IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2021] EWCA Crim 269

No. 202002878 A4

Royal Courts of Justice

Tuesday, 2 February 2021

Before:

LADY JUSTICE ANDREWS
MR JUSTICE SPENCER
HIS HONOUR JUDGE AUBREY QC

REGINA
V
COLIN BROWN

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Opus 2 International Ltd.
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

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MR A. NUTTALL appeared on behalf of the Appellant.
MR J. GROUT-SMITH appeared on behalf of the Respondent.

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J U D G M E N T

MR JUSTICE SPENCER:

1 This is an appeal against sentence brought by leave of the single judge.

2 On 13 November 2020 in the Crown Court at Carlisle the defendant, who is now 78 years old, was sentenced by HHJ Barker to a term of 12 months' immediate imprisonment for an offence of causing death by dangerous driving. He had pleaded guilty at an earlier hearing and was afforded full credit of one-third for his plea. He was disqualified from driving for a total period of 42 months, as to which there is no complaint.

3 There is no challenge to the imposition of a custodial sentence of that length. It is contended, however, that the judge should have suspended the inevitable term of imprisonment. Alternatively, it is submitted that in the light of the deterioration in the appellant's health since the sentence was imposed, this court should allow the appeal and now substitute a suspended sentence. Sadly, the appellant has recently tested positive for Covid. Indeed, we were told by his counsel, Mr Nuttall, that the appellant is currently in hospital. The appellant has now served nearly 12 weeks of his sentence.

4 This is a tragic case from every point of view. The fatal accident took place at about 12.15 p.m. on 14 August 2018 on the A66 just east of Penrith in Cumbria. The appellant was then 76 years old. He and his wife had set off from their home near Ipswich in Suffolk at about 5.30 that morning after rising at 4:45 a.m. The appellant was driving their Renault Master van and the van was towing a caravan. They had made three stops for rest and refreshment during the seven hours or so of the journey to the point where the accident took place. The last of those stops was about an hour before the accident.

5 The appellant must have fallen asleep at the wheel because for six seconds over a distance of 150 metres or so his vehicle began to drift across the road and into the opposite carriageway. This was at a point where there were warning chevrons on the road surface

and rumble strips embedded in the surface to alert a driver to the change in the lanes of the carriageway.

6 The appellant's vehicle veered directly into the path of an oncoming car, a Citroen C3 driven by Mrs Ann Copley, aged 76. She had no chance at all of avoiding the collision. She was fatally injured and died at the scene. It was several hours before she could be cut free from the wreckage. Mrs Copley was a very active, outgoing and vigorous lady who lived life to the full, a much loved mother and grandmother. There was a very moving impact statement from her daughter on behalf of all the family. Their loss is incalculable. For example, the grandchildren have lost their only surviving grandparent.

7 The appellant was injured too in the accident and was admitted to hospital with a broken arm and damage to his spine. He spent 13 days in hospital. There was evidence that when the police spoke to him at the hospital under caution soon after the accident he said he had felt tired as he approached Penrith. He was interviewed formally by the police on 27 October 2018. He could not recall saying previously that he felt tired. He could give no account of the immediate lead up to the collision, save that he had taken a break about an hour earlier, stopping in a lay-by for a burger and a cup of tea. He denied any responsibility for the collision and mentioned a number of medical conditions from which he suffered.

8 The possibility of some medical explanation for a temporary loss of consciousness was thoroughly explored, all of which took a considerable time. It was not until May 2020 that the appellant was charged with the offence of causing death by dangerous driving. He entered a guilty plea at the first hearing in the Crown Court on 28 July. The case was adjourned for a pre-sentence report, but the sentencing hearing could not take place until 13 November, because the appellant underwent surgery in September 2020 for a hernia and was shielding during the pandemic in view of his health issues generally.

9 Unusually, we have a full transcript of the sentencing hearing, including the powerful mitigation advanced on the appellant's behalf by his counsel. Mr Nuttall. The judge was provided with a very large number of impressive testimonials which we too have read. They spoke of the appellant's positive good character, including his charitable work. Several of the testimonials referred to the appellant's extensive unblemished driving record, in this country and abroad, in the course of his employment and for leisure.

10 The appellant was no stranger to family tragedy himself. Nine years ago he lost his son aged 43. Indeed, the purpose of the journey to the Lake District on this occasion was to visit the area where his son's ashes had been scattered. It had become an annual pilgrimage. The appellant had also lost his daughter in 2019 since this fatal accident. To friends and to the author of the pre-sentence report the appellant had expressed deep remorse for Mrs Copley's death. He had written to the family and also directly to the judge. There was medical evidence confirming that the appellant suffered from chronic obstructive pulmonary disease (COPD) and associated respiratory problems, despite which he had managed to remain active well into his seventies. He had continued to work in an upholstery business until the age of 73. He had undergone a heart bypass operation in 2015. He had no relevant convictions and had a good driving record.

11 It was common ground at the sentencing hearing that this was a Level 3 offence under the Sentencing Council Guideline: Causing Death by Driving. The Guideline identifies driving when knowingly deprived of adequate sleep or rest as “seriously culpable behaviour”. The starting point after a trial was, therefore, three years’ custody and the sentencing range two to five years. The focus of Mr Nuttall's mitigation before the judge, and his submission, before this court, was that the inevitable custodial sentence could properly have been suspended. As to culpability, Mr Nuttall submitted to the judge that the appellant had no intention of driving dangerously. He thought he had done the right thing by taking a break and taking refreshment, although, sadly, this may in fact have been

the cause of the somnolence which overtook him when he dozed off at the wheel. Mr Nuttall submitted to the judge that the appellant could not be shielded from the pandemic in custody and his health would undoubtedly be at grave risk. He was particularly vulnerable.

12 In passing sentence, the judge observed that the appellant had undertaken a very long journey and that the breaks he had taken were not long enough. The appellant had created the conditions in which he fell asleep at the wheel. It was likely that he would have known he was feeling tired to the point of falling asleep, but he did not act upon that, perhaps because he was nearly at the end of the journey and wanted to press on and complete it. The judge took into account the appellant's age, his poor health, his positive good character and the family tragedies the appellant himself had suffered. He took into account the appellant's genuine remorse and his good driving record.

13 The judge took 30 months as his starting point and reduced that by a further 12 months on account of the appellant's extensive personal mitigation. That produced a sentence of 18 months. The judge then allowed full credit of one-third for the appellant's guilty plea, resulting in the sentence of 12 months' imprisonment.

14 The judge considered anxiously whether it was possible to suspend that sentence. He said:

> "I must now turn to the vexed issue of whether that sentence should be suspended or served immediately. I of course have careful consideration of the Definitive Guideline on the Imposition of Community and Custodial Sentences. In my judgment, given that it was by your criminal act that you caused the death of another which was avoidable, the only appropriate punishment that can be achieved in this case is one by the imposition of an immediate custodial sentence, despite the strong mitigation that has been put forward so ably on your behalf. There are some who may observe that what is the point of sending an elderly man of your age into custody, but I in this court recognise that there is a significant body of ageing population who drive, who also hold a significant duty and responsibility for their driving, to

the care of others and that is a message that, in my judgment, must be made and must be sent out."

15 In the grounds of appeal and in his oral submissions Mr Nuttall has suggested that the judge was wrong to impose an immediate custodial sentence seemingly as a deterrent to elderly drivers. Mr Nuttall submits that given the appellant's precarious medical condition and his advanced age, he was and is extremely vulnerable. He had been shielding from Covid 19 for many months. The court should have highlighted and taken into account the very real danger to the appellant if he were sent to prison. Mr Nuttall referred in his grounds of appeal to the well-known observations of the Lord Chief Justice in *Manning* [2020] EWCA Crim 592, [2020] 2 Crim App R(S) 46 to the effect that the current conditions in prisons owing to the pandemic represent a factor which can properly be taken into account in deciding whether to suspend a sentence of imprisonment, because the likely impact of the sentence may be heavier during the current emergency than it would otherwise be. Mr Nuttall also emphasised in his oral submissions that the appellant continues to be in constant pain from his hernia operation. As we mentioned earlier, the latest position is that two nights ago the appellant was found collapsed in his cell and is currently in hospital. There is no further update on that.

16 Taken with the mitigation relating to the offence itself and the submission that culpability is low, and coupled with the appellant's positive good character, Mr Nuttall submits that the judge should have suspended the sentence.

17 In granting leave, the single judge directed that an up-to-date medical report be obtained. We have a report dated 28 January from the clinical team lead at HMP Northumberland where the appellant is serving his sentence. He was transferred to that prison on 13 January and was identified as a frail elderly man. He can dress himself slowly. He declined any walking aid. He is housed in a disabled cell with an en suite shower and shower chair. He is able to manage his own medication. Within a few days concerns were highlighted in

relation to his social care needs. His cell area was dirty and he was unkempt. The prison does not have 24-hour health care provision.

18 On 20 January the appellant reported feeling generally unwell. He tested positive for Covid and was admitted to the local general hospital on 21 January. On 27 January he returned to prison. The report concludes by saying that he continues to struggle to care for himself, but is able to manage his own medication. We have already dealt with the latest position and of course express our earnest hope that his recovery will be swift and he will be able to return to prison.

19 Mr Nuttall submits that in view of this latest deterioration in the appellant's health the argument for a suspended sentence has become even stronger and the fears Mr Nuttall expressed for the appellant’s health in his submissions to the judge have materialised.

20 On behalf of the Crown we have a respondent's notice from Mr Grout-Smith, together with a very helpful addendum addressing the legal issues which arise where a deterioration in a prisoner's health during his sentence is relied on in support of an appeal.

21 We have considered the circumstances of this tragic case and all counsel’s submissions very carefully indeed. There is no escaping the fact that the appellant's driving on this occasion was seriously culpable. As a result, he took the life of another human being. The very considerable personal mitigation was amply reflected in the reduction of the sentence to only 18 months' imprisonment, before credit for plea, which we note is six months below the bottom of the range in the Guideline for any sentence for causing death by dangerous driving.

22 The judge then had the difficult task of balancing the factors under the Guideline on the imposition of custodial sentences. The Guideline requires the court to weigh the factors on each side of the equation in considering whether it is possible to suspend the sentence. Here, the judge did just that. It was a matter solely for his evaluation. Plainly, without

the judge needing to spell it out, there was a realistic prospect of rehabilitation and there was strong personal mitigation. Those factors indicated that it might be appropriate to suspend the sentence. But on the other side of the scales the judge was fully entitled to conclude, adopting the words of the Guideline, that for an offence as serious as this involving the taking of a life "appropriate punishment" could only be achieved by immediate custody. The judge was well aware of the appellant's precarious health and took it fully into account.

23 We reject the suggestion that the judge was in fact passing or meaning to pass a deterrent sentence. He was simply making the point that no different an approach could be taken to the imposition of an immediate custodial sentence simply because of a defendant's advanced age. Elderly drivers needed to be aware of this.

24 It is clear from the passage we have quoted from the judge's sentencing remarks that the key factor in the Guideline to which he gave overwhelming weight, as he was entitled to do, was the fact that an offence as serious as this could not be met with appropriate punishment except by immediate custody. He was fully entitled to reach that conclusion. We are quite unable to say that it was wrong in principle for the judge to have declined to impose a suspended sentence.

25 We have also considered separately, and very carefully, the impact on this appeal of the deterioration in the appellant's health since he has been in custody. The extent to which this court on appeal can take into account such a deterioration was definitively examined by this court in *R v Stephenson* [2018] EWCA Crim 318, [2018] 2 Crim Ap R(S) 6. In cases of serious ill-health, this court may have regard to a significant deterioration in a medical condition that was known at the date of sentencing, but such cases will be rare. There remains as well the discretion of this court to impose a lesser sentence as an act of mercy. In *Stephenson* the court emphasised, however, the powers available to the Secretary of State (through the prison governor in practice) to transfer a prisoner to hospital if required and to

direct early release on health grounds or compassionate grounds in appropriate circumstances.

26 Although there has been some deterioration in the appellant's health since he was sentenced, it is clear that his health needs are being adequately addressed in custody. That is exemplified by his recent transfer again to hospital. We are sure that if there were to be any further serious deterioration the prison authorities can and will act appropriately to deal with the situation. The appellant has now served the equivalent of nearly six months of his sentence. His release date at the very latest is in May. We are told by Mr Nuttall that there is no prospect of early release on home detention curfew as might usually be expected, because this case involves a death. Even if that is indeed the position, it does not affect the entitlement of the Secretary of State in an appropriate case to exercise discretion to direct early release on health grounds or compassionate grounds. That is not a matter for us but for the Secretary of State.

27 We see no basis for allowing the appeal on the grounds of deterioration in the appellant's health whilst in custody.

28 Therefore, in all of the circumstances and despite Mr Nuttall's very powerful submissions, we are quite satisfied that the sentence the judge imposed in this tragic case was neither wrong in principle nor manifestly excessive. The appeal must therefore be dismissed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.