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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2023/00991/B4
[2024] EWCA Crim 368



Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 2nd February 2024

B e f o r e:

LORD JUSTICE EDIS

MR JUSTICE CHOUDHURY

HIS HONOUR JUDGE ALTHAM

(Sitting as a Judge of the Court of Appeal Criminal Division)

R E X

- v -

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Mr A Watkins appeared on behalf of the Appellant

Miss M Masselis appeared on behalf of the Crown

J U D G M E N T

Friday 2nd February 2024

LORD JUSTICE EDIS: I shall ask Mr Justice Choudhury to give the judgment of the court.

MR JUSTICE CHOUDHURY:

1. On 26th January 2023, following a trial in the Crown Court at Chester before His Honour Judge Leeming and a jury, the appellant (who was then aged 22) was convicted of causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988 (count 1). An alternative offence of causing death by careless driving, which the appellant had previously admitted, was ordered to lie on the file.

2. Earlier in the proceedings, on 30th September 2022, the appellant pleaded guilty to a number of related driving offences.

3. The end result was that on 3rd March 2023 the appellant was sentenced as follows: on count 1, causing death by dangerous driving, nine years' imprisonment; on count 2, causing death by driving whilst unlicensed, contrary to section 3ZB of the 1988 Act, six months' imprisonment concurrent; on count 3, causing death by driving whilst uninsured, six months' imprisonment concurrent; on count 4, dangerous driving, contrary to section 2 of the 1988 Act, 12 months' imprisonment consecutive. On each of seven related summary offences, no separate penalty was imposed. They included failure to provide a specimen for analysis, the use of a motor vehicle on a road or in public place without third party insurance, driving a motor vehicle otherwise than in accordance with a licence, two offences of failing to stop after a road accident, and two offences of failing to report an accident. The total sentence was one of ten years' imprisonment. He was disqualified from driving for a period of 60 months, with an extension period of 60 months, and until an extended test was passed.

4. The appellant applied for leave to appeal against both conviction and sentence. Leave was refused by the single judge. The appellant renewed both applications before the full court. Leave to appeal against conviction was refused by the full court on 7th November 2023: see [2023] EWCA Crim 1361. However, the renewed application for leave to appeal against sentence was adjourned to enable counsel to assemble evidence, including video evidence, that went to the question of the quality of the appellant's driving before and at the time of the fatal accident. By a decision dated 15th November 2023, leave to appeal against sentence was granted: see [2023] EWCA Crim 1335. The matter was then adjourned. It is that appeal against sentence which now comes before us with the leave of the full court.

5. The facts, in brief summary, are as follows. At about 7 am on 14th September 2020, when the appellant was aged 20, he was driving a Ford Focus motor vehicle on Hungerford Road, Crewe, when it struck and killed a 42-year-old female cyclist, Agnieszka Poczowska. The appellant was not qualified to drive. He held a provisional licence, and he was uninsured. At the time of the collision the front seat passenger was also not qualified to drive and was therefore not qualified to supervise.

6. Video recordings made on a third party's mobile phone shortly before the incident showed the appellant socialising with others in a flat in the Crewe area and alcohol being consumed by the group. Three of the videos showed the appellant dancing around in boxer shorts and holding bottles of vodka or wine. None of the videos record the appellant drinking any alcohol.

7. There were no witnesses to the collision itself. However, it was partly captured on CCTV from a house adjacent to the scene. Only the precise point of impact was missed by the CCTV. The position of both parties immediately before and after the collision is clear.

8. Hungerford Road is a single carriageway residential road with two lanes, one in each direction. It is subject to a 30-mph speed limit. The appellant entered Hungerford Road, travelling in the direction of Crewe. At the time, the victim was riding her green Milford pedal cycle in the opposite direction. She was riding close to the pavement when she was struck head-on by the Ford Focus. She was thrown onto the windscreen and roof of the vehicle, before coming to rest some distance away.

9. Having struck the victim, the appellant did not stop. Instead, he continued along the same road before turning around and driving back along Hungerford Road. He slowed down at the point of collision. The appellant would therefore have known exactly what had happened, even if he did not know at the time that the victim would die from her injuries.

10. The victim sustained catastrophic injuries that proved to be fatal. She was taken to hospital by the emergency services, but was pronounced dead at 7.49 am.

11. A post-mortem examination was carried out. The cause of death was determined to be multiple injuries, including a complex skull fracture and a torn liver.

12. The appellant drove off. He was seen by other motorists weaving through traffic and driving on the wrong side of the road. About two miles from the location of the first collision, another cyclist, Mr Michael Meers, was riding his pedal cycle on Crewe Road when he was hit by the Ford Focus. Fortunately, that further collision did not result in any serious injury to Mr Meers.

13. The appellant did not stop at that scene either, although he was observed to pause some distance ahead of Mr Meers, before driving off again. The appellant went on to drive a

further 22 miles to Crewe. The windscreen of the Ford Focus was shattered, obscuring his view. Part of his route took him on to the M6 motorway.

14. The car was later abandoned on a residential street, after which the appellant removed his jacket in some nearby woods before catching a taxi to his mother's home. He was arrested at 8.50 am. He refused to provide a sample of his breath on two occasions but pretended to be asleep.

15. The victim had been engaged to be married to her long-standing partner. Moving personal statements from her fiancé and her eldest daughter described eloquently the shattering impact that her death has had on their lives.

16. The appellant had five previous convictions for six offences of which the most serious was an offence in 2018 of possessing a knife or a bladed article. He had not previously been the subject of a custodial sentence. He had no driving-related convictions.

17. The pre-sentence report assessed the appellant as presenting a medium risk of reconviction and a low risk of serious re-offending. The risk of harm to other road users, cyclists and pedestrians was assessed as high. The report noted a degree of immaturity and a lack of any real insight into the consequences of his actions.

18. The appellant wrote a letter to the victim's family in which he claimed to be deeply remorseful, although he still maintained that his driving had only been careless.

19. Evidence from his mother painted a more positive side to his character, and other evidence suggested positive engagement in custody.

The Sentencing Remarks

20. In sentencing the appellant, the judge found that the appellant had consumed alcohol, but did not find him to be "significantly impaired" as a result. The judge noted that the maximum sentence available at the time was 14 years' custody, the offence having been committed before 26th June 2022, the date when new legislation imposing a maximum sentence of life imprisonment came into effect.

21. Having regard to the guidelines in force at the time, the judge noted that the court must focus on the culpability of the driving. He stated as follows:

"Whilst every case is fact specific, your offending, in my judgment, does fall into level 1. Your driving involved a flagrant disregard for the rules of the road, a young driver, driving on the wrong side of the road for no apparent reason, with no driving licence, no supervision, no insurance, having consumed alcohol and an apparent disregard for the great danger that driving in that way would cause to others by driving specifically in the opposing carriageway.

This leads to a starting point of eight years' custody. ..."

22. Having so determined, the judge went on to consider the aggravating and mitigating factors. He identified as aggravating factors: the fact that the appellant had failed to lend assistance, knowing that he had been in a collision with a cyclist; driving off in an attempt to avoid apprehension; and driving for a significant distance with a shattered windscreen, thereby putting other road users and the public at risk.

23. The mitigating factors, which were: the absence of motoring convictions, the lack of previous custodial sentences and his personal mitigation, were found to be outweighed by the aggravating ones.

24. Accordingly, the judge applied an uplift from the starting point to nine years' custody. The further dangerous driving after the first collision, the subject of count 4, attracted a sentence of 12 months' imprisonment, which was ordered to be served consecutively. The other sentences imposed were as set out at the beginning of this judgment.

25. Mr Watkins, who appears on behalf of the appellant as he did in the court below, advances a single ground of appeal, which is that the judge erred in finding that the very brief instance of dangerous driving prior to the fatal collision was capable of amounting to a level 1 offence, thus rendering the sentence manifestly excessive.

26. As directed by the full court when granting leave, an agreed note of the evidence has been prepared dealing with the quality of the appellant's driving prior to and at the time of the fatal collision. In summary, this provides: (1) the investigator, Mr Thompson, had not attempted to calculate either the duration or distance over which the appellant's car was wrongly positioned on the road; (2) Mr Thompson agreed that in the moment immediately prior to the collision, the appellant's car appeared to be similarly positioned to other cars which had preceded it, travelling in the same direction; (3) Mr Thompson agreed that immediately post-collision the appellant's car had begun to return to its correct position on the road, although he could not say whether that was due to the appellant's efforts or the force of the collision; and (4) whilst it was not possible to calculate the speed at the point of impact, there was no suggestion of driving at excessive speed.

27. Mr Watkins submits that this evidence supports the contention that the appellant was driving at an appropriate speed and had only departed from the proper position on the road for one second before the collision. As such, it was not the case that the appellant's driving before and at the time of the collision involved a flagrant disregard for the rules of the road so as to fall into level 1 of the guidelines.

28. Miss Masselis, who appears for the Crown as she did below, submits that the judge was entitled to conclude that the driving was such as to fall into level 1, and that he gave detailed reasons for so concluding: the appellant had no licence; was unsupervised; had consumed alcohol (albeit he was not significantly impaired); there was no reason for the appellant to be fully in the opposing carriageway; and the victim was clearly visible.

29. Both counsel developed their submissions orally before us today, and we are grateful to them both for their clear and helpful submissions.

Analysis

30. The applicable guideline at the time was the Sentencing Guidelines Council's definitive guideline in respect of causing death by dangerous driving ("the guideline"). The guideline identifies three levels of seriousness:

"Section D Offence guidelines

Causing death by dangerous driving

Factors to take into consideration

...

3. Levels of seriousness

The 3 levels are distinguished by factors related predominantly to the standard of driving; the general description of the degree of risk is complemented by examples of the type of bad driving arising. The presence of aggravating factors or combinations of a small number of determinants of seriousness will increase the starting point within the range. Where there is a larger group of determinants of seriousness and/or aggravating factors, this may justify moving the starting point to the next level.

Level 1 – The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great

danger being caused to others. Such offences are likely to be characterised by:

- A prolonged, persistent and deliberate course of very bad driving **AND/OR**
- Consumption of substantial amounts of alcohol or drugs leading to gross impairment **AND/OR**
- A group of determinants of seriousness which in isolation or smaller number would place the offence in level 2

Level 1 is that for which the increase in maximum penalty was aimed primarily. Where an offence involves both of the determinants of seriousness identified, particularly if accompanied by aggravating factors such as multiple deaths or injuries, or a very bad driving record, this may move an offence towards the top of the sentencing range.

Level 2 – This is driving that created a *substantial* risk of danger and is likely to be characterised by:

- Greatly excessive speed, racing or competitive driving against another driver **OR**
- Gross avoidable distraction such as reading or composing text messages over a period of time **OR**
- Driving whilst ability to drive is impaired as a result of consumption of alcohol or drugs, failing to take prescribed medication or as a result of a known medical condition **OR**
- A group of determinants of seriousness which in isolation or smaller number would place the offence in level 3

Level 3 – This is driving that created a *significant* risk of danger and is likely to be characterised by:

- Driving above the speed limit/at a speed that is inappropriate for the prevailing conditions **OR**
- Driving when knowingly deprived of adequate sleep or rest or knowing that the vehicle has a dangerous defect or is poorly maintained or is dangerously loaded **OR**
- A brief but obvious danger arising from a seriously dangerous manoeuvre **OR**
- Driving whilst avoidably distracted **OR**

- Failing to have proper regard to vulnerable road users

The starting point and range overlap with Level 2 is to allow the breadth of discretion necessary to accommodate circumstances where there are significant aggravating factors."

31. The term "flagrant disregard" for the rules of the road is to be understood by reference to the examples given under level 1. The evidence in the present case of the appellant's driving before and at the point of collision cannot, in our judgment, be said to be characterised by a "prolonged, persistent and deliberate course of very bad driving". Indeed, the evidence was that the appellant was not driving at excessive speed either in relation to the speed limit, or the road conditions at the time, and that his vehicle appeared to be similarly positioned to other vehicles travelling in the same direction. There was no other evidence to suggest a course of bad driving so as to amount to a "flagrant disregard" for the rules of the road, although it is evident that at the point of collision he was too far over on the opposing carriageway.

32. Furthermore, whilst the judge found that alcohol had been consumed, the judge's express finding that the appellant was not thereby "significantly impaired" means that his driving cannot be characterised as being subject to "gross impairment", as referred to in level 1.

33. The absence of these characteristics means that the appellant's driving was not self-evidently to be categorised as a level 1 offence.

34. The guidance at the time did provide that a level 1 offence could be one involving "a group of determinants of seriousness which in isolation or smaller number would place the offence in level 2". The question is whether it can be said that those level 2 determinants are sufficient to increase the seriousness to level 1.

35. The factors identified by the judge included those at 11C to D of the sentencing remarks. These included: (1) that the appellant was a young driver; (2) that he was driving on the wrong side of the road for no apparent reason; (3) that he had no driving licence, no supervision and no insurance; and (4) that he had consumed alcohol. Of these, (1) and (3) do not relate directly to the quality or standard of driving at the relevant time, although they could have an effect on it and would in any event be considered as aggravating factors. As to (2), the appellant did have a reason to be at least partially on the opposing carriageway: there was a need to overtake parked vehicles at a location where the two-way road had narrowed, albeit that the appellant had moved significantly further over than required. As to (4), the finding that the appellant was "not significantly impaired" by his consumption of alcohol suggests that there was not a degree of impairment that would be characteristic of a level 2 offence.

36. The combination of these factors is not such as to elevate the seriousness of the offending to level 1. In our judgment, this was a case where the driving created a substantial risk of danger, either because it was characterised by determinants of seriousness commensurate with the examples in level 2, or by a group of determinants of seriousness which could in isolation or smaller number place the offence in level 3. Accordingly, the starting point is one of five years' custody, with a range of four to seven years.

37. As to aggravating and mitigating factors, we agree with the judge's analysis of these and his conclusion that a substantial uplift from the starting point was warranted. In our judgment, an increase to six years results in a sentence for the offending in this case under count 1 that is just and proportionate, having regard to the maximum sentence in place at the time. Whilst this would place the sentence near the top of the range for a level 2 offence, we consider that such an uplift is amply warranted, having regard to the circumstances of this case, including, in particular, the very bad driving displayed in the aftermath of the first

collision.

38. Accordingly, we quash the sentence of nine years' imprisonment on count 1 and replace it with one of six years' imprisonment. All other sentences, including the consecutive term of 12 months' imprisonment on count 4, remain the same, save that the extended period of disqualification is adjusted to one of 42 months instead of 60 months. The total sentence is, therefore, one of seven years' imprisonment.

39. To that extent this appeal is allowed. We recognise that the reduction in sentence will be disappointing for the victim's family, to whom the punishment may not appear severe enough for the person who took the victim's life. The sentence now imposed is one that is lawful and in accordance with the proper application of the guideline. It does not represent in any way the diminution of the value of the life taken away, which must be one of unimaginable loss for the family.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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