he sought leave to appeal out of time. In the circumstances it would have been unjust to have refused him leave. The facts of the case can be taken very shortly. The deceased was a man called Jamie Topley and he and the appellant became friends in the summer of 2004. Both were drug addicts. The appellant had a long-term addiction to heroin, the deceased had a great problem with cocaine and ecstasy as well as alcohol. On 11th September 2004 the appellant and the deceased were with other friends snorting cocaine. The appellant cooked some of the drug and injected it into himself and then injected it into the deceased. That incident was covered by count 2 of the indictment. There is no appeal against that conviction. The disaster occurred on the following day, 12th September. The appellant and the deceased met a drug dealer. The deceased purchased some heroin from him. The two of them then snorted it in the appellant's car. Later that evening they met again. On this occasion the appellant cooked up some heroin. He prepared the syringe and helped the deceased to locate a vein. The heroin was then injected into the deceased. The evidence as to the precise circumstances will be elaborated in a little more detail later in the judgment. Within seconds of the injection it became apparent to the appellant that something had gone dreadfully wrong. The deceased was reacting very badly. The appellant telephoned emergency services. An ambulance attended and the deceased was pronounced dead at 11 o'clock that evening. The cause of death was an overdose of heroin and alcohol. In interview, and the interviews were prolonged and we take this very shortly, the applicant admitted taking drugs with the deceased. He asserted that the deceased had injected heroin himself on three or four occasions before 12th September. On the first such occasion he had supplied and injected the deceased but thereafter the deceased had taken heroin without assistance. That account was developed in subsequent interviews. In May 2006, that is the date when the appellant pleaded guilty to manslaughter, the details of what had happened on the night of 12th September were of no great importance, because the governing principles set out in *R v Kennedy* and the Court of Appeal (Criminal Division), [2005] EWCA Crim 685, on any view covered this case. The basic facts of *Kennedy* were that he prepared a dose of heroin for the deceased at his request and provided him with a syringe ready for self-injection. The deceased did indeed inject himself with the heroin and then returned the empty syringe back to Kennedy. The dose of heroin caused the death of the deceased. Kennedy was subsequently charged with and convicted of manslaughter. In the Court of Appeal it was confirmed that Kennedy had no defence. The judgment identified the principles which applied to the present case at the date when the appellant pleaded guilty. It was referred to in open court in discussions with the judge. It was accepted, on all sides, and in particular on behalf of the appellant himself, that on the basis of *Kennedy*, as he had undoubtedly supplied the fatal heroin dose, he had no defence to counts 1 and 3. The Crown adopted precisely the same approach and so the issue whether the appellant might be guilty on any other factual basis never arose for consideration. Following its judgment in *Kennedy*, the Court of Appeal certified the following question: "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a Class A controlled drug, which is then freely and voluntarily self-administered by the person to

whom it was supplied and the administration of the drug then causes his death?" The response of the House of Lords was very clear and simple: "In the case of a fully informed and responsible adult never." In reaching its conclusion the House of Lords referred to another decision of the court, *R v Rogers* [2003] 1 WLR 1374. In *Rogers* it was the deceased who bought heroin for himself and for Rogers. He placed the heroin into two syringes. He injected Rogers and then, while Rogers held his belt round the deceased's arm as a tourniquet, he, the deceased, injected himself. Again it was a fatal dose. Rodgers was convicted of manslaughter. The House of Lords considered that Rogers was wrongly decided. In his analysis in *Kennedy*, Lord Bingham of Cornhill went on to consider the possibility that two people, one of whom would be the person who self-injected with a deadly dose, could be found to have been acting together, so that as a matter of fact the drug was jointly administered. If so, a manslaughter verdict would be appropriate and could properly be returned against the survivor: SMITH BERNAL WORDWAVE "It is possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection." If a defendant may be convicted on the basis that the fatal dose was jointly administered, then it follows that he is not automatically entitled to be acquitted if the deceased rather than the defendant physically operated the plunger on the syringe and caused the drug to enter his body. In the present case there was evidence which might reasonably have led a jury to conclude that this appellant had indeed jointly participated in the administration of the fatal dose of heroin. From the interviews as they developed, it emerged that he supplied the deceased with the heroin, which he, the appellant, drew into the syringe on 12th September. He did not hand the syringe to the deceased but he took it and the needle to the deceased's arm, where he found an appropriate vein. He laid the tip of the needle against the skin of the deceased above that vein. It is not clear from the interview that he ever in fact let go of the syringe, but on his account the deceased depressed the plunger. Having done so, the appellant assisted in the physical withdrawal of the plunger from the deceased's arm. That, in summary was the appellant's eventual account of what had happened. The Crown, we must note, was in possession of evidence which tended to suggest that the assertion that the deceased operated the plunger may not have been true. But our immediate concern is that on his own account, it would have been open to the jury to convict the appellant on the basis identified by Lord Bingham of Cornhill in *Kennedy*. We have therefore been asked to consider whether it would be appropriate to quash the conviction entered on the basis of the appellant's guilty plea. We have reflected carefully on this question. It is clear beyond any doubt that the guilty plea by the appellant and the entire proceedings in the Crown Court were based on the principles explained in *Kennedy*, in this Court. If *Kennedy* was guilty, plainly the defendant, as he then was, was also guilty. However, in the House of Lords it was decided that *Kennedy* was not and, as a matter of law on the facts, could not be guilty. It therefore follows that the appellant's guilty plea was tendered and accepted and the entire proceedings were conducted on what now emerges was a fallacious basis. Whatever view we may now form of the case as a result of reanalysing the interview record, in the light of the principles laid down in the House of Lords, we have come to the conclusion that it would be inappropriate in this case to uphold a conviction

following proceedings which were conducted on a wholly incorrect basis in law. In doing so, we should be depriving the appellant of the opportunity to invite a jury to decide whether he was or was not guilty of joint participation in the death of the deceased. In those circumstances the convictions on counts 1 and 3 should be quashed. In view of the fact that the appellant has served his sentence, the Crown, while maintaining that there was ample evidence to justify the appellant's conviction if the case were tried, did not invite us to order a retrial. Given the Crown's approach to the case, we have decided that we should not do so. Lee Burgess is a professional criminal in his mid- thirties. On 27th April 2007 in the Crown Court at Sheffield he pleaded guilty to three counts and on 3rd May was sentenced by the Recorder of Sheffield, His Honour Judge Goldsack QC, as follows: count 1, escape, 18 months' imprisonment, count 2, burglary, also 7 years' SMITH BERNAL WORDWAVE imprisonment; count 3, a further burglary, 7 years' imprisonment. The sentences for burglary were ordered to run concurrently with each other, but the sentence for escape was to run consecutively. Five other dwelling-house burglary offences were taken into consideration. The sentence was ordered to run consecutively to a sentence of 10 years which the appellant was then serving. The important question in the present case relates to the conviction of escape, which is the only conviction which has been called into question. The facts were very straightforward. On 6th June 2003 the appellant was sentenced to a total of 10 years' imprisonment, 9 years' for robbery, 5 years' concurrent for five distraction burglaries and 1 year consecutive for breach of licence from a previous sentence. Less than 4 years into that sentence, he was moved into an open prison and allowed to enjoy what is described as a "community visit". On 1st October 2006 he failed to return to prison following his authorised departure from Spring Hill Open Prison. Those very simple facts form the basis of the allegation that he had escaped. He pleaded guilty. That plea was based on legal advice, which we now know was wrong. The appellant was not in custody. He was free from custody, albeit temporarily and under an obligation to return to continue his sentence and resubmit himself to custody. In short, therefore, he did not escape at all. His failure to return at the end of the period when he was lawfully at large, did not constitute this offence. That is the effect of the decision of this Court in *R v Montgomery* [2007] EWCA Crim 2157 after a thorough analysis of all the relevant authorities. Montgomery's appeal was already in progress but still undecided when the appellant appeared before Sheffield Crown Court on 27th April

2007. The decision in *Montgomery* did not become available until the 31st July. After conviction and sentence the appellant began by seeking leave to appeal against sentence, but once *Montgomery* became available for study, he sought legal advice and then leave to appeal out of time against conviction. He needed leave to pursue that application, and we granted it. In practical terms, and we emphasise "in practical terms" this is not a change of law case at all. The clarification of the law relating to escape was already in progress at the time when the appellant pleaded guilty. In that sense the case was very similar to *Byram* and the appellant is currently serving the sentence imposed on him following that appearance, consecutively to the other sentences but as an additional punishment. Now that the law has

been clarified, it can be appreciated that he should not have pleaded guilty because, as a matter of law, he was not in fact guilty. The offence which the applicant committed was a summary offence only and he was not charged with it. In those circumstances the conviction on count 1 will be quashed. By way of footnote, we wonder whether it is sufficient to reflect the seriousness of at least some prisoners failing to return to custody following authorised leave of one kind or another for the offence to be summary only. However, that is not a matter today. In any event the sentence for those who commit criminal offences, after having been released and failing to return to prison custody, should normally be regarded as significantly aggravated. SMITH BERNAL WORDWAVE We turn briefly to the renewed application for leave to appeal against sentence imposed for two dwelling-house burglaries with five similar offences taken into consideration. We can illustrate the nature of this man's criminality by describing very briefly the circumstances of one of these burglaries. It was 2 o'clock in the afternoon, in January 2007, when an elderly 80-year-old woman was alone in her ground floor flat. She heard a knock at the door. Using her walking stick to aid her, she made her way to the door. The appellant was there and said he had brought a late Christmas parcel, some kind of old-fashioned clock. Without being invited, he stepped into the house and walked into the lounge and there sat down and started chattering to the victim, all about the history of Hillsborough. She was uncomfortable but, no doubt given her age she was rather helpless about what to do. He asked for a cup of tea and although she had many reservations about it she went off to the kitchen to make it. Whilst she was in kitchen she heard the appellant on the telephone. When she returned the appellant had gone and so had her purse which it contained her money. She had been subject of a similar distraction burglary on a previous occasion, so there was a video camera installed for her security. From it the appellant was identified by a police officer. The money was not a large amount for some but for the victim it was a great deal. She could not afford to replace it and naturally enough she was left shaken and upset and felt very vulnerable. The other burglaries were similar in their nature and in their consequences. The single judge made this observation refusing the appellant leave to appeal against sentence: "While serving a sentence of 10 years, including a sentence of 9 years for robbery committed while on bail you escaped from custody." Those last four words we now know were inaccurate. It should read: "You failed to return to custody". It makes no difference to the impact on sentence. The Single Judge then continued: "You then embarked upon a series of burglaries characteristically directed at elderly and vulnerable people. The further sentence was not excessive." We agree with the Single Judge. We agree with the Recorder of Sheffield who took a very strong view about the criminality involved in this case. Accordingly the renewed application for leave to appeal against sentence is refused. SMITH BERNAL WORDWAVE

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