Neutral Citation Number: [2024] EWCA Crim 949

IN THE COURT OF APPEAL

CRIMINAL DIVISION

ON APPEAL FROM THE CROWN COURT AT CARDIFF

HIS HONOUR JUDGE JEREMY JENKINS No. 62CL0174324

CASE NO 202401942/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday, 24 July 2024

Before:

LORD JUSTICE WILLIAM DAVIS
MRS JUSTICE THORNTON DBE
THE RECORDER OF WOLVERHAMPTON
HIS HONOUR JUDGE MICHAEL CHAMBERS KC
(Sitting as a Judge of the CACD)

REFERENCE BY THE ATTORNEY GENERAL UNDER
S.36 OF THE CRIMINAL JUSTICE ACT 1988

REX
V
HARLEY WHITEMAN

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MR K BROCKLEHURST appeared on behalf of the Attorney General
MR J HARTSON appeared on behalf of the Offender

J U D G M E N T

1. LORD JUSTICE WILLIAM DAVIS: On 2 April 2024 in the Crown Court at Cardiff Harley Whiteman pleaded guilty to causing the death of Kaylan Hippsley by dangerous driving and to failing to provide a specimen of breath for analysis. On 30 April 2024 in the same Crown Court he was sentenced to detention in a young offender institution for six years nine months for causing death by dangerous driving. A concurrent sentence of three months was imposed for failing to provide a specimen. Ancillary orders were made to which we shall return at the conclusion of this judgment.
2. His Majesty's Solicitor General now applies pursuant to section 36 of the Criminal Justice Act 1988 to refer the sentence for causing death by dangerous driving as unduly lenient.
3. The offender is 20. He was born in July 2004. He has held a full driving licence since November 2022. He has no previous convictions of any kind.
4. On 29 February 2024 at some point during the afternoon he left the college in Aberdare in South Wales which he attended for vocational training in conjunction with undertaking his apprenticeship in carpentry. He owned a Ford Fiesta which he drove, together with a friend, from college to a public house in Aberdare. They drank together in that public house. The friend recalled having three pints of lager there.
5. They then drove to Hirwaun, a village about three miles from Aberdare where they picked up another friend. The three of them went to a public house in that village. The landlord of that public house knew the offender as a regular in the pub. He had another pint to drink there. Shortly before 6.00 pm the offender and one of his friends began to mess about and to throw each other against the fruit machine in the bar. The landlord asked them to leave because they were disturbing other customers. His impression was that the offender was under the influence of something other than alcohol. His

impression was correct. At some point during the afternoon the offender had taken a line of cocaine.

6. Despite the fact that he was affected by both drink and drugs, the offender got back into his car and drove away with his two friends as passengers. His car was fitted with tinted front passenger windows. The level of tint was such that the amount of light passing through the windows was very significantly reduced. This constituted a breach of the relevant construction and use regulations. The effect was the same as if the driver was wearing sunglasses. By the time the offender drove away from the pub it was getting dark.
7. He drove around Hirwaun without putting on the lights on his car. He was seen driving on the high street and, as he tried to negotiate a bend at speed, he veered onto the wrong side of the road. There came a point at which he started to drive up Brecon Road. People on the pavement at Brecon Road saw and heard the offender's car. They had a clear impression of the car being driven at excessive speed. Estimates of the speed varied between 40 mph and 60 mph. At this point Brecon Road has a 20 mph speed limit; it is a main thoroughfare in the village. On this evening cars were parked on both sides of the road. For two cars to pass extreme care was needed. The offender drove without any regard for the road conditions. His car swerved around on the road.
8. Ahead of him on the nearside pavement was 13-year-old Kaylan Hippsley. Kaylan was on his way to a local community centre with some friends of a similar age. He apparently had crossed the road ahead of them. The offender approached at speed. Because of the parked cars the space for two cars to pass was particularly limited at this point. As the offender drew close to the point where Kaylan was, another car came in the opposite direction. The offender did not slow down. He was going too fast in any event. He

swerved so as to avoid the oncoming car. As a result his car hit the kerb on the nearside. He lost control of the car. The front nearside of the car struck Kaylan. Kaylan was thrown some distance with the force of the collision. This was in full view of his young friends and other people in the vicinity.

9. The offender's car sustained significant damage. The most obvious damage was to the windscreen on the nearside. We have seen photographs. It was left with a large hole where the car had struck Kaylan. That did not deter the offender from driving away. He carried on driving around the village at speed without any lights. He again drove too fast on the high street, going onto the wrong side of the road.
10. He returned to Brecon Road and drove slowly past Kaylan who was now lying fatally injured on the pavement being tended to by passers-by. Once the offender saw what was going on, he accelerated away. He drove the wrong way down a one-way street and nearly collided with another car. After further bad driving he drove back to his home address in the village. He left the car there and returned on foot to Brecon Road.
11. By the time he arrived Kaylan was being tended to by a student nurse who was doing her best to help until an ambulance arrived. Initially the offender went and sat next to Kaylan and held his hand. At least one person recognised him as the driver of the car which had struck Kaylan and which then had driven past a short time later. The offender was pulled away from Kaylan by members of the public. They could smell alcohol on him. They thought he was drunk. His reaction was to make such comments as: "Do you think I give a fuck about this kid on the floor?" Someone accused him of being the driver of the car which had struck Kaylan. He denied that he was. He said that he did not own a car and that he could not drive.

12. Once the police were at the scene the offender was pointed out as the driver responsible for the collision. He was argumentative and belligerent. He was required to provide a roadside breath test. When he refused he was arrested. He also refused to provide a sample of breath at the police station. When interviewed he replied no comment to all questions.
13. Kaylan was taken to the University Hospital of Wales. He had sustained multiple and very grave injuries, including a severe head injury. He died in hospital on 3 March 2024.
14. At the sentencing hearing the judge had victim personal statements from many members of Kaylan's family. The family plainly was close-knit. Kaylan's sudden death caused immense sorrow and pain to all of them. We have read all the statements, as did the sentencing judge. We shall refer simply by way of example to two of the family members. Kaylan lived with his grandmother. She expressed herself as having no purpose in life any more. She did not know how she would carry on. Kaylan's older sister said that she could not bear to be anywhere which reminded her of her brother. There was also a statement from the head of the school attended by Kaylan. He was a popular boy, well-known around the school. The school community was devastated when the news of his death was announced. "A cloak of sadness shrouded the school" is how the head described it.
15. The judge also had statements from those who knew the offender. They spoke highly of his general character. A youth worker with whom he had had contact said that he was "an exemplary young person". He was also said to be "responsible and considerate". This picture of a sensible young man was consistent with the view of the author of the pre-sentence report. She noted that the offender had had some difficulty in his family life earlier in his childhood. She considered that he had applied himself well in the 18

months prior to February 2024, pursuing his chosen trade of carpentry. Her assessment was that the offender's behaviour on the night in question was anomalous. She set out the offender's account of the events of that day. In relation to the collision the offender told her that he had been aware of "a little bang" and that he thought that he had hit the pavement. He said that he could not explain his behaviour at the scene following the collision.

16. In his sentencing remarks the judge set out the facts as we have rehearsed them. He described the offender's behaviour after the collision as "abhorrent and heartless" and "totally unrepentant". The judge referred to the relevant Sentencing Council guideline which he acknowledged reflected the considerable increase in sentences for the offence of causing death by dangerous driving. He was there referring to the fact that in June 2022 the maximum sentence for the offence was increased from 14 years to life imprisonment.

17. He found that the offender's case fell into category A culpability. This was because the offender took a decision, albeit a drunken one, deliberately to ignore the rules of the road and to show disregard of the danger to others. He drove in a highly impaired state through drink and drugs at a speed which was dangerously inappropriate for the road and the circumstances that evening. The judge found that it was a prolonged, persistent and deliberate course of dangerous driving. In that way the judge identified four different factors within category A as set out in the guideline. The matter was further aggravated by the following factors. First, the offender left the scene. Second, Kaylan was a vulnerable road user. Third, the offender had passengers in the car.

18. In relation to mitigating factors, the judge said that there was some remorse but that that

had to be seen in the context of the offender's behaviour at the scene and at the police station. The offender's good character, his clean driving record and his age also mitigated the offending.

19. The judge then turned to what the appropriate sentence would have been after a trial and he said this:

> "Balancing the aggravating and mitigating features as best one can, and taking into account your age, the fact that this will be your first custodial sentence, and everything that I have read in testimonials and the Pre-Sentence Report ... the appropriate starting point here, in my judgment, is one of 9 years' detention."

20. The plea of guilty which had been tendered at the first hearing in the Crown Court reduced that sentence by 25 per cent.

21. The Solicitor General's argument is that the sentence imposed failed to reflect the seriousness of the offending by reference to the starting point in the guideline. The starting point for a Category A offence is 12 years. In a case with multiple high culpability factors the judge ought to have moved up within the range before any consideration of aggravating and mitigating factors. Moreover, the mitigating factors did not outweigh the aggravating factors. Arguably the reverse was the case. Taking all of those matters into account, the judge's sentence after a trial of nine years' detention was unduly lenient.

22. In written submissions on behalf of the offender, emphasis was placed on the offender's age and the guidance given within the Sentencing Council guideline as to how to approach the maturity of young men, particularly young men who are only just past the age of 18. In oral submissions Mr Hartson, who appeared for the offender in the court below, repeated his submissions on that point. He drew our attention to the particular

section in the guideline relating to immaturity. Mr Hartson argued that this was a young man who had a plethora of mitigation. Whilst nine years was, as a sentence after trial, less than would have been imposed had he been an adult, all of the circumstances justified the judge taking the view he did. He pointed out that nine years is within the range set by the guideline for a Category A offence.

23. The correct formulation of what amounts to an unduly lenient sentence is still that provided by the Lord Chief Justice in Attorney General's Reference No 4 of 1989, [1990] 1 WLR 41:

> "A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all relevant factors, could reasonably consider appropriate."

24. It follows that for us to conclude that this sentence was unduly lenient we would have to find that it was not reasonably appropriate for the sentence to have been based on a period of nine years' custody before reduction for plea.

25. We are satisfied that the judge was correct in concluding that culpability fell into Category A. He would have been wrong to reach any other conclusion. The contrary is not argued before us today. On the judge’s analysis, there were four factors of high culpability in relation to the offender's driving. We do not consider that his analysis can be faulted. He was correct to conclude that the dangerous driving had been prolonged and persistent. The evidence demonstrated that the offender had taken cocaine whilst still in Aberdare and had also drunk to excess there. He had therefore driven from Aberdare when highly impaired by drink and drugs. In addition, the evidence showed that the dangerous driving within the streets of the village was persistent. It was not only the manner of the driving, it involved driving without lights in a car which breached

construction regulations.

26. From the starting point of 12 years in the guideline, in our judgment the judge should have adjusted upwards to reflect the multiple factors of high culpability. The category range for a Category A case is eight to 18 years. The upwards adjustment was not required to be very substantial but in our judgment an increase of two years would have been appropriate.

27. The judge's careful and well-structured sentencing remarks identified the correct category for culpability and the factors which indicated that culpability was high. He set out the aggravating factors. He enumerated such mitigation as he was able to find. What the judge did not explain is how he reached a sentence after trial of nine years' custody. There will be cases where mitigation is so compelling and striking that a very substantial reduction in the sentence is required, even for an offence as serious as this one. In this instance the judge referred to the offender's age. That was of some significance. As is well recognised and as is reflected in the guideline, a person does not achieve full maturity and all the trappings of adulthood simply by reaching their 18th birthday. Chronological age is not as important as the person's maturity. The evidence of a person's lack of maturity will vary from case to case. There is in this case no evidence that the offender was particularly immature. If anything the evidence is to the contrary. The judge did not refer to the offender’s immaturity. We can see why he did not. Whilst age is and was a relevant consideration, in this instance it was not of such significance as to outweigh the undoubted aggravating factors. Looking at matters in the round we consider that the aggravating and mitigating factors balance each other out. Even taking the most favourable view of the offender's position, the judge could not have reduced the sentence after trial below the starting point as it appears in the guideline for a Category A

offence.

28. It follows that in our judgment the judge could not reasonably have concluded that the proper sentence after a trial would have been nine years' custody. Rather, the least sentence would have been 12 years' custody prior to reduction for plea. After that reduction the sentence to be served should have been nine years' detention in a young offender institution.

29. We are satisfied therefore that the sentence imposed was unduly lenient. We do retain a discretion as to whether the sentence imposed should be quashed and the appropriate sentence substituted. Given the gravity of this offence and the consequences of it we conclude that we should exercise our discretion and impose a sentence of nine years' detention. We quash the sentence imposed by the judge in the Crown Court and substitute the sentence of nine years' detention in a young offender institution.

30. When passing sentence the judge recognised that no sentence of his could assuage the pain and anger felt by Kaylan's family and friends and the terrible effect that his death had had on them and on the wider community in Hirwaun and Aberdare. That applies equally to the sentence we have now imposed in substitution for the sentence imposed in the Crown Court. However, just as the judge was obliged to follow the sentencing guideline, so are we. The sentence we have imposed is the best the court can do to reflect the gravity of what this offender did.

31. We turn finally to the ancillary orders. In the Crown Court the offender was disqualified from driving for a total period of eight years four months. That was disqualification for five years plus an extension period of three years four months pursuant to section 35A of the Road Traffic Offenders Act 1988. This disqualification related solely to the offence of causing death by dangerous driving. Having increased the sentence, we must increase

the extension period. The offender will serve two-thirds of the sentence of nine years' detention we have imposed. Therefore the extension period will be six years. We quash the period of disqualification ordered in the Crown Court and the offender will be disqualified for a total of 11 years for causing death by dangerous driving.

32. When first sentencing the judge did not impose any disqualification, as he was obliged to do, for the offence of failing to provide a specimen. At a slip rule hearing he did then impose a sentence of 12 months' disqualification for that offence to be served concurrently. We do not interfere with that sentence, save that the sentence did not include any extension period. The effect is academic but we substitute for the sentence of 12 months' disqualification, 12 months' disqualification with an extension period of six years. We emphasise that will make no difference to what the offender has to serve.

33. Finally, at the conclusion of his sentencing remarks the judge said: "There are 46 tag days I understand to count". Nothing further was said by him. The court record shows that 23 days was ordered to count as time served. This was not announced in court. Therefore it was not part of the sentence. We clarify the position as follows: on the information we have the offender was subject to a qualifying curfew for 46 days pursuant to section 240A of the Criminal Justice Act 2003: 23 days will count as time served. If this period is mistaken this court will order amendment of the record to show the correct period.

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

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