

**[2021 Gib LR 511]****LISHMAN v. R.**

COURT OF APPEAL (Kay, P., Elias and Davis, JJ.A.): October 14th,  
2021

2021/GCA/010

*Sentencing—manslaughter—loss of control—appeal allowed against sentence of 10 years 10 months’ imprisonment—deceased had stabbed appellant first and then been fatally stabbed by him—judge overstated aggravating factors and understated mitigating factors—case did not fall outside sentencing guideline on loss of control manslaughter—sentence of 6 years’ imprisonment substituted*

The appellant was charged with murder.

The appellant was charged with murdering his wife. He pleaded guilty to manslaughter by reason of loss of control, which plea was accepted. The factual basis of the plea was that the appellant’s wife had left him, which he found very distressing; in the course of an argument at the family home, the appellant picked up his wife’s mobile phone; she stabbed him in the chest, inflicting a serious wound; and he then stabbed her 12 times before stabbing himself.

When sentencing the appellant, the judge referred to the Manslaughter Definitive Guideline, issued by the Sentencing Council of England and Wales. As the offence was manslaughter, harm was of the utmost seriousness. The judge identified this as a category C case, namely lower culpability. Under the Guideline, the starting point was 5 years’ imprisonment with a range of 3–6 years. She then considered aggravating and mitigating factors. The aggravating factors to which she attached significance were the persistence of violence; the presence of and risk of harm to the parties’ child; the use of a knife; and the impact on members of the deceased’s family, including her other daughter who was so distressed that she required psychiatric care. Mitigating factors were the background of the relationship breakdown; the circumstances of the offence and the fact that the deceased stabbed the appellant first; lack of intoxication; and absence of previous convictions. The judge was dismissive of positive good character and remorse. The judge considered that although the background circumstances together with the qualifying trigger represented a very high degree of provocation, the appellant’s reaction was so aggressive and

extreme as to raise the seriousness of the offence considerably. She sentenced him to 10 years 10 months' imprisonment.

He appealed against his sentence on the ground that it was manifestly excessive because the judge was not justified in imposing a sentence which exceeded the category range of 3–6 years in the Guideline. It was also submitted that the judge's treatment of the aggravating and mitigating factors was unfair to the appellant.

**Held**, allowing the appeal:

To assess whether the judge was justified in departing so far from the Guideline, it was necessary to examine her analysis of the aggravating and mitigating factors. The judge overstated the aggravating factors. In relation to the persistent or frenzied nature of the violence, the appellant inflicted multiple stab wounds but that was not unusual in loss of control cases. However, the judge was bound to accept that the appellant was responding to provocation of an extremely grave character in the way that another normally tolerant and self-restrained person might have done. Although use of a weapon was listed in the Guideline as a potentially aggravating factor, the use by the appellant of the knife which had just been used by his wife to inflict a life threatening wound on him deprived this feature of most of its aggravating potential. In respect of the impact on members of the deceased's family, the judge was right to identify the presence of the parties' child as an aggravating factor. It was permissible to take into account the impact of the offence on the deceased's close relatives but it would be erroneous to increase a sentence by a large margin, especially in a loss of control case. The judge gave the impact on the deceased's family more weight than was permissible when determining the appropriate sentence. In addition, the judge understated some of the mitigating factors. Although she gave the appellant credit for his lack of previous convictions, she seemed to have denied him credit for positive good character. There was witness evidence of his usual gentle disposition. The judge should have treated the appellant as a person of previous and positive good character. In addition, on the available material and in the face of positive evidence about the appellant's character, it was unduly critical of the appellant to be dismissive of his remorse. The judge was wrong to categorize this case as one falling outside the Guideline on loss of control manslaughter. The starting point of 12 years was wrong in principle and manifestly excessive. The correct starting point in the circumstances was at the top of the category range, namely 6 years. The appellant's appeal against his sentence would be allowed. The sentence of 10 years 10 months' imprisonment would be quashed and a sentence of 6 years substituted (paras. 15–26).

**Legislation construed:**

Criminal Procedure and Evidence Act 2011, s.484(4): The relevant terms of this subsection are set out at para. 7.

*C. Finch* (instructed by Verralls) for the claimant;

C. *Ramagge* (instructed by the Office of Criminal Prosecutions and Litigation) for the defendant.

1 **KAY, P.:** Real Lishman (the appellant) was charged with murdering his wife, Carolina, on November 8th, 2017. On February 19th, 2020 he pleaded guilty to manslaughter by reason of loss of control. The plea was accepted and on December 7th, 2020, he was sentenced to 10 years 10 months imprisonment by Ramagge Prescott, J. He now appeals against that sentence.

2 The case has a somewhat convoluted history. The appellant was first tried for and convicted of murder in March 2019. Through his counsel, he had offered a plea to manslaughter by reason of loss of control but this had been unequivocally rejected by the prosecution. The appellant did not enter a plea of guilty to manslaughter on arraignment. At the trial, the judge, Dudley, C.J., ruled that manslaughter by means of loss of control should not be left to the jury. The sole issue became self-defence and the jury rejected it.

3 The appellant appealed to this court on the ground that the Chief Justice had been wrong to rule out manslaughter by reason of loss of control. This court agreed and ordered a retrial. The retrial before Ramagge Prescott, J. was listed to commence on February 19th, 2020 but, as I have said, the appellant pleaded guilty to manslaughter on that day and this time the prosecution accepted the plea.

4 The factual basis of the plea was set out in a document prepared by the prosecution, the material parts of which reads as follows:

“2. Towards the end of 2017 Carolina Lishman no longer wished to be married to Real Lishman. She enquired about getting a divorce and was advised that she would first have to separate. The day after she returned from the USA she told Real she wanted to leave him and left to her mother’s house. X [their child] remained in the family home with Real.

3. At this time, she had also commenced an affectionate and sexual relationship with a police officer and she was concerned that Real would find out as this would affect her future with X.

4. Real Lishman was very distressed by the news of the separation and resigned from work. He later regretted this decision and sought work in the same company and elsewhere but was unsuccessful.

5. At about 15:15 on the 8 November, X was picked up from school by Real Lishman and taken to the family home. Carolina later attended to pick up X. Whilst in the house, Real Lishman picked up Carolina’s

mobile phone and went into the kitchen. Carolina picked up a knife and stabbed Real Lishman in the chest, inflicting a serious wound.

6. Real Lishman retrieved the knife and inflicted a total of 12 stab wounds on Carolina's body, two of which were on her back. Neck bruising was also consistent with forceful neck compression.

7. Real Lishman then self-inflicted wounds on his chest. Forensic analysis findings suggest Real Lishman was the last person injured with the knife and that the other chest wounds he had were self-inflicted.

8. Neighbours and X knocked on the door of PC Rooke who was at home and off duty. PC Rooke asked X if she was alright to which she replied 'Mummy has stabbed my Daddy, Mummy is in the kitchen laid down on the floor playing dead and Daddy has stabbed himself and is on the floor on the hall. They are both on the floor playing dead.'

9. At about 18:29 a call was received at Command and Dispatch from PC Rooke claiming a possible murder or suicide. Police and the ambulance were immediately deployed. Police entered the house and encountered Real Lishman on the floor in the corridor in front of the kitchen. Carolina Lishman was lying on the kitchen floor with a knife in her right hand between her index finger and thumb.

10. Real Lishman was unconscious when the police arrived and when asked what had happened said 'My wife and I were fighting, she pulled a knife and stabbed me and I took it and stabbed her and then she took it and . . .' As short while later he said 'She went for me with a knife, she stabbed me in the heart. I took the knife off her, I defended myself'.

11. Carolina Lishman was non-responsive and CPR had to be administered by officers and ambulance personnel. Real Lishman was in and out of consciousness but was breathing throughout. With the assistance of police officers, he was carried down to the ambulance as the lift was broken and then transported to hospital. Carolina Lishman was receiving CPR and was subsequently transported to hospital. CPR was still administered. It was at 19:37 she was pronounced dead.

12. Real Lishman was treated for his injuries. He had a total of 7 incised wounds, two wounds to part of his left hand and five to the left side of the front chest. Within the group of 7 incised stab wounds there were 3 scab puncture wounds. One of his injuries was a lesion to his intercostal artery which required emergency surgery as this had caused severe internal bleeding and the condition was life threatening. Once stabilised, he was transferred to ICU.

13. Forensic post mortems were conducted on the deceased by the pathologist Dr Lockyer who noted a total of 12 stab wounds on her

body, two of which were on her back. One of the stab wounds entered the chest through the sternum and caused fatal damage to the heart. Neck bruising was also noted which could have been caused by forceful neck compression. The cause of death was cited as ‘Multiple incised wounds’.

14. On 27 November 2017, having been discharged from hospital, Real Lishman was transferred to New Mole House Police Station where, during the course of the afternoon, he was interviewed under caution in the presence of his lawyer and where he exercised his right to silence. He was lawfully arrested and was later charged with the murder of Carolina Lishman.

15. Real Lishman has no previous convictions.”

5 In addition to that account, the judge also referred to the judgment of this court when allowing the appellant’s appeal against his murder conviction. In the course of that judgment Dame Janet Smith said (2020 Gib LR 1, at para. 42):

“42 We recapitulate what we think a jury might reasonably consider that those circumstances were. The jury might reasonably think that the appellant was or may have been under a degree of emotional tension because of the breakdown of his marriage and the potential loss of the custody and company of his daughter. They might reasonably accept that the deceased may have stabbed him in the chest when he picked up her mobile phone. They might reasonably accept that the deceased may have inflicted a serious life-threatening wound and they might reasonably conclude, particularly if they thought that the appellant had been in a vulnerable emotional state, that that was an action of extreme gravity, giving rise in the appellant to a justifiable sense of being seriously wronged. They might then reasonably conclude that the appellant had or might have lost his self-control and had stabbed the deceased very violently. In those circumstances, the nature of the trigger being extremely serious, our judgment is that a jury could reasonably conclude that a man with a normal degree of tolerance and self-restraint might react in that or a similar way.”

6 When sentencing the appellant, the judge accepted that as “the scenario most favourable to the Defendant” and it is upon that basis that he was sentenced.

7 At an early stage of her sentencing remarks, the judge referred to the Manslaughter Definitive Guideline issued by the Sentencing Council of England and Wales. In Gibraltar, by s.484(4) of the Criminal Procedure and Evidence Act, where no sentencing guidelines have been published in Gibraltar, “a court may, except where the circumstances of Gibraltar are

such that it would not be appropriate to do so, have regard to the Sentencing Council Guidelines for England and Wales . . .”

8 As the judge stated, the local practice in the Supreme Court is to use the England and Wales Sentencing Guidelines “unless circumstances make it inappropriate to do so.”

9 The Guideline dealing with manslaughter by reason of loss of control addresses the issues of harm and culpability. As the offence is one of homicide, harm is always of the utmost seriousness. Culpability is divided into three categories: A (high), B (medium) and C (lower). Category C is the appropriate designation when the qualifying trigger “represented a very high degree of provocation.” The judge correctly identified this as a Category C case. Under the Guideline, the starting point was therefore 5 years’ custody with a category range of 3–6 years’ custody. She then proceeded by way of conventional methodology to consider aggravating and mitigating factors.

10 The aggravating factors to which she attached significance were persistence of violence (albeit limited to the context of the index incident); the presence of and risk of harm to the child, X; the use of a knife; and the impact on members of the deceased’s family. The mitigating factors accepted by the judge were the background circumstances, in the sense of the relationship breakdown; the circumstances of the offence; the fact that the deceased stabbed the appellant first, with a knife she picked up in the kitchen; lack of intoxication; and absence of previous convictions. On the other hand, she was dismissive of positive good character and remorse as mitigating factors. I shall return to some of these matters later. In imposing the sentence of 10 years 10 months, the judge made clear that she was discounting from a notional sentence of 12 years by reference to the guilty plea. She concluded her sentencing remarks as follows:

“35. In my view, although the background circumstances together with the qualifying trigger represented a very high degree of provocation, the reaction of the Defendant was so aggressive and so extreme as to raise the seriousness of the offence considerably . . .

36. I remind myself that, as indicated by the guidelines, the court should avoid an overly mechanistic application of them. The aggravating factors in this case together with the impact of the Defendant’s actions on the family, and most particularly the devastating impact upon Y [the older daughter of Carolina] lead me to conclude that it is appropriate to impose a sentence outside the category range . . . Each case must be fact specific and the corresponding sentence should reflect that. Taking all that I have discussed into consideration I impose a sentence of 12 years.

37. Counsel asks for a full one third reduction on the basis that, as email traffic shows, the Defendant offered the Prosecution a plea of guilty to manslaughter before the beginning of the first trial but that was rejected . . . But the point is a plea to manslaughter, whether by reason of loss of control or unlawful act, was never tendered before the court. The Defendant is therefore not entitled to the full discount. I will apply a small discount to reflect the plea on the day of the trial and I reduce the term of 12 years to one of 10 years and 10 months.”

11 The grounds of appeal are set out extensively but the central contention is that the sentence is manifestly excessive because the judge was not justified in imposing a sentence which exceeded the category range of 3 to 6 years referred to in the Guideline. In addition, they assert that the judge’s treatment of aggravating and mitigating factors was unfair to the appellant.

### **Analysis**

12 When considering a sentence for manslaughter by reason of loss of control, it is important to keep in mind the features of the offence that set it apart from murder. This form of manslaughter exists only where the defendant loses his self-control and the trigger for that loss was attributable to things said or things done by the victim, which constituted in circumstances of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged. It also assumes that a person of the defendant’s sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances, might have reacted in the same or a similar way. They are not my words. They are the words by which the statute defines this form of manslaughter. By deciding to accept the plea of guilty to manslaughter by reason of loss of control, the prosecution set the legal parameters for sentencing. The law entrusts that decision to the independent prosecutor, not to judges or anyone else. The offence remains a serious one of homicide but significantly less so than murder. That is reflected in the sentencing Guideline.

13 I accept that a judge can impose a sentence outside the Guideline when the interests of justice so require and that, in any event, the Guideline should not be applied in an overly mechanistic way. The striking point in the present case is that the judge’s starting point of 12 years is double the top of the category range set out in the Guideline. It is also significant that the category range in relation to loss of control cases is much narrower than the category ranges for the other forms of manslaughter, no doubt because of the conditions which have to be satisfied for loss of control to apply.

14 In order to assess whether the judge was justified in departing from the Guideline in such a stark way, it is necessary to examine her analysis of the aggravating and mitigating factors. The following seem to me to demand attention.

**(1) *The “persistence” or “frenzied” nature of the violence***

15 This is the first aggravating factor mentioned by the judge. Plainly the appellant inflicted multiple stab wounds. However, this is not unusual in loss of control cases. It is not always the case, but I return to the definition of loss of control manslaughter. The judge was bound to accept that the appellant was responding to provocation of an extremely grave character in the way that another normally tolerant and self-restrained person might have done. For this reason, it is difficult to justify attaching great weight on the pathology of the violence, horrific though it undoubtedly was.

**(2) *The use of a knife as a weapon***

16 Although “use of a weapon” is listed in the Guideline as a potentially aggravating factor, it seems to me that the use of a knife which had just been used by his wife to inflict a life threatening wound on the appellant, and which he had to remove from his own chest, deprives this feature of most of its aggravating potential.

**(3) *The impact on members of the deceased’s family***

17 The judge was right to identify the presence of the appellant’s 6-year-old daughter as an aggravating factor. Fortunately, the evidence from the victim personal statements was that she “appeared to have made a remarkable recovery . . . and is currently coping well with the loss of her mother.” There is no doubt that the loss of their daughter in these circumstances has been, and continues to be, profoundly distressing for the deceased’s parents, as it is for her sister. The person on whom it has had the most devastating impact is the deceased’s other daughter, Y (of whom the appellant is not the father) a young woman who has been plunged into despair necessitating inpatient psychiatric care. It is not necessary for me to spell out the details.

18 In order to arrive at the appropriate sentence, a judge’s first task is to have regard to the circumstances of the offence and the offender. It is also permissible to take into account the impact on the victim’s close relatives but, however sad that may be, it would be erroneous to bump up a sentence by a large margin, particularly in a loss of control case where, as I have said, the defendant is, by definition, being partially excused from full criminal liability by circumstances which were initially not of his making. Whilst I have no less sympathy for the deceased’s family than the judge had, I am bound to say that I consider that she gave this aspect of the case more weight than is permissible when determining the appropriate sentence.

19 I turn to some of the mitigating factors identified by the judge. As a preliminary observation, I would say that, although she referred to the



background/domestic relationship difficulties and the deceased's part in initiating the serious violence that led to her death, in my judgment she did not afford them the importance that they merited. However, I am particularly concerned about two other mitigating factors.

**(1) Positive good character**

20 Although the judge gave the appellant credit for his lack of previous convictions, she seems to have denied him credit for positive good character. Three witnesses gave evidence of his usually gentle disposition. However, the judge proceeded to negative that by reference to a passage in a pre-sentence report, in which the probation officer referred to an incident 12 years before the present offence, when the appellant slapped a previous partner once at a heightened moment, when the relationship was coming to an end. What the judge did not refer to was that the woman in question told the probation officer that she was "extremely surprised" by that incident; it quickly de-escalated; and, in the years since then, she and the appellant have remained good friends with no grudges or animosity. She too described his demeanour as "patient and calm" and said that he always appeared to be a good father. In these circumstances, I consider that the judge should have treated the appellant as a person of previous and *positive* good character.

**(2) Remorse**

21 The judge's answer to a submission that the appellant is remorseful was: "I treat the sincerity of his remorse with some caution." I do not underestimate the difficulty any judge has in evaluating remorse, especially a judge who does not have the opportunity of seeing a defendant throughout a trial. The evidence of remorse came from the pre-sentence report in which the probation officer had said, on April 4th, 2019:

"The Defendant, however, is deeply shocked by the level of violence he perpetrated *and is genuinely remorseful* and acknowledges that he made a fatal error."

22 The same probation officer re-interviewed the appellant after he had pleaded to manslaughter. In an addendum he wrote:

"The defendant stated 'I have always wanted to take responsibility for my actions' . . . the defendant reiterated his regret and remorse for 'this tragedy'. He recognises that it has had a 'massive' impact on the victim's family and that no one should have to endure this."

23 Upon what basis did the judge reject or dilute this evidence? She criticized the appellant for not having written to the deceased's parents or sister to express remorse and for not expressing any contrition to his daughter until the day on which he entered his guilty plea. She also referred

to a short report from the counsellor who had been working with the appellant in prison. Her point was that the counsellor's report, which was brief, made no reference to remorse. However, the expression of opinion by the author is only three lines long and focuses on the appellant's relationship with his daughter. It seems to be essentially positive and constructive. The absence of express mention of remorse is a weak foundation for an adverse finding on this issue. The judge seemed to treat this brief, essentially supportive report more as a matter of aggravation than of mitigation. Moreover, as is apparent from her approach to the probation officer's report, she would not necessarily have been impressed by any mention of remorse in the counsellor's report. On the available material, and in the face of positive evidence about the appellant's character, it seems to me to have been unduly critical of the appellant to be dismissive of his remorse.

24 Having identified the ways in which the judge overstated the aggravating factors and understated some of the mitigating factors, I am led to the conclusion that she was wrong to categorize this case as one falling outside the Guideline on loss of control manslaughter. It is a tragic and serious case but, in many ways, it is typical of loss of control cases. It is difficult for a defendant to come within the parameters of this partial defence to murder because the criteria are hard to satisfy, but when they are satisfied, the sentence has to reflect that reality. In my judgment, the starting point of 12 years in this case was both wrong in principle and manifestly excessive. The correct starting point on the facts and circumstances of the case was at the top end of the category range stated in the Guideline, namely, 6 years.

25 The judge withheld most of the credit conventionally given for a guilty plea on the basis that, although one was offered prior to the original trial, when it was rejected by the Prosecution, the appellant did not plead guilty to manslaughter at that stage but only on the day when the retrial was listed. Current practice supports her approach. I do not think it necessary to revisit that aspect of the sentence.

26 In all these circumstances I have come to the conclusion that this appeal against sentence must be allowed. I would quash the sentence of 10 years 10 months and substitute one of 6 years' imprisonment.

27 **ELIAS, J.A.:** I agree.

28 **DAVIS, J.A.:** I also agree.

*Appeal allowed.*