



Neutral Citation Number: [2019] EWHC 2826 (Admin)

Case No: CO/2303/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2019

Before:

LORD JUSTICE HAMBLÉN
And
MR JUSTICE LANE

Between:

ADRIAN JONES
- and -
CROWN PROSECUTION SERVICE

Appellant

Respondent

- and -
CROYDON CROWN COURT

Interested Party

Pamela Rose (instructed by **GT Stewart Solicitors & Advocates**) for the **Appellant**
Simon Heptonstall (instructed by the **Crown Prosecution Service, Appeals and Review Unit**)
for the **Respondent**

Hearing date: 16 October 2019

Approved Judgment

Lord Justice Hamblen:

Introduction

1. This is an appeal by way of case stated against the decision of Mr Recorder Benson QC sitting at Croydon Crown Court on 25-26 April 2018, on an appeal from Croydon Magistrates' Court in respect of the appellant's convictions for driving related offences.
2. The case stated asks two questions:
 - (i) When the Crown Court determines an appeal against conviction, does it have the power under section 48 of the Senior Courts Act 1981 to re-determine the sentence de novo of matters where the appeal has been unsuccessful, in circumstances where another Crown Court has sentenced on those matters on a committal for sentence, heard prior to the appeal?
 - (ii) Can an offence of careless driving be established based upon the physical condition of a person when driving?

The factual and procedural background

3. On 26 September 2017 the appellant was found guilty at the Croydon Magistrates' Court on the following charges:
 - (i) Dangerous Driving on 5 November 2016, contrary to section 2 of the Road Traffic Act 1988 (Triable either way offence).
 - (ii) Failing to provide a specimen of blood for analysis on 5 November 2016, contrary to section 7(2) of the Road Traffic Act 1988 (summary only offence)
 - (iii) Driving with no insurance on 5 November 2016 (summary only offence).
4. The appellant was committed for sentence to the Crown Court under section 6 of the Powers of Criminal Courts (Sentencing) Act 2000 in respect of the failing to provide a specimen, and under section 3 of that Act for the dangerous driving offence.
5. On 12 December 2017, the appellant appeared at the Croydon Crown Court before Mr Recorder Wilson QC on the committal and was sentenced as follows:
 - (i) Dangerous Driving – 9 months' imprisonment suspended for 18 months
 - (ii) Failing to provide a specimen – 1 month's imprisonment consecutive suspended for 18 months.
 - (iii) No insurance – Licence endorsed, no separate penalty.
6. The total term of imprisonment was therefore 10 months' imprisonment suspended for 18 months. In addition, he was made subject to a 6 months curfew requirement electronically monitored for 40 days and a rehabilitation activity requirement ("RAR"). He was disqualified from driving for 18 months backdated to the date of the interim disqualification imposed by the Magistrates' Court on 27 October 2017. Finally, he was required to take an extended re-test pursuant to section 36(1) of the Road Traffic

Offenders Act 1988 as a mandatory consequence of his conviction for dangerous driving.

7. Prior to the appeal hearing at the Crown Court, the appellant had complied with the orders imposed by the sentencing Court.
8. On 25 and 26 April 2018, the appellant's appeal against conviction was heard before Mr Recorder Benson QC and two lay justices. The Court acquitted the appellant of the offence of dangerous driving, but convicted him of careless driving, failing to provide a specimen and having no insurance.
9. Taking into account the sentence already completed by the appellant, the appellant was sentenced in relation to the careless driving to a £10 fine with 1 day's imprisonment in default, deemed served and licence endorsed. As the appeal was unsuccessful on the failing to provide a specimen charge, the court did not interfere with the sentence for that matter, save that, considering totality, it would have cut the disqualification period to 12 months disqualification as the appellant had been acquitted of the dangerous driving matter.
10. At the end of the hearing, at the invitation of the judge, the Probation Service agreed to revoke the RAR, the curfew and the electronic monitoring. This was to assist in the variation of a sentence now overtly too harsh as it was not believed that the Crown Court had the power to vary the sentence imposed by another Crown Court on the previous committal for sentence for a matter where the appeal had been unsuccessful. The extended re-test would fall away, as that was mandatory as a result of the original conviction for dangerous driving.

The facts found by the Crown Court in relation to the careless driving

11. As set out in the case stated, these are as follows:

“8. The Court could not be sure that the accident was caused solely as a result of the driving of the defendant. However, the defendant's evidence was that he attended a ‘wake’ following the funeral of his ex-partner's friend, who was tragically killed in a motor bike accident. He did not know anyone present. Outside this event, Mr Jones was attacked as seen on CCTV by a number of males. He sustained head injuries, one wound to his forehead and one to the back of his head. He lost consciousness, having fallen to the floor. It was shortly afterwards that he got into the car and drove off. Blood was “pouring” down his face from his head wounds whilst he was driving.

9. The Court found that the “reasonably prudent” driver would not have driven in these circumstances and when in his physical condition. Therefore, the defendant was found to be driving carelessly.”

Question 1 – The extent of the Crown Court’s power under section 48 of the Senior Courts Act 1981 (“the 1981 Act”)

12. It is now agreed between the parties that the Crown Court does have the power under section 48 of the 1981 Act to confirm, reverse or vary the sentence in matters where the appeal has been unsuccessful, including in circumstances where another Crown Court has sentenced on those matters on a committal for sentence, heard prior to the appeal.
13. Section 48 of the 1981 Act provides as follows:

“Section 48 Appeals to Crown Court.

 - (1) The Crown Court may, in the course of hearing any appeal, correct any error or mistake in the order or judgment incorporating the decision which is the subject of the appeal.
 - (2) On the termination of the hearing of an appeal the Crown Court—
 - (a) may confirm, reverse or vary any part of the decision appealed against, including a determination not to impose a separate penalty in respect of an offence; or
 - (b) may remit the matter with its opinion thereon to the authority whose decision is appealed against; or
 - (c) may make such other order in the matter as the court thinks just, and by such order exercise any power which the said authority might have exercised.
 - (3) Subsection (2) has effect subject to any enactment relating to any such appeal which expressly limits or restricts the powers of the court on the appeal.
 - (4) Subject to section 11(6) of the Criminal Appeal Act 1995, if the appeal is against a conviction or a sentence, the preceding provisions of this section shall be construed as including power to award any punishment, whether more or less severe than that awarded by the magistrates’ court whose decision is appealed against, if that is a punishment which that magistrates’ court might have awarded.
 - (5) This section applies whether or not the appeal is against the whole of the decision.
 - (6) In this section “sentence” includes any order made by a court when dealing with an offender...”
14. In *Dutta v Westcott* (1987) 84 Cr.App.R. 103 the Divisional Court decided that the Crown Court had the power under section 48 to vary sentence not only on matters subject to the appeal but on all matters that were before the Magistrates’ Court.

15. In considering that issue Woolf LJ emphasised the importance of the fact that an appeal to the Crown Court involves a re-hearing. As he stated at p110:

“In considering the proper interpretation of the section, it seems to me important to bear in mind that the Crown Court, when it is exercising its jurisdiction, is re-hearing the matter *de novo*. Whether it is dealing with conviction or sentence, the Crown Court looks at the matter afresh.”

16. The Court held that “the decision” which is the subject of the appeal under section 48(1) is “the whole of the decision made by the Magistrates' court on the occasion on which the conviction or sentence which was the subject expressly of the appeal was made” and that the Crown Court accordingly has the power to confirm, reverse or vary any part of that decision. As Woolf LJ explained at p111:

“In my view one is forced back to the meaning of the words to which I made reference, “the decision which is the subject of the appeal.” So far as those words are concerned, it is quite clear from section 48 itself that the decision which is the subject of an appeal cannot mean merely a decision to convict or a decision to sentence. Even on Miss Lang's submission it includes both a decision to convict and then the decision to impose a sentence. It is my view that the word “decision” as used in section 48 is being used in a wide sense. I regard it as clear from the wording of section 48 as a whole that what was intended by the words to which I have referred (which are not in my view words of art) was that the Crown Court should have the right to confirm, reverse or vary the whole of the decision made by the Magistrates' court on the occasion on which the conviction or sentence which was the subject expressly of the appeal was made. Therefore, although a defendant chooses only to appeal against part of the decision, namely, a particular conviction or a particular sentence, the Crown Court has jurisdiction in respect of all the matters which were then before the court.”

17. In my judgment the same approach applies even if the sentencing part of the decision has been carried out by the Crown Court on remittal. All aspects of the “decision” are before the Crown Court. That includes conviction, sentence and, where sentence is by the Crown Court, sentence by the Crown Court.
18. This does not involve the Crown Court seeking to impermissibly exercise an appellate role in relation to the decision of a different constitution of that Court. It is merely following the proper procedure which flows from it being seized of the appeal.
19. I would accordingly answer Question 1 in the affirmative.

Question 2 – Careless Driving

20. We interpret the question as asking whether the offence of careless driving can be established based solely upon the physical condition of a person when driving.

21. Section 3 of the Road Traffic Act 1988 (as substituted by s.2 of the Road Traffic Act 1991) provides as follows:

“Careless and inconsiderate driving

3. If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence”

22. The meaning of driving “without due care and attention” is addressed in section 3ZA of the Road Traffic Act 1988 which provides that:

“...

(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.

(3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.”

23. Ms Rose for the appellant submits that it is necessary to show that the driving fell below that of a competent and careful driver, not merely that a competent and careful driver would not have driven. The emphasis is on the “way” in which he drives.

24. In support of the appellant’s case Ms Rose relies on the reasoning and decision of the Court of Appeal in *R v Webster* [2006] EWCA Crim 415, [2006] 2 Cr.App.R. 6 in which it was held that it was not sufficient merely to rely on the condition of the driver in order to prove dangerous driving. The condition of the driver was relevant and admissible but did not determine whether the way in which the defendant drove was dangerous.

25. Section 2(1)(a) of the Road Traffic Act 1988 defines “dangerous driving” in a similar manner to the definition of “careless driving” under section 3ZA(2). Section 2(1)-(3) provides as follows:

“(1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

(2) A person is also to be regarded as driving dangerously for the purposes of Sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) above “dangerous” refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.”

26. The test in section 2(1)(a) is the same as that in section 3ZA(2) save that for dangerous driving “the way” he drives must fall “far below” “what would be expected of a competent and careful driver”, whereas for careless driving it need only fall “below” that standard.

27. In *Webster* the Court was concerned with an appeal against a conviction for aiding and abetting causing death by dangerous driving by allowing someone who was intoxicated to drive, who then drove dangerously. The Court recognised that this depended on whether a person can be guilty of dangerous driving when the reason for the danger is the state of the driver rather than the manner of his driving. In giving the judgment of the Court, Moses LJ stated:

“10. The question thus arises as to whether it is sufficient, in order to prove the offence of aiding and abetting causing death by dangerous driving to prove knowledge of the intoxicated state of the driver at the time permission is given. That question turns on whether a driver can be guilty of dangerous driving when the reason for danger is the state of the driver rather than the manner of his driving.

11. In order to determine whether the drunken condition of a driver is, of itself, sufficient to establish the offence of dangerous driving, it is as well to start with the wording of the statute itself. Section 2A poses two questions:—

1. Did the defendant's driving fall far below the standard of a competent and careful driver? and

2. Would it have been obvious to a careful and competent driver that driving in that way would be dangerous?

It is of note that Section 2A underlines the proposition that those two questions provide the limitations of the offence in the use of the words “only if”. Those statutory questions direct attention

only to the manner of driving in their references in both (a) and (b) to the way he drives and that way.

12. Section 2A(2) provides an additional test in the use of the words also to be regarded . Section 2A(2) plainly refers to the defective state of the vehicle and not to the defective state of the driver.

13. If the argument finished there it would be plain that Section 2A(1) refers only to the manner of driving. The extension of the definition of dangerous driving in Section 2A(2) is limited to the dangerous consequences of driving a defective vehicle. There is nothing in the wording of the statute to justify extending the offence to danger occasioned merely by reason of the defective condition of the driver.”

28. Whilst there were additional reasons for holding that the offence involved the manner of driving (namely, the reference to “driving in that way” in section 2A(1)(b) and the limited nature of the extension made in section 2A(2)), an important reason for that conclusion was the reference to “the way he drives” in section 2A(1)(a), the same expression as used in section 3ZA(2). Adapted to the case of careless driving, paragraph [12] of the judgment would read as follows:

“It is of note that section 3ZA underlines the proposition that the question provides the limitations of the offence in the use of the words “only if”. The statutory question directs attention only to the manner of driving in its reference to the way he drives.”

29. The Court recognised that there was a dictum to the contrary in the judgment of the Court of Appeal in *R v Woodward* [1995] 2 Cr.App.R. 388. In that case the Court held that evidence that the defendant had been drinking before he drove was admissible on the issue of whether the defendant was driving dangerously. In considering that question Lord Taylor CJ referred to section 2A(3) and said at 395:

“The fact (if it be so) that an accused has ingested a large quantity of alcoholic drink is a circumstance within the knowledge of the accused. Accordingly, the statute requires that “regard shall be had” to it.”

Lord Taylor CJ also relied upon section 2A(2), observing that:

“It would be strange if Parliament intended to make driving a vehicle in a dangerously defective state an offence under the section but not driving when the driver is in a dangerously defective state due to drink.” (see page 85(g)).

30. Whilst recognising the “good sense” of this, the Court in *Webster* nevertheless concluded at [17] that:

“...the closely drafted definition of “dangerous driving” does not permit proof of that offence to be limited to the danger occasioned by the condition of the driver.”

31. The Court reasoned as follows:

“17. ...Firstly, the wording of the statute excludes such a possibility. Section 2A(1) refers only to the manner of driving. The definition is broadened by Section 2A(2) which eschews reference to the state of the driver and is confined to the defective condition of the vehicle. Section 2A(3) permits regard to circumstances which may well include the condition of the driver. But that condition is not dispositive of the question whether the person was driving dangerously. His condition will, by virtue of subsection (3) be relevant to whether there was danger of injury or serious damage but no more.

18. Secondly, the authority on which the prosecution relied is not authority for the proposition that dangerous driving may be established merely by reference to the condition of the driver. The sentence on which the prosecution relied must be read in the context of the decision as a whole. That case decided that evidence of drink taken before driving was admissible. It did not decide that evidence of drinking before driving was sufficient to prove the offence. Although, the Lord Chief Justice's reference to the statute has been praised as improving on the law laid down by Parliament but criticised for misreading that law (see e.g. Archbold News Issue 2, 1 March 1995 and Smith & Hogan 11th Edn., page 1014), that single sentence is not the basis of the decision. The decision in *R v Marison* [1996 Crim. L.R. 909] which followed *Woodward* can be regarded as a decision that the defence of automatism was not available to an hypoglycaemic driver who clearly drove in a dangerous manner when he drove the vehicle on to the wrong side of the road. It was not, in any event, the subject of any submissions before us.

19. Thirdly, despite the recommendation in the Road Traffic Law Review Report (1988) the White Paper, *The Road User and The Law* (1989), Cm. 576 paragraph 2.9 demonstrated that the Government was not prepared to accept the recommendation that a new “very bad” driving offence should include reference to unfit drivers. It is unnecessary, in order to make that good, to refer to Hansard extracts in the House of Lords in relation to the Road Traffic Bill.”

32. Moses LJ recognised that *Woodward* had been followed in *R v Marison* [1996] Crim LR 909, but nevertheless considered that it could distinguish that decision on the grounds that it also involved driving in a dangerous manner.

33. In my judgment this Court should follow the last of the Court of Appeal decisions and the one which most directly addresses the issue which arises in this case. Although this

is a case of careless rather than dangerous driving, the reasons given by the Court for reaching its conclusion largely also apply to careless driving. It would also be unsatisfactory for a different approach to apply to careless driving, all the more so given that the definition of both driving offences refers to the “way” or manner of driving.

34. Adapting the conclusion of the Court in *Webster* at [20] to the case of careless driving, the law may be stated as follows:

It is not sufficient merely to rely on the condition of the driver in order to prove the offence of careless driving or of causing death by careless driving. The condition of the driver is relevant and admissible. But it does not determine whether the way in which the defendant drove was careless.

35. I would accordingly answer Question 2 in the negative.
36. Mr Heptonstall for the respondent submits that, even if that be so, the safety of the conviction for careless driving is unaffected. He submits that here, as set out in paragraph 8 of the case stated, the Crown Court concluded on the facts that it could not be sure that the accident was caused “solely” as the result of the appellant’s driving. There is an implied finding of some contribution on the part of the appellant as a result of the way he was driving.
37. I am unable to accept this submission. Paragraph 9 of the case stated makes it clear that it was because a reasonably prudent driver would not have driven in the appellant’s physical condition that (“therefore”) he was found to be driving carelessly. Indeed, the need to ask Question 2 of the case stated only arises if that be so. Moreover, if the Crown Court had intended to find that the appellant’s driving had contributed to the accident, it would have surely have provided some explanation of how it had done so, which it failed to do.
38. In these circumstances, as Mr Heptonstall accepts, in the light of answering Question 2 in the negative, the basis of the conviction for careless driving falls away.

Conclusion

39. The remaining question to be addressed is the appropriate order to make in the light of the answers given to the questions in the case stated. Under section 28A of the 1981 Act this Court has wide powers to reverse, affirm or amend the determination in respect of which the case has been stated or to remit the matter.
40. Given the passage of time, the sentence already served by the appellant, and the indications given in the case stated as to what sentences the Crown Court would have imposed in relation to the other offences if it had considered it had power to do so, this Court can and should finally determine the matter. In all the circumstances, I consider that the following order should be made:
- (i) The conviction determination for careless driving is reversed and the conviction quashed.
 - (ii) The sentence for failing to provide a specimen is varied so as to be a £10 fine with 1 day’s imprisonment in default, deemed served and licence endorsed.

- (iii) The disqualification period, which now attaches to the failing to provide a specimen, is varied and reduced to 12 months.
- (iv) The Crown Court's order to reverse the requirement to take an extended re-test is affirmed.

41. The sentence for no insurance is unaffected and remains licence endorsed with no separate penalty.

Mr Justice Lane:

42. I agree.