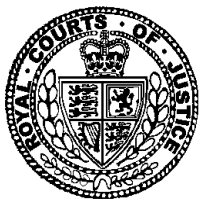

Neutral Citation Number: [2022] EWCA Crim 10

Case No: 202100219 A1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT GUILDFORD

HIS HONOUR JUDGE FRASER, RECORDER OF GUILDFORD

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 January 2022

Before:

LORD JUSTICE MALES

MRS JUSTICE CUTTS

and

HIS HONOUR JUDGE LUCRAFT QC, RECORDER OF LONDON

- -

Between:

REGINA

- and -

SANJAY NIJHAWAN

- -

- -

Jason Pitter QC (appearing **pro bono**) for the **Appellant**

Sally O'Neill QC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 17th December 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10.30 a.m. on 13 January 2022

Lord Justice Males:

Introduction

1.

On 7 th October 2016 in the Crown Court at Guildford before His Honour Judge Fraser, the Recorder of Guildford, the applicant Sanjay Nijhawan, now aged 51, was convicted of the manslaughter of his wife on the grounds of diminished responsibility. He was acquitted of murder. He had in fact pleaded guilty to manslaughter just before the beginning of the trial, although the jury was not told this.

2.
On 1 st December 2016 he was sentenced to life imprisonment with a minimum term of 10 years less the time which he had served on remand. There was at the time no application for leave to appeal against that sentence.

3.
Now, however, the applicant applies for an extension of time of 1,481 days (just over four years) in which to seek leave to appeal against sentence and to call fresh evidence.

4.
In short, the fresh evidence which he seeks to call is expert evidence from Professor David Healy to the effect that the medication for depression which the applicant was taking was capable of inducing suicidal and homicidal tendencies in people who would not otherwise be at risk of committing homicide or suicide and that there appears to be a strong case that this medication did compromise the applicant's functioning in this case, causing or contributing to the killing of his wife. It is said that since the applicant ceased taking this medication, he has been a different man. On behalf of the applicant Mr Jason Pitter QC (who did not appear at the trial and who has represented the applicant pro bono on this application) submits that if this evidence had been taken into account by the sentencing judge, it would have had an important impact on the appropriate sentence to be passed. First, the judge would not have concluded that the applicant was dangerous and would therefore not have had to consider a discretionary life sentence. Second, it would have affected the judge's assessment of the applicant's culpability for the killing of his wife. In the result, it is submitted that instead of a life sentence the judge would have been able to and would have passed a determinate sentence.

5.
The prosecution, represented by Ms Sally O'Neill, submits that this evidence ought not to be admitted. There was extensive psychiatric evidence before the judge for the purpose of sentence and careful consideration was given to all factors affecting the applicant's state of mind. In any event the evidence of Professor Healy is controversial. The prosecution have served a report from Professor Seena Fazel who takes issue with the conclusions drawn by Professor Healy.

The facts

6.
The applicant was of previous good character. He married his wife, Sonita, in 2005. Initially they lived together at the applicant's house in Barnes. In 2012 they had a son, Kai. Sonita, who had earlier worked as an accountant for a pension company, was employed by her father who owned a number of care homes. The applicant was described by his brother in law as "somebody who would not hurt a fly". The applicant and his wife appeared to have a loving relationship and did not argue. There was no evidence of Sonita having or seeking to form a relationship with any third party.

7.
In April 2016, at about the time the applicant and his wife moved into their new home, the applicant left his job at a bank as he felt unable to cope with the stress of work. There were also financial

pressures. He had been mentally unwell for a number of months, losing weight and becoming increasingly withdrawn. Sonita told friends that she was concerned about leaving her husband unsupervised as he might take his own life. He would accompany her to work but appeared unable to concentrate on anything. He was experiencing body tremors, especially to the hands, and found it increasingly difficult to sleep. He would get up at night and walk up and down the stairs. Sonita arranged for medical and psychological appointments for the applicant and attended consultations with him. His mental state put her under a great deal of pressure. The applicant was prescribed a variety of medications, including sertraline, zopiclone and mirtazapine.

8.
According to the applicant, his wife threatened to leave him if he did not “snap out of it”. On the evening of 20 May 2016, they argued. Sonita said that she would divorce the applicant, took off her wedding ring and threw it down on the floor. The applicant considered that this would be a humiliation for him. (It is not clear whether the applicant’s wife did in fact intend to divorce him; there is other evidence that tended to indicate that she remained supportive of him, and it may be that this was an attempt, disastrous as it turned out, to make him “snap out of it” as she had told him to).

9.
It appears that as a result of this argument, the applicant decided to kill his wife. He took a telephone from her to prevent her from phoning her family. He accessed the internet and researched a number of topics, including “pressure points” and “soft part of the female human skull”. At some point he brought an axe in from the garage.

10.
The next morning the applicant and his wife argued again. He attacked her with the axe and also with a kitchen knife in what was evidently a frenzied and sustained attack, with blows mainly to the head and neck and then to her thighs. The pathologist recorded that Sonita sustained 124 significant injuries which included 40 cut and blunt force injuries to her head. Of these 18 were to the back, 11 cut wounds were to the right hand side of her head and 10 cut wounds to the top left hand side of her skull. These injuries were likely to have been caused by the axe and the force used was said to approach severe. She also had 25 stab wounds concentrated on the left hand side of her neck – her jugular vein was punctured in several areas and there was a cut to her carotid artery. These wounds were more likely to have been caused by the knife, as were 28 stab wounds to her left thigh and 31 to her right thigh, penetrating to a depth of approximately 8 to 9 cm. The wounds with the knife were said to have been caused with moderate force. Sonata had numerous defensive cut injuries to the back of both of her hands and forearms with bruising around those sites indicating that she was alive at the time these wounds were inflicted, which appeared to be with the axe. The positioning of the wounds indicated that she had moved or been moved during the attack as she was found laying face up with multiple injuries to the front of her thighs but with 18 significant axe wounds to the back of her head. There were clumps of her scalp and hair within an extensive bloodied area of the kitchen where the body was found.

11.
The police attended following a call from the applicant’s sister. On arrival they discovered Sonita’s body, along with the applicant who had injuries consistent with a suicide attempt. He was repeatedly stabbing himself in the legs with a small knife. Almost immediately he admitted the killing, saying that it was to do with the debts which they owed on the house and the building works being carried out. He had also sent a series of texts to various members of the family about what had happened. The

applicant was conveyed to hospital. While there, he wrote a note expressing his severe remorse at what he had done.

12.
On 24 th May 2016, following a mental health assessment, the applicant was released from hospital. The examining psychiatrist found that he demonstrated “no clear symptoms of psychosis”, although he did present with a low mood and was considered to be at moderate to high risk of self-harm.

The evidence at the trial

13.
The applicant was found to be fit to plead and stand trial. The significant issue during the trial was his state of mind during the killing. The jury heard from two consultant forensic psychiatrists, Dr Richard Noon instructed by the prosecution and Dr Philip Joseph instructed by the defence.

14.
Dr Noon’s evidence was that the applicant did not suffer from any severe and enduring psychotic mental illness, but did suffer from a depressive disorder of at least moderate and possibly greater severity. He was suffering from this depressive illness at the time of the offence. That was an abnormality of mental functioning caused by a recognised medical condition. However, the applicant was aware of his actions at the time and was able to understand the nature of his conduct.

15.
Dr Joseph said that the applicant’s abnormality of mental functioning provided an explanation for his conduct at the time of the killing, although it did not mean that the applicant did not know the nature of his conduct or that what he was doing was wrong when he killed his wife. He said that the nature of the killing suggested that, when mentally ill, the applicant presented a risk of serious harm to members of the public, for example his family.

16.
On the basis of this evidence the jury convicted the applicant of manslaughter on the grounds of diminished responsibility.

The evidence at sentence

17.
Psychiatric evidence was also before the judge at the time of sentence. In addition to their evidence already given, Dr Noon and Dr Joseph produced further reports. Dr Noon concluded that the applicant posed a low risk of violent behaviour towards others, the primary risk being one of suicide. Dr Joseph recommended a psychiatric disposal, although Dr Noon did not.

18.
There was in addition evidence from Dr Catherine Durkin, the consultant forensic psychiatrist with responsibility for treating the applicant. She agreed with Dr Noon and Dr Joseph that the applicant suffered a depressive episode of at least a moderate degree around the time of the offence, although there was no evidence to indicate that he was suffering from a psychotic illness. She concluded that the applicant did not fulfil the statutory criteria for consideration of a hospital order and did not require hospital treatment.

19.

The judge had in addition a pre-sentence report and victim impact statements from members of Sonita's family.

The sentence

20.
In careful and thorough sentencing remarks, the judge considered first whether a hospital order or a hospital and limitation direction should be made. However, there was insufficient evidence to justify such a proposal. He considered next the issue of dangerousness, observing that although all three psychiatrists were of the view that the applicant represented a low risk to others, both Dr Joseph and Dr Durkin had referred to the risk of serious harm in future, at any rate (as Dr Durkin put it) "in the context of a strained intimate relationship, particularly if there were additional financial and professional stresses and deterioration in his mental state". The judge noted that, in any event, his responsibility after listening to all the evidence through the trial was different from that of the psychiatrists and included consideration of public safety, the nature of the offence, the circumstances in which it was committed and the extent to which the applicant's mental responsibility was diminished.

21.
The judge concluded that there were a number of factors indicating significant future risk. These were that the applicant had been capable of forming a settled intention to kill hours in advance of actually doing so; he had planned the killing, researching information on the internet which would assist him, hiding his wife's phone and getting the axe ready for use; the attack itself was sustained, brutal and excessive; the motive, being to avoid his wife telling his family about a divorce, also caused the judge concern, supporting the view that the applicant was unable to countenance the risk of being humiliated within the family. Despite everything, these risks had not disappeared and there was a future risk of serious harm to intimate partners, significantly increased if the relationship was failing and the applicant's mental health was deteriorating. Accordingly, the judge found that the applicant satisfied the statutory test of dangerousness and, moreover, that in view of the applicant's significant level of residual culpability, the aggravating factors present, the level of danger to the public and the lack of any reliable estimate of the length of time during which the applicant would remain a danger, a life sentence was appropriate.

22.
The judge then turned to the minimum term, reasoning that if the applicant had been convicted of murder a starting point of 25 years would have been required in view of the bringing of the axe to the scene. The use of the knife was also significant. It was a case where, in view of the facts already mentioned, the applicant bore significant responsibility for the killing despite the abnormality of mind from which he was suffering. Taking account of the aggravating and mitigating factors and of the applicant's impaired mental functioning which meant that he was guilty of manslaughter and not murder, the judge arrived at a minimum term of 15 years. He reduced that by one third to reflect the applicant's early plea of guilty to manslaughter and arrived at a minimum term of 10 years, less the 193 days which the applicant had served on remand.

The application for leave to adduce fresh evidence

23.
As we have said, there was at the time no application for leave to appeal against this sentence. However, in August 2017 the applicant watched in prison a Panorama programme ("A Prescription for Murder?") in which

Professor Healy expressed the view that certain antidepressant drugs could cause people to become violent and potentially homicidal. These included sertraline, an antidepressant drug which dates back more than 30 years, and which was the drug prescribed for the applicant's depression in the period leading up to the killing. This led in due course to Professor Healy being instructed to produce a report on possible grounds for appeal against the applicant's sentence.

24.
Professor Healy's report was dated 31 st January 2020 and was produced following a telephone interview with the applicant 10 days earlier. Professor Healy expressed the view that the drugs prescribed for the applicant, sertraline and mirtazapine (a sedative antidepressant which might be expected to assist with sleeping) were both capable of causing homicide. He suggested that if there was no other explanation for the killing, there would be "little option but to consider a factor such as his treatment, especially if there were other indications of an adverse response to this treatment" as having played a part in causing this to happen. That said, Professor Healy acknowledged that the killing of a wife, after a series of domestic arguments, was not an inexplicable event. Even so, the Professor concluded that the degree of frenzy in the attack, the circumstances in which it happened with the applicant's son in bed upstairs, the lack of any prior history of violence, and the evidence of a relatively successful marriage, all suggested that some factor had tipped the balance in causing the killing. As there was "convincing evidence" (elsewhere described as "unequivocal" evidence) that sertraline and mirtazapine "can induce suicidality and homicidality in people, not just patients, who would not otherwise be at risk of suicide or homicide", the case that treatment had compromised the applicant's functioning appeared strong. This should have been taken into account for the purpose of sentencing, but did not appear to have been considered by any of the psychiatrists who had examined the applicant at the time. Moreover, since his treatment with these drugs had ceased, the applicant had "been a different man", which reinforced the applicant's case that the treatment had caused or contributed to the killing of his wife. It is this report which the applicant seeks to adduce as fresh evidence on appeal.

25.
In response the prosecution submitted a response from Professor Seena Fazel dated 27 th July 2021, after an interview conducted by video link. Professor Fazel noted that the psychiatrists who had examined the applicant at the time had diagnosed a depressive illness of at least moderate severity, a diagnosis with which he agreed, but that none of them had found evidence of psychotic features. His conclusion was that "there is no clear evidence that either antidepressant alone or in combination led to violent or homicidal thoughts or worsened the applicant's suicidal ideas" or played any part in the offence. He considered that Professor Healy had overstated the links between antidepressant drugs and homicide: rather than "convincing evidence", there was a spectrum of psychiatric opinion on this issue and there remained some uncertainty.

The directions hearing

26.
The application for leave to appeal and to adduce fresh evidence was referred to the full court by the single judge, with a recommendation that a hearing for directions should be held. A directions hearing took place at which this court, presided over by Lady Justice Simler, directed among other things that (1) the reports of Professor Healy and Professor Fazel should be sent to the psychiatrists who had given evidence at the trial, who should be asked to say whether they had reviewed the medication taken by the applicant before the killing and considered whether it might have been a contributory

factor in the killing; and (2) Professor Healy and Professor Fazel should produce a joint report setting out areas of agreement and matters remaining in dispute between them.

The further reports

27.
Further short reports were provided by Dr Noon and Dr Durkin. Dr Joseph has retired and did not respond. Dr Noon confirmed that he had reviewed the GP medical records and discussed his medication with the applicant, including considering its effects on him. He continued:

"I did not consider that Mr Nijhawan's prescribed medication was a contributory factor in this case. I consider that the offence arose out of his depressive illness coupled with the shame related to the marriage break-up and his feelings of failure associated with this. The issues related to SSRI's, impulsivity and suicidal and homicidal actions are well publicised. They are addressed in the report by Professor Fazel."

28.
Dr Durkin said that she did not detect any abnormalities in the applicant's response to the medication he was prescribed or any objective evidence of side effects. She said that:

"Owing to the lack of abnormalities in Mr Nijhawan's response to the antidepressant, anxiotic and antipsychotic medication in hospital there was no evidence to suggest that his response to these medications was either a contributory factor in the prior killing, nor a risk factor for the future."

29.
Professor Healy and Professor Fazel proved unable to reach any agreement. They each produced a further report standing by what they had already said.

The oral evidence

30.
In the circumstances it appeared to us that the appropriate course was to receive the evidence of Professor Healy and Professor Fazel de bene esse and for them to be cross examined upon it. We found that to be extremely helpful in clarifying the experts' respective positions and indicating how this application should be determined.

31.
Professor Healy was dismissive of the training of forensic psychiatrists, suggesting that they have no understanding of the possible adverse effects of drugs such as sertraline, despite his insistence that these effects are firmly established by unequivocal evidence. He was critical of what he described as the efforts of the pharmaceutical industry to downplay these effects. For these reasons he attached little or no significance to the views of the forensic psychiatrists who had treated or examined the applicant and interpreted their latest reports as indicating that they had not considered the possibility that the applicant's medication had played a part in causing the killing. It was clear that Professor Healy has a strong belief that drugs such as sertraline can cause people to become suicidal or homicidal and has spoken about and published on this issue for many years.

32.
He acknowledged, however, that as he had only spoken to the applicant on the telephone as distinct from a face-to-face interview, he was at something of a disadvantage in describing the impact of the applicant's medication in this particular case.

33.
Although Professor Healy sought to interpret the limited contemporary information from the applicant's GP records, ultimately, and without undue simplification, his position was that something had caused the applicant to kill his wife and that the only two possibilities were (1) a deterioration in his underlying mental condition (for which there was no evidence in the GP records) or (2) the treatment which he was receiving. As there was no evidence of the former, it must be the latter.

34.
Professor Fazel, in comparison, was a rather more impressive witness. His evidence was measured and careful, giving ground where appropriate to do so. He explained that an understanding of the effects of medication on a patient, including side effects and potential harms, forms a basic part of a psychiatrist's training. In his view it was not true to say that forensic psychiatrists had no understanding of the potential adverse effects of antidepressants. The issue whether the particular drugs prescribed for the applicant had a tendency to cause suicide risks or increased aggression including homicidal thoughts was well rehearsed in the literature with which forensic psychiatrists could be expected to be familiar, although it was an exaggeration to say that the evidence was unequivocal. In fact there was a spectrum of psychiatric opinion on the point. However, while the issue was well known, instances where these effects had occurred were rare and, where they had occurred, had occurred in adolescents rather than adults.

35.
In particular, it would be routine to review in ward rounds and team meetings whether a patient was experiencing side effects as a result of medication. That would be so in any case, but to keep a lookout for signs of aggression or homicidal tendencies in a forensic unit such as that in which the applicant had been treated after the killing would be particularly important. The issue of risk to others as well as to the patient would be an acute concern for the treating psychiatrists.

36.
Professor Fazel had also reviewed the contemporary records. He saw no evidence there to suggest that the applicant's medication had played any part in the killing of his wife.

The application for leave to appeal in the absence of fresh evidence

37.
Mr Pitter made clear that the application for leave to appeal against sentence was pursued regardless of whether the fresh evidence in the form of Professor Healy's report is admitted. However, in our judgment an appeal without the fresh evidence would have no prospect of success. Without the fresh evidence, the sentence imposed by the judge was neither wrong in principle nor manifestly excessive. The judge was entitled to conclude that the applicant was dangerous and to impose a life sentence. He was correct to say that if the applicant had been convicted of murder, a starting point of 25 years would have been appropriate, and was best placed to assess the applicant's culpability having presided over the trial. The credit for plea to manslaughter was appropriate. Overall, the sentencing remarks show a careful and structured approach.

The application to adduce fresh evidence

38.
Accordingly the fresh evidence is critical to this application. The criteria for the admission of fresh evidence on appeal are set out in section 23 of the Criminal Appeal Act 1968. The court is required to have regard to (a) whether the evidence appears to be capable of belief, (b) whether it appears that it

may afford any ground for allowing the appeal, (c) whether it would have been admissible in the court below, and (d) whether there is a reasonable explanation for the failure to adduce the evidence in the court below.

39.
On the facts of this case there is a considerable overlap between these matters. Professor Healy appears to be a distinguished psychiatrist and, on its face, his report appears to be capable of belief; if the evidence contained in his report is accepted, it may afford a ground for reducing the sentence imposed; the evidence would have been admissible below; and if Professor Healy's criticisms of the training of forensic psychiatrists are correct, there is a reasonable explanation for the fact that the causative effect of the applicant's medication was not appreciated. While there was some delay between the screening of the Panorama programme and the application to adduce fresh evidence, we acknowledge the difficulty of formulating a case with the applicant in prison and, if there is merit in the proposed appeal, we would not wish to shut the applicant out from advancing his case.

40.
Accordingly we are prepared to grant the necessary extension of time, to admit the evidence and to grant leave to appeal.

Determination of the appeal

41.
However, when the fresh evidence of Professor Healy is considered in the light of the evidence as a whole, including the responsive evidence of Professor Fazel, it is clear in our judgment that the appeal must be dismissed.

42.
The contemporary evidence, whether contained in the GP records or in the records of treatment of the applicant (or the appellant as he now is) after the killing are inconclusive. While the experts pointed to comments in the appellant's notes, for example to the effect that the appellant had experienced "morbid thoughts" or that he was feeling "a bit better", we consider that these shed no real light on the issue before us. What is clear, however, is that none of the psychiatrists treating the appellant found any evidence of psychosis. In our judgment it is equally clear that the psychiatrists who examined and treated the appellant at the time were aware of the medication which he had been taking, considered whether it could have played any part in the killing, and concluded that it did not. That is what Dr Noon and Dr Durkin have said in their latest reports and we see no reason to doubt them. The evidence of Professor Fazel which we have summarised above demonstrates that this would have been actively under consideration by any competent forensic psychiatrist in 2016.

43.
The psychiatrists who examined and treated the appellant at the time were far better placed than Professor Healy could be, basing himself on one relatively brief telephone interview, to determine what role, if any, the appellant's medication had played in the killing of his wife. Their evidence, as now clarified, demonstrates that they considered the possibility raised by Professor Healy and concluded that, in the appellant's case at any rate, the medication had played no causative role. There is no proper basis to doubt this evidence, which is the best evidence available on the point.

44.
Further, in our judgment Professor Healy's evidence that the appellant's medication explains the killing of his wife rests on an insecure foundation. As we have noted, Professor Healy's considered

that there were only two possibilities, either (1) a deterioration in the appellant's underlying mental condition or (2) the treatment which he was receiving. However, it is impossible to discount (as Professor Healy did) the first of these possibilities. The evidence is clear that the day before the killing the applicant and his wife had a serious argument which culminated in her saying she wanted a divorce and throwing her wedding ring on the floor. This would undoubtedly have been a significant additional stress factor operating on what was already the applicant's troubled mental state exacerbated by his financial difficulties. The evidence shows that the applicant already saw himself as a financial failure. Now he had failed in his marriage too, an outcome which he could not bear, seeing it as a humiliation which he was not prepared for his family to know about. There is no reason to doubt that this is what caused him to kill his wife and to attempt to kill himself. Accordingly the premise for Professor Healy's theory, namely that there is no reason to suppose that there were any additional stress factors causing a deterioration in the applicant's underlying mental condition leading him to kill his wife is unsound. As Professor Healy himself acknowledged in his first report, the killing of a wife after a series of domestic arguments, by a husband suffering from depression and anxiety who feared the humiliation of divorce and who intended to kill himself, is not an inexplicable event. There is, therefore, no need to speculate (and it could not be more than speculation) that the real cause of the killing was the appellant's medication.

Disposal

45.
For these reasons we grant the necessary extension of time, we admit the evidence of Professor Healy and we grant leave to appeal against sentence. Having done so, however, we dismiss the appeal. There will be a representation order for leading counsel.