

R.v.Van Hoogstraten

In the Central Criminal Court

T20017249
T20018292
T20018312

Submissions on behalf of the defendant

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The factual basis for sentence

(1) The defendant has been convicted of manslaughter on an indictment charging him with murder. In determining on what basis of fact he is to be sentenced, the principle established in the cases is that if the jury can have reached the verdict only on a particular basis of fact, that basis of fact must be adopted for the purposes of sentence. (see Boyer (1981) 3 Cr.App.R.(S.) 35, Baldwin (1989) 11 Cr.App.R.(S.) 139). If it is uncertain which of two different versions of the facts has been adopted by the jury, the sentencing judge is entitled to form his own view of the facts, based on the evidence heard in the trial (see Cawthorne [1996] 2 Cr.App.R.(S.) 445, Solomon and Triumph (1984) 6 Cr.App.R.(S.) 120).

(2) In this case it is clear that there is only one basis on which the jury could have reached their verdict. That is the basis set out in the summing up at page 11 paragraph C to page 12 paragraph B:

"Now if, members of the jury, you are not sure that Van Hoogstraten ordered Knapp to murder Mohammed Raja or to cause him really serious bodily injury, but you were sure that he ordered, advised, encouraged or persuaded Knapp to cause some harm to Mohammed Raja but not to kill him or to cause some harm less than really serious bodily injury and if you were sure that Knapp, having received that order, in company with Croke or whoever else was the other man who was there if it was not Croke, went beyond it and killed Mohammed Raja, Van Hoogstraten would not be guilty of murder but he would be guilty of manslaughter.
Now, let me just try and put a little more on the canvas to explain what I

am about at the moment. By reference to the facts of this case this verdict could come into play if were you sure that what Hoogstraten counselled Knapp to do was to frighten Mohammed Raja by, for example, threatening him with force, by assaulting him or kidnapping him or doing damage to his home and if you were sure he had not ordered any really serious bodily harm to be done to Mr Raja but in the event things went wrong, in the sense that Knapp and Croke, or whoever else it was, for whatever reason went beyond what Van Hoogstraten had ordered and killed Mohammed Raja, that would be a circumstance in which, as I have said to you, in that event Van Hoogstraten would be guilty of manslaughter.

Now, the reason is simple, the law holds a person responsible for the consequences of setting in train an unlawful piece of conduct and plainly if you were satisfied so that you were sure that what he had ordered was to threaten, to assault him in a less than serious way, otherwise damage his home, that would all be unlawful conduct and if you set in train unlawful conduct and death ensues as a result, even though you haven't counselled it the law holds you responsible for manslaughter."

(3) That is the only basis on which a possible verdict of manslaughter was

left to the jury, and the only basis on the evidence in the case on which to a verdict of manslaughter could have been returned. This was confirmed following conviction when Mr Ferguson submitted (without demur from the Crown or the Court) on behalf of the defendant: "My Lord, the matter which I am sure is already central to your Lordship's thinking as far as sentence is concerned of course is the obvious, and I apologise for referring to it, but it is the crucial matter to be considered and that is that on the jury's verdict what Mr Van Hoogstraten has been convicted of is a counselling to cause some harm to Mr Raja or alternatively a counselling to frighten Mr Raja and of course in both or under both headings the matter went tragically wrong. Nevertheless, so far as his criminal responsibility is concerned that, I understand it, my Lord, is the basis of the jury's verdict."

(4) By acquitting the defendant of murder, the jury have indicated that they were not satisfied that the defendant instructed his co-defendants to kill the deceased, or to inflict grievous bodily harm on him. It also follows from the verdict that the defendant did not intend or foresee that his co-defendants would independently form the intention to kill or to cause grievous bodily harm. If the jury had been satisfied that the defendant contemplated that his co-defendants might intentionally kill or cause grievous bodily harm to the deceased, they would have been obliged to convict him of murder. (see English [1999] 1 A.C. 1,).

(5) It follows that the basis of fact on which the defendant is to be sentenced is that he counselled his co-defendants to assault or frighten the deceased in some way, but that he did not instruct them to kill the deceased or to cause grievous bodily harm, and that he did not foresee that the co-defendants would either kill the deceased or intentionally inflict grievous bodily harm on him.

(6) This version of the facts in turn can be considered ambiguous. What did

the defendant actually counsel the co-defendants to do? It would be consistent with the verdict that the defendant had counselled the co-defendants to attack the deceased physically, and inflict injuries

falling short of really serious injury(version A); alternatively, it would be consistent with the verdict that the defendant had counselled the co-defendants to behave towards the deceased in such a way as to frighten him, but not to assault him physically (version B.) Both of these possibilities are mentioned in the summing up at page 11 and 12.

(7) Given that there is no indication which of these versions of the facts

was adopted by the jury as the basis of the verdict, it is for the sentencing judge to decide which version is to be adopted as the basis of sentence. (see Cawthorne [1996] 2 Cr. App. R. (S.) 445). The sentencing judge must however direct himself in accordance with the criminal standard of proof (Kerrigan (1993) 14 Cr. App. R. (S.) 179, decided in relation to a Newton hearing) and must give the defendant the benefit of any doubt there may be concerning the basis of the verdict of guilty on manslaughter (Stosiek (1982) 4 Cr. App. R. (S.) 205, Tovey (1993) 14 Cr. App. R. (S.) 766.) The following passage occurs in the judgment in Tovey, a case of where a verdict of manslaughter was returned on a count charging murder:

"Secondly, and alternatively, it is said that if the issue as to who produced the knife and how it got there remains obscure, as it was on the evidence, the benefit of any doubt arising from that obscurity or confusion should be given to the appellant. With that second submission we feel bound to agree. There was confusion. The jury's verdict clearly reflected a version of events as perceived by the jury. That version was wrapped in mystery. The appellant should have the advantage of that uncertainty."

(8) It has recently been held that the sentencing judge must give reasons

for preferring one version of the facts to the other (Byrne, June 27, 2002, [2002] EWCA Crim. 1975.)

(9) The following passage occurs in the judgment of Kay L.J.:

"It was for the judge, since he had concluded that he should not ask the jury to express their decision in terms of one possible finding of manslaughter or another, to decide the proper factual basis upon which sentence should be passed. That is just the same as in other cases, where a judge has to reach such a conclusion, the jury having returned a verdict of guilty but there being more than one factual basis upon which they may have acted.

The judge does so by considering the totality of the evidence. It is unnecessary for him to review that evidence in detail in his sentencing remarks because he will already have done that in the course of his summing-up. But it is necessary for him to explain how it is that he arrives at his conclusion. Here, the judge sought to do so by saying that the evidence, suggested overwhelmingly that the appellant had lost his temper and had struck some very severe blows. We think that the judge was entitled to explain his decision in this way, although it may have been better if he had gone into matters in greater detail and explained a little more fully how he reached his conclusion. Nonetheless, this was a case in which it was essentially a matter of looking at the evidence in the round and deciding what the position was. The judge had decided that there was a loss of temper. He had evidence from a series of eyewitnesses about the

severity of the blows that were struck; he had to have regard to the pathologist's evidence, but he was entitled to come to a conclusion adverse to the appellant.

(10) In the absence of any evidence of the precise nature of the instructions given by the defendant to the co-defendants, it is submitted that the court is bound to give the defendant the benefit of the doubt and proceed to sentence on the basis of version (b), that is that the defendant counselled the co-defendants to frighten the deceased but not necessarily to assault him physically.

The proper basis for sentence in cases of manslaughter arising out of an unlawful act.

(11) The principle on which a court should approach the task of sentencing a defendant convicted of manslaughter, where death has resulted unintentionally from an unlawful act, has been considered in a number of cases. In principle, the correct approach is to determine what sentence would have been appropriate for the unlawful act, if death had not resulted from that act, and then to consider to what extent the sentence should be enhanced to reflect the fact that death has resulted, albeit unintentionally and in an unforeseen manner. (see Ruby (1987) 9 Cr.App.R.(S.) 305)

(12) On version A the facts, that the defendant counselled the co-defendants to attack the deceased physically in a manner likely to cause injury falling short of really serious injury, the defendant would have been liable (if the deceased had not died) to be convicted of assault occasioning actual bodily harm or conspiring to do commit that offence. The maximum sentence for either offence would have been five years' imprisonment. While it is clear that the maximum sentence for manslaughter arising out of such circumstances is not limited to the maximum term for assault occasioning actual bodily harm, the proper sentence for the intended offence provides the starting point for the determination of the proper sentence for manslaughter.

(13) Determining the sentence which would have been appropriate if the defendant had been convicted of assault against the actual bodily harm involves a consideration of other decisions on comparable facts. The nearest equivalent cases, albeit plainly at a higher tariff, appear to be cases charged as aggravated burglary or burglary with intent to cause grievous bodily harm, where groups of men have attacked victims in their own homes after forcing their way into the victim's house, and acted generally in a manner which suggests that the attack was planned and deliberate.

(14) The following cases may serve as a basis for comparison:

Attorney-General's Reference (No. 16 of 1994) (R. v. Fairfax) (1995) 16 Cr.App.R.(S.) 629

The offender was convicted of aggravated burglary with intent to inflict grievous b