Neutral Citation Number: [2020] EWCA Crim 1319

Case No: 202000918 B1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM READING CROWN COURT
HER HONOUR JUDGE NORTON
T20197174

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2020

Before :

LORD JUSTICE DAVIS
MR JUSTICE LAVENDER
and
MR JUSTICE PEPPERALL

- -

Between :

REGINA	**Respondent**
- and -	
JOSEPH KARUMBA WANGIGE	**Appellant**

(Transcript of the Handed Down Judgment.
Copies of this transcript are available from:
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7414 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Edward Butler (instructed by **MMA Solicitors**) for the **Appellant**
Mr John McGuinness QC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date: 16th September 2020

Judgment
As Approved by the Court

LORD JUSTICE DAVIS :

Introduction

1. The doctrine of autrefois convict is narrowly circumscribed. There is, however, a wider principle, the broad effect of which is to preclude, in the absence of special circumstances, the pursuit of a subsequent prosecution based on substantially the same facts as resulted in a prior conviction: see *Beedie* [1998] QB 356. The issue on this appeal is whether such principle, properly applied to the circumstances of this case, should have required the Crown Court judge to stay, as an abuse, an indictment alleging causing death by dangerous driving.

2. The judge in the present case declined to order a stay. The appellant thereafter pleaded guilty to causing death by dangerous driving. It is common ground that this is one of those instances where a defendant may appeal against conviction notwithstanding that the fact of the conviction was based on his plea of guilt. Indeed the Single Judge has granted him leave to appeal.

3. Before us the appellant was represented by Mr Edward Butler, who had appeared for the appellant in the Crown Court proceedings below but not in the prior Magistrates' Court proceedings which we will come on to mention. The respondent was represented on this appeal by Mr John McGuinness QC, who had no involvement in the proceedings below. We are grateful to them for their very thorough and careful arguments.

Background Facts

4. On the night of 26 November 2016, at or around 1:47 am, Russell Lee, aged 32, was making his way home on foot. He had spent much of the evening drinking in the centre of Reading with friends (subsequent analysis indicated that he was over 2.5 times the legal limit for driving, the blood alcohol concentration being around 210 mg per ml of blood).

5. He sought to cross the road near the junction of the A329 Kings Road with the A4 London Road. In doing so, he was struck by the offside of a silver Vauxhall Astra travelling along the London Road. The car was being driven by the appellant. After the collision, the car did not stop. Very serious injuries were caused to Mr Lee. He was taken to hospital, having initially received some treatment by paramedics when they came to the scene. Very sadly, the injuries proved to be catastrophic. He never regained consciousness and died on 30 November 2016.

6. The registration number of the Astra had been ascertained. This linked the car to the appellant. He was arrested on the evening of 26 November. He made no comment to questions asked in interview.

7. Inevitably a detailed investigation was undertaken by the police. Various statements were taken. No one had actually seen the collision itself; but one witness, Mr Rashid, who worked in a nearby fish-and-chip shop had seen the approach of the car (which he described as a black car). He estimated that it was going "at least 50 mph" when it drove past his shop. The driving limit for the road at that point was 30 mph. In addition, there was CCTV footage taken from another nearby store. This caught the Astra as it passed the store, shortly before the collision. It was subsequently to be stated that, as caught

on the CCTV, the car was "travelling noticeably faster than other vehicles." Overall, there clearly was an issue, raised at the time, as to the speed at which the Astra was travelling.

8. A Collision Report was prepared by PC Hannan of the Forensic Collision Investigation Unit, dated 22 February 2017. A copy was provided to us at the appeal hearing. It was 37 pages in length, including Appendices. It contains various photographs, plans and diagrams of a kind commonly found in such reports and further contains a detailed discussion of the investigation and examination undertaken by PC Hannan.

9. Amongst other things, it had also been identified, on examination of the Astra by Mr Norris, a Police Vehicle Examiner, that three of the four tyres of the Astra were significantly underinflated and one (the front off-side tyre) was worn below the legal limit. The windscreen wipers were broken and fixed in an upright position, there was an insecure headlight mounting and various lights were inoperative. Overall, it was concluded that the car had been in a dangerous condition. Significant damage to the windscreen glass and to the mounting of the offside front headlamp were noted, consistent with a collision with a pedestrian. The severe damage to the windscreen connoted that the driver had driven on after the collision with the windscreen in such a state. It was also noted that there had been no valid test certificate.

10. The report of PC Hannan included extensive reference to the statement of Mr Rashid, to the Police Vehicle Examiner's Report and to various other reports. PC Hannan had also, of course, considered the CCTV footage.

11. In his conclusions, PC Hannan did not attribute the collision in any way to the car's defective condition (for example, the tyres). As to the issue of speed, PC Hannan dealt with this in Section 7 of his report in six short sub-paragraphs. He seemingly based his conclusion on speed primarily by reference to his analysis of the CCTV footage. There were, for example, no tyre or skid marks to assist in this exercise.

12. In that regard he stated:

> "7.3. The [CCTV] system records six frames per second. The front of the Astra is in shot for three frames relating to half a second."

13. He went on to refer to certain measurements which he took and to a reconstruction using a police car driving at 30 mph. He shortly stated his conclusion in this Section of the report as follows:

> "7.6. The results indicated that the Astra was travelling at around 30 mph."

14. His overall conclusions, set out in Section 10 of his report, stated, among other things, his opinion that no pre-impact defects were found with the car that would have affected the handling and stopping of the car. His ultimate overall conclusion was expressed in these terms:

> "10.14. In conclusion, it is possible that the driver and pedestrian were on a true collision course where neither was in a position

> to avoid the inevitable impact once the pedestrian had left the pavement."

15. The papers were then submitted to the Crown Prosecution Service. They raised a number of questions with PC Hannan on various aspects of his report. None of those questions related to the Section on speed. In this regard, PC Hannan had previously made a witness statement, also dated 22 February 2017. In that statement, he among other things said:

> "Analysis of the [CCTV] footage shows the Astra to have been travelling at around 30 mph."

He also repeated in that statement his conclusion that there were no pre-impact defects which would have affected the handling and stopping of the car. He repeated, at the end of that statement, his overall conclusion in precisely the terms of paragraph 10.14 of his Collision Report.

16. PC Hannan made a further statement, dated 4 May 2017, in the light of the further questions posed to him by the Crown Prosecution Service. He expressed no change of opinion from his earlier overall conclusions.

The Proceedings in the Magistrates' Court

17. The decision was then made by the Crown Prosecution Service, on the information available, to bring charges in the Magistrates' Court. These charges were formulated as follows. The first charge related to use of a motor vehicle with equipment likely to cause danger or injury (by reference to the tyres, windscreen glass, headlight mounting and other defects). The second charge was using a motor vehicle without a valid test certificate. The third charge was failing to stop after a road accident, contrary to s. 170 (4) of the Road Traffic Act 1988 and Schedule 2 to the Road Traffic Offenders Act 1988. That charge was particularised as follows:

> "On 26/11/2016 at Reading in the County of Berkshire being the driver of a mechanically propelled vehicle namely Vauxhall Astra PJ54 GYC owing to the presence of which on a road, namely London Road, an accident occurred whereby personal injury was caused to another person, namely Russell Lee, failed to stop [sic]."

The fourth charge was that of, being a driver of a vehicle involved in a road accident, failing to report that accident: with corresponding particulars of the charge.

18. This charging decision was strongly opposed by members of Mr Lee's family. They were of the view that far graver charges should be brought. They remonstrated with the authorities. But the charging decision was maintained.

19. On 8 June 2017 the appellant pleaded guilty in the Reading Magistrates' Court to all four charges. Sentencing took place on 30 June 2017. Members of Mr Lee's family were present at such hearing and personally presented their victim personal statements. This court has not seen such statements but presumably they set out the understandably devastating consequences to them of Mr Lee's tragic death.

20. At the hearing, the prosecution was represented by an experienced Crown Prosecution Service lawyer who had had extensive involvement in the case. She submitted at the hearing a full written Note for Sentence. That stated, among other things, that there had been a "full and thorough investigation"; that "the Crown has considered the possible charges and concluded that the 4 before you are the ones made out in law"; and reminded the court that it was not sentencing the appellant for causing the death of Mr Lee. Reference was made to aspects of PC Hannan's Collision Report, including specific reference to paragraph 10.14. Reference was also made, and consistently with the first charge, both to the pre-collision defects in the vehicle and to the post-collision defects in the vehicle.

21. The sentence available on Charges 1 and 2 was that of a fine, with discretionary disqualification in respect of the second charge. The sentences available on Charges 3 and 4 extended to a custodial sentence of a maximum of 6 months' imprisonment, together with disqualification and mandatory endorsement. For the purposes of the relevant Guideline and categorisation thereunder, and as stated to the District Judge, relevant factors on culpability included the fact that, by leaving the scene, the appellant had avoided a request for a breath or blood or urine sample and further that he must have known that personal injury had been caused. The extent of the injury in fact caused also indicated greater harm (in this case, resulting in death) for the purposes of the Guideline.

22. It was also an aggravating factor that the appellant had a previous conviction (albeit in 2006) for drink driving. There was mitigation in his remorse and in his early plea of guilt.

23. In passing sentence, the District Judge noted that the appellant faced no criminal charges for causing the death of Mr Lee. The District Judge indicated that he had carefully considered the moving Victim Personal Statements. He considered, on Charges 3 and 4, that for the purposes of categorisation this was at "absolutely the top end" of seriousness. He imposed an immediate custodial sentence of 4 months' imprisonment (in effect, the maximum possible with full credit for plea) and disqualified the appellant from driving for 14 months. He imposed no separate penalty on Charges 1 and 2 save as to endorsement of the appellant's licence.

24. In the result, Mr Lee's family pursued their grievance at the charging decision, to the effect that no more serious charges had been brought, via the Victims' Right to Review Scheme. The decision was reviewed and upheld. On further challenge, that decision was confirmed on 11 July 2018.

Subsequent Events

25. Inevitably, an inquest into the death of Mr Lee was opened. As we were informed, it currently stands adjourned pending conclusion of the current proceedings. The appellant has not thus far given evidence in the inquest.

26. However, at a preliminary stage of the inquest the Coroner's Office, in the light of some observations made by Mr Lee's family, directed some questions to PC Hannan, which in part related to speed. By email of 25 June 2018, PC Hannan among other things said:

> "The speed calculation went as far as it could. The system only recorded at 6 frames per second. As this line of investigation did not suggest the driver was speeding it did not feature massively in the report or photo album".

The email went on:

> "Clearly I have a quantity of unused material relating to the screen frame shots from the CCTV and photos taken of the road marked up and with the derived 6.45m covered. The potential for errors is massive because of the 6 frames issue and made worse by the vehicle only appearing in 3 frames. It could be argued the speed of the vehicle was between 22-43mph depending on which bit in time between 0.33-0.66 seconds we call frame 3. Hence the mostly likely speed derived to be around 30mph if we say frame 3 is equal to 0.5 seconds elapsed."

27. It is said that this response, with a reference to a possible speed of between 22-43 mph (not mentioned in PC Hannan's first report), then prompted a further police review. At all events, further statements and reports were obtained, notably from a very experienced forensic collision investigator, David Hague, whose expertise included CCTV analysis. He produced a lengthy Report dated 30 June 2019. It is not suggested that Mr Hague had available to him any new or improved technology not available to PC Hannan.

28. The report of Mr Hague differed very markedly from the report of PC Hannan, in particular on the issue of speed. Mr Hague stated that the images shown on the CCTV footage were in fact separated by a time period of 0.16 seconds. On the wheel measurements and measured distances available, that indicated that the car had been travelling no slower than 42 mph and was "probably travelling at a speed between 43 mph and 48 mph (around 46 mph)". After further detailed observations, he stated his opinion that, if reasonably alert, the driver would probably not have been able to stop from his approach at 46 mph but probably would have been able to stop if travelling at 30 mph. He further said that, if the car was travelling at 30 mph, Mr Lee would have had time to clear the path of the car so that a collision would not have occurred.

29. His fundamental point of disagreement with PC Hannan on the issue of speed was on PC Hannan's taking half a second as the interval for the three images. In actuality, however, as he said, there were only two time intervals between the first and third images in a sequence: accordingly the actual time between the images was 0.32 seconds (being two intervals of 0.16 seconds) rather than the 0.50 seconds taken by PC Hannan. Over the relevant measured distance used by PC Hannan himself, this gave a result corresponding to a conclusion of around 46 mph.

30. A statement dated 4 January 2019 from PS Mahon, a very experienced police driver, indicated that in a controlled experiment he felt very uncomfortable indeed driving through the junction of Kings Road and London Road at 45 mph and he did not consider it safe to do so at such a speed.

31. In addition, the prosecuting authorities sought a further statement from Mr Norris, the Vehicle Examiner. By a statement dated 17 August 2018, he among other things now

proposed that the identified defects in the car could be seen as possible contributing factors to the collision and might, when applied with the other factors, have some bearing on the circumstances resulting in the collision and might have contributed to the overall result. A statement dated 9 August 2018 from a Mr Price referred to the under-inflation of the tyres and set out in general terms the potential effects of that on driving, steering and control.

32. By a further statement dated 23 October 2019 PC Hannan, whilst acknowledging the points made by Mr Hague, by no means wholly retracted his previous report or conclusion on the issue of speed. He stated that he had been satisfied with the method used and with the conclusion that the driver had been travelling at "around" 30 mph. He said this:

> "It is likely that he was travelling at more than 30 mph but, with the footage only, I was not confident to be able to state this as fact.
>
> This finding was not derived at by purely considering the CCTV work. Looking at the wider circumstances of this collision I formed the opinion that the speed of the vehicle was likely to be within a range closer to 30 mph."

We were told that subsequently PC Hannan had deferred to Mr Hague's much greater expertise on CCTV analysis.

33. In the light, in particular, of this fresh report, the authorities reconsidered the whole matter of charging. Having done so, they decided to bring a charge of causing death by dangerous driving. A charge to this effect was brought on 18 July 2019, over two years after the appellant had been sentenced on the four charges which he had faced in the Magistrates' Court.

The Proceedings in the Crown Court

34. The appellant then applied to have these fresh proceedings stayed in the Crown Court. We will come on to the applicable principles: but in essence what was being said was that it was oppressive and unfair now to charge him with causing death by dangerous driving when, in respect of the same incident, he had previously been charged with and sentenced for the four matters put before the Magistrates' Court by the prosecution.

35. There was a hearing in the Reading Crown Court before Her Honour Judge Norton. In the course of that hearing, counsel then appearing for the prosecution made clear that the prosecution was to an extent also relying upon the pre-existing defects of the vehicle which had been the subject of the charges in the Magistrates' Court as further support, by way of contributing factors, to the new charge of causing death by dangerous driving. Thus counsel had among other things said in the written prosecution summary:

> "That assessment of speed [by Mr Hague] coupled with the pre-accident condition of the car – the underinflated tyres, which make it more difficult to handle a vehicle, the broken windscreen wipers and the damaged offside headlamp – are relied upon by the prosecution to show that the defendant was driving

> dangerously fast in inherently more challenging circumstances because of the condition of the car…."

Counsel further, in a subsequent written argument, placed reliance on Mr Norris' further statement and Mr Price's statement. Counsel in addition relied on post-collision events as supporting the charge of causing death by dangerous driving.

36. The judge dismissed the application for a stay. As to whether the further charge was based on substantially the same facts her essential reasoning was set out in paragraph 10.5 of her Ruling of 14 February 2020 as follows:

> "In my judgment, this case is wholly different to and is distinguishable from both *Beedie* and *Phipps* in both of which the evidence upon which the first set of charges were based was intrinsic to the latter prosecution. Notwithstanding a degree of contextual overlap, a prosecution for causing death by dangerous driving is not, on the facts of this case, based upon the same, or substantially the same facts that gave rise to the earlier charges. The offence of causing death by dangerous driving is completed at the point of the collision (albeit that evidence of the defendant's conduct thereafter will remain relevant and admissible evidence); the initial charges either started, or are based upon the defendant's driving only after that point."

37. In the alternative, and if she was wrong about that, she considered whether there were special circumstances such as to justify the continuation of this prosecution. She held that there were. She said this:

> "10.8 If I am wrong about that then I would, in any event, find that there are special or exceptional reasons for allowing this prosecution to continue. All the points that I have outlined above concerning the clear distinction between what happened before, and what happened after the collision, together with the very wide disparity in gravity between the earlier and the latter proceedings, are relevant to that decision. But in addition, it is relevant to consider how these latter proceedings arose in order to ascertain whether the prosecution could, or should, have charged the defendant with causing death by dangerous driving at the same time as the lesser summary matters.
>
> 10.9 As outlined above, it is clear that the prosecuting authorities made their charging decisions on the basis of Mr Hannan's erroneous report, and that those errors were discovered, and new evidence put forward in the form of Mr Hague's report as a result of the police review which was in turn triggered by the family of the deceased exercising the Victim's Right to Review procedure – a procedure which, I note in passing, did not exist at the time that either *Beedie* or *Phipps* were determined. This is not then a decision made to instigate new proceedings due to a change of mind about the appropriate charging decision (although that of itself would be no bar as is

> made clear in *R v LG* [2018] EWCA Crim 736); but because errors in the initial investigation have been discovered and corrected and an evidential basis for a charge of causing death by dangerous driving has now been put forward which the CPS considers does meet the appropriate threshold for charging, whereas on the previous evidential basis, they were not so satisfied. Accordingly, it is tantamount to fresh evidence, and in my judgment that (coupled with those matters previously outlined about the distinction between offences committed before and those that only arose subsequent to and because of the fatal collision; and the wide disparity between the summary only offences and the indictable only offence) amounts to sufficient special circumstances to allow this prosecution to [proceed]."

38. A further point was argued before the judge that in the Magistrates' Court the prosecution had made a representation that there would be no charge in respect of the death and the appellant and his lawyer had relied on that to their detriment. The judge rejected that argument; and that point has not been pursued further on this appeal.

39. Following that ruling, the appellant pleaded guilty on 9 March 2020. We gather that he has not as yet been sentenced.

The Legal Principles

40. We turn to the applicable principles and the authorities on which they are founded.

41. A convenient starting point is to be found in the statement of Cockburn CJ in the old case of *Elrington* [1861] 1 B & S 688 at p. 688, where he said this:

> "…whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form".

The rationale for this restriction on subsequent trials is obvious. It finds reflection in the principle, formerly conventionally expressed as a maxim in Latin, to the effect that no person shall be vexed twice in the same cause. It also finds reflection in the further, and related principle, also formerly conventionally expressed as a maxim in Latin, that it is in the public interest that there be finality to litigation.

42. The point was discussed, and the statement in *Elrington* approved, in the decision of the House of Lords in *Connelly v DPP* [1964] AC 1254. That decision was directly concerned with the scope of the doctrine of autrefois acquit: which was decided to be narrow in scope. But the House of Lords also identified two wider, albeit related, principles. First, no person should be punished twice for an offence arising out of the same, or substantially the same, set of facts. Second, there should be no sequential trials for offences on an ascending scale of gravity (the *Elrington* point).

43. The position was, for example, stated in this way by Lord Devlin at p.1359-1360 of his speech:

> "The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment …. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular case, exercise his discretion as to whether or not he applies the general rule."

44. It is clear that one underpinning rationale for this approach is the well-known principle set out to in the civil case of *Henderson v Henderson* (1843) 3 Hare 100 at pp. 114-115, which was a case referred to by Lord Devlin with approval. It was among other things there stated:

> "… where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."

As Lord Reid crisply put it in *Connelly* at p.1296:

> "So the general rule must be that a prosecutor should combine in one indictment all the charges which he intends to prefer."

And as Lord Pearce said at p.1367:

> "It would be an abuse if [the prosecutor] could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence."

45. All this was considered and applied in *Beedie* (cited above). In that case, a young woman had died in her rented bedsit of carbon monoxide poisoning caused by a defective gas fire and blocked flue. The landlord was summarily prosecuted for regulatory offences under the Health and Safety at Work Act 1974. He pleaded guilty and was fined. Several months later, following an inquest at which he made various admissions, without having been warned that he was not obliged to answer any question tending to incriminate him, he was charged with (gross negligence) manslaughter. It was held in the Court of Appeal that such prosecution should be stayed. The second offence as charged arose out of the same, or substantially the same facts, as the first offence. As put by Rose LJ at p366E, a stay should have been ordered because the

manslaughter allegation was based on substantially the same facts as the earlier summary prosecution and gave rise to an offence of greater gravity, no new facts having occurred, in breach of the *Elrington* principle. Further, the public interest in a prosecution for manslaughter and the concerns of the victim's family did not constitute sufficient special circumstances.

46. Just what may be involved in consideration of whether a subsequent prosecution was based on substantially the same facts was considered further by a constitution of this court in *Phipps* [2005] EWCA Crim 33 – a decision surprisingly not included in any official Law Reports.

47. In that case, a driver had been charged in the Magistrates' Court with driving with excess alcohol and, on his plea of guilt, fined and disqualified from driving. He had in fact been driving on the wrong side of the carriageway of the A3 road and had collided with a car. Subsequent to that sentence, and following complaint from the driver of the other car, who had been injured, he was then charged with dangerous driving. He applied for a stay of the Crown Court proceedings, relying on the *Beedie* decision.

48. In refusing the application for a stay, the Crown Court judge drew a distinction between the charges, saying that the first offence related to the amount of alcohol in the blood whereas the second offence related to the manner of the driving.

49. The Court of Appeal disagreed with this approach.

50. The applicable general approach was stated by Clarke LJ, giving the judgment of the court, in these terms at paragraph 21:

> "The authorities do not consider in detail what is meant by the same or substantially the same facts but, in our view, as Lord Pearce [in *Connelly*] makes clear in the passage already quoted, they essentially mean that the Crown should not be permitted, save in special or exceptional circumstances, to bring a second set of proceedings arising out of the same incident as the first set of proceedings after the first set of proceedings has been concluded. The principle (which is in essence that identified in the civil law by Wigram CJ in *Henderson v Henderson*) is that the Crown should decide at the outset, or at the latest before the conclusion of the first set of proceedings, what charges it wishes to bring arising out of the same incident. Any other approach is unfairly oppressive to a defendant. It is for that reason that the burden is on the Crown to identify special or exceptional circumstances to justify such a course…."

51. As to the actual offences arising in the case of *Phipps*, they were of course different in law. But as Clarke LJ put it at paragraph 27:

> "Both the allegations arose out of the fact that the appellant was driving his car on the A3 at Malden in an unlawful manner".

As further there pointed out, the manner of the driving had also been relevant to the penalty imposed on the first offence; and, on the second offence, the fault of driving

with excess alcohol would be relevant both as to the nature of the driving (since the effects of alcohol potentially bore on the issues of driving dangerously) and as to the penalty for dangerous driving. The court then went on at paragraph 29 to say this:

> "In all these circumstances, it seems to us that both these prosecutions and the allegations in them arose out of the same or substantially the same facts, namely driving the appellant's car on the A3 at Malden. They both arose out of that same incident, in much the same way as in *Beedie*…"

52. In *Dwyer* [2012] EWCA Crim 10, a constitution of this court considered cases such as *Connelly*, *Beedie* and *Phipps*. *Dwyer* was in fact a case where further fresh evidential materials were sought to be relied upon in the second prosecution. The court, at paragraph 25, stated:

> "In our judgment, the words 'the same or substantially the same facts' or 'the same incident' refer to the relevant state of affairs as they existed to the knowledge of the prosecutor at the date the proceedings were concluded".

In that case, on its facts (the background was drug offending) it was held that the defendant had been charged and sentenced in the second set of proceedings on "almost precisely the same basis" as he had been sentenced in the first set of proceedings. The defendant may have been exceptionally fortunate in the sentence passed in the first proceedings: but "it is not a basis for giving the prosecution a second bite at the same cherry".

53. Finally, we were referred, on the issue of special circumstances, to the decision of a constitution of this court in *Antoine (Jordan)*, [2014] EWCA Crim 1971, [2015] 1 Cr. App. R 8.

54. In that case, the defendant was found with a loaded hand gun. When remanded, he was overheard saying that he was "fucked" and was looking at a sentence of 10 years as "I got caught with a loaded hand gun". The charging advice and decision of the Crown Prosecution Service referred to this being a loaded hand gun, ready to be fired; that the defendant was "facing a lengthy sentence"; and that the defendant was a danger and involved in gang violence. Disposal in the Crown Court was in terms contemplated.

55. By an inexplicable blunder, the charge was by reference to s. 1 (1) (a) of the Firearms Act 1968, possession of a firearm without a licence. When the matter was first before the Magistrates' Court on 30 July 2013, it was apparently dealt with by a paralegal for the prosecution. No request for the matter to be sent to the Crown Court was made. The defendant pleaded guilty on that day and was sentenced, also on that day, to 4 months' imprisonment (the maximum available sentence in the Magistrates' Court being 6 months' imprisonment). The blunder was noted almost immediately thereafter and a request to the Magistrates to reopen the matter was made the following day. Following refusal on 9 August 2013, the defendant was charged on 14 August 2013 with further firearms offences. The Crown Court judge refused an application for a stay, saying that there were special circumstances; whereupon the defendant pleaded guilty.

56. A constitution of this court upheld that ruling. As it was found, the mistakes made by the Crown Prosecution Service resulted in the defendant "being charged with the wrong offences and [being] dealt with in the wrong court". It was observed that no-one with responsibility for the case correctly applied their minds to the appropriate charges: and the second set of proceedings involved a "move from misconceived charges to correct charges". On the facts of the case, the decisions in *Beedie* and *Dwyer* were to be distinguished.

Submissions

57. We do not attempt to set out the full details of the respective submissions, written and oral, presented to us. But in a nutshell, they were as follows.

58. Mr Butler submitted that this was a classic instance in which a stay should have been ordered, in line with the decisions in *Elrington*, *Beedie* and *Phipps*. An informed and considered decision, made in the light of (among other things) Mr Rashid's statement and the CCTV evidence, was reached at the time to charge the appellant in the Magistrates' Court with the four matters there identified. It was explained to the District Judge that the appellant was not to be sentenced for causing the death. Thereafter, no new facts emerged and nothing changed. All that happened was that the prosecuting authorities obtained a second expert collision report which on the issue of speed reached a different view, on the facts, from the first. That did not mean that the second proceedings were not founded on the same or substantially the same facts: on the contrary, it in effect confirmed that they were so founded. For like reasons, it was submitted, no special circumstances had arisen.

59. For the respondent, Mr McGuinness submitted that the ingredients of the first four charges were different from the subsequent charge of causing death by dangerous driving: and, in particular, the first four charges had not, he said, been concerned with the manner of driving. He further submitted that the report of Mr Hague was a new matter which meant that the case ceased to be on substantially the same facts as when the first charges were brought. The report of Mr Hague, he went on to say, had identified a fundamental error in the report of PC Hannan which had vitiated PC Hannan's conclusion on speed. Thus it was only the report of Mr Hague that now enabled the prosecution to prove the facts of the appellant driving dangerously and of causing the death of Mr Lee. He submitted that, adopting the words of the court in *Dwyer*, at the time the first proceedings were concluded the true state of affairs (as since identified in Mr Hague's report and supplemented by PS Mahon) was not within the knowledge of the prosecutor. Alternatively, there were at all events here special circumstances, as the judge was entitled to find; and there was no proper basis for the appellate court interfering with her evaluation. He also observed that even if (which he strongly disputed) the prosecuting authorities had been at fault at the first stage then, as *Antoine* illustrated, that was not in itself necessarily a bar to the existence of special circumstances justifying a second prosecution.

Disposal

60. Having considered the circumstances and the competing submissions, we have reached the conclusion – and ultimately, we have to say, the clear conclusion – that, on a proper application of the principles outlined in *Beedie* and *Phipps*, the only proper course was

to stay the second set of proceedings. It was unfair and oppressive for the appellant to have to face a second prosecution.

61. Our reasons are as follows.

(1) Substantially the same facts

62. In terms of the primary facts nothing had changed between the first charging decision and the subsequent charging decision. What had changed was that a different expert opinion, making a different analysis of the issue of speed and reaching a different conclusion on the evidence, had been obtained.

63. Moreover, in our judgment the substance of the four charges in the Magistrates' Court cannot be divorced from the substance of the charge of causing death by dangerous driving. It is true that essential ingredients of the latter charge are the manner of driving and the causation of death: which are not necessarily ingredients of the first four charges. But the reality, in our view, is that there would have been no prosecution of either kind had there not been unlawful driving and the collision. As it was put in *Phipps*, all arose out of "the same incident".

64. Accordingly the argument of Mr McGuinness that the second prosecution wholly differed from the first in that (unlike the first prosecution) it focused on the *manner* of the driving cannot be upheld. First, it adopts an approach comparable to that taken by the Crown Court judge in *Phipps* in focusing narrowly on the ingredients of the respective charges. But that narrow approach was explicitly rejected by the Court of Appeal, which decided that a more holistic approach, by reference to all the circumstances, was required in assessing whether the charges arose out of the same incident. Second, it fails sufficiently to acknowledge that there were in any event factors materially relevant to both sets of proceedings which were common to such proceedings: as the points made by the prosecution in the Magistrates Court and the points made by the prosecution in the Crown Court show. Thus in the Magistrates' Court, the fact of death being caused was (properly) put forward as relevant to sentence: and indeed the Victim Personal Statements were, in their way, also directed to that issue. Correspondingly, in the Crown Court counsel for the prosecution had (properly) put forward both the defective state of the vehicle, in particular as to tyres and windscreen wipers, which the appellant was to be taken as having known, and also the appellant's subsequent conduct in driving on after the collision without stopping and with a shattered windscreen, as contributing factors or supporting evidence towards the allegation of dangerous driving causative of death and towards any sentence. Although Mr McGuinness sought to downplay those points as speculative, they were points which were open to be made and which were made: as the judge rightly acknowledged. Yet further, as pointed out by Lavender J in the course of argument, the third and fourth charges in the Magistrates Court also – as indeed the particulars of the charges connoted – actually required there to be a causal connection between the presence of the car on the road and the accident (see, for example, *Quelch v Phipps* [1955] 2 QB 107).

65. The judge seems to have thought that (leaving aside the driving without a valid certificate) the initial charges were based upon the driving only after the collision. That was not correct: pre-collision aspects had also been relied on. The driving had been unlawful throughout. In truth the judge's approach, in saying that there was no more than "some contextual overlap", downplays matters and was itself tantamount, with all

respect, to adopting the narrow approach wrongly taken by the Crown Court judge in *Phipps* which the Court of Appeal had rejected. No doubt it can be said, as Hughes LJ said in *Arnold* [2008] EWCA Crim 1034, [2008] 2 Cr. App. R 37 at paragraph 37, that there can be a difference between two charges founded on the same facts and two charges sharing some facts in common. The present case, however, on analysis, falls into the former category.

66. Mr McGuinness nevertheless insisted that all had changed in the light of Mr Hague's report which had not been available at the time of the first charging decision. We take the view that such a point logically more obviously arises in the context of the second issue as to whether there were special circumstances (which was the way the matter was presented to, and dealt with, by the judge). At this stage of the argument, the obvious riposte to this argument is that the facts had not changed. What had changed, as we have already said, was the evaluation of the evidence as to those facts, in the light of Mr Hague's report. But, that said, we will deal with some aspects of his argument at this stage.

67. Mr McGuinness submitted that the initial evaluation had been vitiated because of the fundamental error of PC Hannan, as identified by Mr Hague, as to the time frame between the images on the CCTV. That, he said, made all the difference. In this regard, he relied, as we have said, on the statement in *Dwyer* that "substantially the same facts", or "the same incident", are to be taken as referring to the relevant state of affairs "as they existed to the knowledge of the prosecutor at the date the proceedings were concluded." And here, he said, the prosecutor at that time had not appreciated the true position as to the time intervals and hence as to speed.

68. If this is a right approach, the implications are potentially disconcerting. One, no doubt simplistic, example was put in argument. Suppose an incident of domestic violence where a victim with a painfully bruised jaw is taken to hospital. A radiographer examining the X-rays erroneously concludes there is bruising but no fracture. The assailant is speedily charged with common assault, pleads guilty and is sentenced. If the victim thereafter complains of ongoing pain and further examination of the same X-rays by a different radiographer then indicates the existence of a fracture, then on the argument of Mr McGuinness a new charge of assault occasioning actual bodily harm could potentially be brought on the basis that the facts were not substantially the same. That is hard to credit. One can readily think of other examples: which might, indeed, not even involve new expert evidence, as such, at all. It is a troubling proposition that subsequent correction of errors or failures or oversights in an initial investigation and charging decision can of itself give rise to an assertion that the incident was not the same.

69. We also add that although the principles on seeking to adduce fresh evidence on appeals, whether under the principles of *Ladd v Marshall* [1954] 1 WLR 1489 (see now Civil Procedure Rules Pt 52.21) for civil appeals or under s. 23 of the Criminal Appeal Act 1968 for criminal appeals, are perhaps not directly in point in the present context, they are, we think, analogous and illustrative of the caution to be shown when fresh evidence or a change of circumstances is to be relied on following determination of a case. In both such situations, one factor invariably required to be taken into account is whether the proffered fresh evidence could reasonably have been available at the first trial. Certainly, on appeals against conviction, the appellate court will ordinarily also be very wary of fresh evidence in the form of what is sometimes called "expert

shopping": see, for example, *Foy* [2020] EWCA Crim 270. At all events, the present case is one where in essence the prosecuting authorities had reached a different charging decision following conclusion of the first proceedings based on a new expert report evaluating the same evidential materials as were available to the first expert. In this respect, we take the view that the statement in *Dwyer* at paragraph 25 as to what is known by the prosecutor by the time the proceedings were concluded is further to be modified so as to add an additional requirement by reference to what reasonably could have been known to the prosecutor by the time the proceedings were concluded. Were it otherwise, the prosecution might actually be advantaged, in making a further charging decision following a previous conviction, by its own wholesale failures and neglect in investigation at the first stage (we stress that we are here speaking generally and not necessarily by reference to this particular case).

70. In the present case, the proposition that all that occurred arose out of "the same incident" (in the language of Lord Pearce in *Connelly* and Clarke LJ in *Phipps*) is surely at least also consistent with the very fact that, in the light of what happened on the night of 26 November 2016, the prosecution carefully considered whether a charge of causing death by dangerous (or careless) driving could properly be brought. After a full investigation, it decided that it could not. Instead it decided that matters merited the four charges brought in the Magistrates' Court: charges to which the appellant pleaded guilty and was sentenced. That is revealing.

71. In our judgment, on analysis this case, overall, falls squarely within the principles of *Elrington*, *Beedie* and *Phipps*. The further charge in the Crown Court was based on substantially the same facts, and the same incident, as had featured in the Magistrates' Court proceedings.

(2) Special Circumstances

72. Were there, nevertheless, special circumstances which justified the bringing of the further charge of causing death by dangerous driving? The arguments to us on this issue to a considerable extent, as we have indicated, deployed the same arguments as raised on the first issue.

73. The decision of the judge on this issue at this stage, prior to any ultimate decision as to whether or not to order a stay, was not an exercise of judicial discretion as such. Rather, it was an exercise of judicial evaluation by reference to the circumstances of the case. But, that said, the appellate court will ordinarily be slow to interfere with such an evaluation.

74. In the present case, however, the judge's reasoning was, with all respect, flawed. She made clear, for instance, that one point which she relied on in reaching her ultimate conclusion on special circumstances was the very wide disparity in gravity between the two sets of proceedings. But that will usually be the case in this context. Indeed the disparity in *Beedie* itself could hardly have been wider: yet the Court of Appeal specifically held that that of itself could not amount to a special circumstance. Moreover, the judge had also relied for this purpose on a differentiation between what happened before and what happened after the collision: but for the reasons given above that was not an available factor to be relied upon, either.

75. However, the judge's central point was based on the new report of Mr Hague, subsequently obtained, which had identified errors in PC Hannan's report. Does this of itself sufficiently constitute special circumstances for this purpose?

76. Mr Butler was disposed to argue that there had been unreasonable behaviour on the part of the prosecution at the time of the first charging decision. If, as has since been said, PC Hannan was relatively newly qualified in his post and in particular had very limited expertise in CCTV image analysis on speed, then all the more reason, Mr Butler submitted, to have raised at the time supplemental questions on his shortly expressed conclusions on the issue of speed or to have obtained the views of a further and more experienced expert: and all the more so in the light of Mr Rashid's statement and in the light of what the CCTV had appeared to indicate by reference to the relative speed of the Astra compared to other cars captured on the CCTV.

77. We do not accept this particular point. The Crown Prosecution Service evidently had considered the matter carefully and, on the basis of the materials available to them (which included PC Hannan's Report and statements), decided not to pursue a charge of causing death by dangerous driving: explaining this to the Magistrates Court. We are certainly not prepared to find that they acted unreasonably in placing reliance on PC Hannan's report and in their initial charging decision.

78. But, that said, matters need to be looked at more widely than that. The police themselves made their investigations. The method and product of their investigations cannot be divorced from the charging process as a whole in this case. Here, they did not choose to instruct Mr Hague. They chose to instruct PC Hannan. He produced his Collision Report, which was detailed. He did not qualify his opinion on the issue of speed by indicating that he lacked the appropriate expertise or in any other way; and, notwithstanding the statement of Mr Rashid, there was no further discussion or exploration of the point at that time. The prosecuting authorities, bluntly put, have to live with that.

79. In our view, a change in position on charging made solely by reference to the new expert report obtained following initial conviction and sentence and founded on the same facts that were in existence at the time of the first charging decision cannot, in the circumstances of this case, amount to a special circumstance sufficient to justify refusing to grant a say. To hold otherwise would amount to a significant and unwarranted encroachment on the application of the principles of *Henderson v Henderson* and of *Beedie* and *Phipps*.

80. Mr McGuinness also sought to place some reliance on *Antoine*, where a stay was held properly to have been refused even where there had been an incompetent blunder as to initial charging by the prosecution and even where, as he pointed out, on no view had any fresh evidence emerged. But *Antoine* was demonstrably an exceptional case, very different from the present. First, in that case the erroneous charge as brought was contrary to what was really intended: the mind did not go with the act, as it were. But in the present case causing death by dangerous (or careless) driving was carefully considered as a possible charge and was consciously rejected. Further, in *Antoine* the defendant had from the start been expecting a sentence of 10 years and must have known, at the time he pleaded guilty in the Magistrates' Court and was sentenced on the same day, that he was the undeserving beneficiary of a complete blunder. Moreover, in that case attempts to correct the error were immediately made by the prosecution and

fresh charges were very swiftly brought. In the present case, however, the appellant would, as Mr McGuinness fairly accepted, reasonably have believed that, on being sentenced in the Magistrates' Court and when it had been openly said that he was not to be sentenced for causing Mr Lee's death, that was the end of the matter. In fact, the present charges were not even brought (as we were told, without any prior notification to the appellant) until some two years later. Overall, in *Antoine* it could properly be adjudged that continuance of the proceedings did not offend the court's sense of justice and propriety. That is not so here.

81. In so concluding on this aspect of the case, we make clear that we are *not* saying that the obtaining of fresh expert, or other, evidence designed to correct an error or oversight or omission relevant to a first charging decision can *never* sufficiently constitute a special circumstance. Ultimately, all will depend on the particular circumstances of the particular case. What we do say is that on such a scenario very close scrutiny indeed is called for before it may properly be adjudged that a second prosecution may fairly proceed.

Conclusion

82. The principles established in cases such as *Elrington* and *Beedie* are important ones. They are not to be circumvented, when they properly come into play, in the absence of circumstances which can properly be described as special. That is not the situation here: the prosecution have not established the existence of special circumstances.

83. The position that has arisen in the present case is particularly unfortunate, given the dissatisfaction, expressed forcibly at the time, of Mr Lee's family with the initial charging decision and given also the fact that they will no doubt have since been told that the appellant had subsequently pleaded guilty to causing death by dangerous driving. That is very regrettable. But our conclusion, applying the principles established by the authorities to the circumstances of this particular case, must be that the appeal is allowed and the conviction quashed.