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IN THE COURT OF APPEAL
CRIMINAL DIVISION SITTING AT
MOLD CROWN COURT
[2022] EWCA Crim 934
CASE NO 202200502/A3



The Law Courts
Civil Centre
Mold, Flintshire
CH7 1AE

Thursday 26 May 2022

Before:

LADY JUSTICE NICOLA DAVIES DBE

MRS JUSTICE JEFFORD DBE

MRS JUSTICE COLLINS RICE DBE

REGINA

V

DAVID CHORLTON

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MS NICOLA CARROLL appeared on behalf of the Crown
MR A WATKINS appeared on behalf of the Appellant.

J U D G M E N T

1. MRS JUSTICE JEFFORD: The appellant (aged 27) appeals against sentence with the leave of the single judge.
2. The sentence the subject of the appeal is one of 10 years' imprisonment imposed by the Crown Court at Manchester Minshull Street following the appellant's guilty plea to an offence of causing death by dangerous driving.
3. Before we turn to that offence and the sentence, it is material to set out some of the background to this appellant and his offences.
4. On 9 January 2020 the appellant, having pleaded guilty in the Magistrates' Court and being committed for sentence to the Crown Court, was sentenced by the Crown Court at Manchester Minshull Street for, amongst other associated offences, an offence of dangerous driving contrary to section 2 of the Road Traffic Act 1988. That offence was committed on 27 November 2019. He was sentenced to 8 months' imprisonment suspended for 18 months. He was disqualified from driving for 12 months and disqualified from driving until an extended test had been passed.
5. The facts of that offence were that, on 27 November 2019, the appellant was driving a stolen Volvo with false number plates. At 12.15 pm a police officer saw the car being driven erratically on Oxford Street, Stalybridge. The police indicated for the driver to stop but he did not. There was a short pursuit in which the driver, the appellant, reached speeds of up to 70 miles per hour in a residential area with a speed limit of 30 miles per hour. He narrowly missed a bus coming in the opposite direction. The car drove into an access road that leads to Copley Academy High School. Two men including the appellant got out and ran off but were detained after a short chase.
6. On 5 January 2021 the appellant was driving an Audi A3. He was stopped by a police

officer on mobile patrol. The appellant gave his name and address. The officer checked the Police National Computer and discovered that the appellant was a disqualified driver.

7. The appellant was charged with two offences: one of using a vehicle with no insurance, contrary to section 143 of the Road Traffic Act 1988, and secondly, driving whilst disqualified contrary to section 103(1)(b) of the Road Traffic Act 1988. Both of these offences are, by virtue of the provisions of the Road Traffic Offenders Act 1988, summary offences.
8. On 11 February 2021 he pleaded guilty before the magistrates to these two offences. He was committed for sentence to the Crown Court. He was purportedly committed under section 20 of the Sentencing Act 2020.
9. Before this matter had come before the Crown Court and while the appellant was on bail, the appellant committed further driving offences which resulted in the death of his friend, Philip Ogden, a young man of 32, who had a baby son and is a tragic loss to his partner and family.
10. The indictment which we are concerned with charged, as count 1, causing the death of Philip Ogden on 9 May 2021 by dangerous driving contrary to section 1 of the Road Traffic Act 1988. In count 2 on the indictment, the statement of offence was causing death by dangerous driving "whilst unlicensed, uninsured, or disqualified contrary to section 3ZB of the Road Traffic Act 1988". We shall return to the nature of that count in due course. Further summary offences of driving while disqualified, using a vehicle without insurance and failing to stop after an accident were also committed to the Crown Court for sentence.
11. On 11 June 2021 in the Crown Court at Manchester Minshull Street the appellant pleaded guilty to count 2 on the indictment but not guilty to count 1. On 6 December 2021 he

changed his plea on count 1 to one of guilty. He was sentenced on 2 February 2022 and on count 1 the sentence was one of 10 years' imprisonment. The offence having been committed during the operational period of his suspended sentence, that sentence was activated in full to be served concurrently.

12. It is the sentence of 10 years' imprisonment that the appellant now appeals against with leave.
13. The facts of this offence were as follows. On 9 May 2021 the appellant was driving a Ford Focus shortly before 11.00 pm, carrying three passengers including the victim Mr Ogden. The appellant was driving at speed and dangerously through the streets of Stalybridge. The driving was captured on CCTV. At 10.53 pm the car was seen driving on the High Street at speed. The appellant performed a handbrake turn before driving into Stanley Street in a built-up industrial area on the outskirts of Stalybridge. This was a cul-de-sac and the car remained there for 2 to 3 minutes before emerging and performing another handbrake turn and again travelling at speed. The appellant drove into Bayley Street, ignoring the "Give Way" markings on the road and at a speed above the 30 mile per hour speed limit.
14. The collision report stated that the vehicle was travelling at no less than 36 miles per hour although the speed was likely to have been higher. The officer and author of the collision report was unable to say that the speed was greater than 39 miles per hour and expressed the opinion that it was in the region of 39 miles per hour.
15. What happened was caught on CCTV, which we have viewed with care. The appellant's car can be seen driving through the crossroads and the "Give Way" markings without any reduction in speed at all. The car collided with an Audi which was driven by Mr Gharibyar. Mr Gharibyar's Audi spun 180 degrees and came to rest in the centre of

the junction. He had been travelling at around 27 miles per hour at the time. He saw the Ford Focus approaching and tried to brake but was unable to avoid the collision. He was dazed but fortunately uninjured and got out of the vehicle. He approached the Ford Focus to check on the people inside.

16. The Ford Focus had also rotated in a spin as a result of the collision and ended up colliding with some metal fencing. Photographs including those in the accident report show the rear and side of the car heavily damaged as a result of that collision together with significant damage to the metal fencing. None of the occupants of the Ford had been wearing seatbelts. As a result of the collision Mr Ogden was thrown from the passenger side backseat and was ejected from the vehicle. Mr Gharibyar found Mr Ogden lying next to the rear bumper on the passenger side of the vehicle. He confronted the other occupants. He was not able to identify who had been driving the vehicle although there is now no issue that it was the appellant. He asked them who Mr Ogden was. The men tried to drag Mr Ogden's body from its position slightly under the body of the car. Mr Gharibyar tried to tell them not to but felt intimidated by them. They moved Mr Ogden's body about half his body length. When Mr Gharibyar went to call the emergency services the men, including the applicant, told him not to, saying: "No Police". One of the men approached him and told him in an aggressive manner: "No Police. No Police". Mr Gharibyar did however call an ambulance.
17. Within about 5 minutes a Volkswagen Golf arrived at the scene driving very fast and stopping abruptly at the collision site. A male identified as one of the men from the Ford got out of the Golf and seemingly went to retrieve something from the Ford before getting back into the Golf which drove off at speed.
18. Two passers-by came to Mr Gharibyar's assistance. They tried to revive Mr Ogden and

perform CPR. Paramedics arrived 6 minutes after the call and found that Mr Ogden had no heartbeat or other signs of life and he was pronounced dead at the scene. The post-mortem examination found a number of significant injuries to Mr Ogden and the pathologist indicated that the injuries were compatible with impact from an item of the car's bodywork such as a door frame or a straight edge. The injuries to his right lung were particularly severe and in conjunction with his other injuries would have rapidly been fatal.

19. The appellant and his associates had fled the scene. The appellant made no attempt to contact the police after the collision but handed himself in to the police 62 hours later. He gave a prepared statement in which he accepted being the driver of the vehicle at the point of the collision. He said that he had suffered a momentary lapse in concentration and denied that his driving was dangerous. It is entirely apparent from the CCTV footage that that was untrue.
20. On pleading guilty, the appellant provided a written basis of plea in which he accepted being the driver at the time of the collision but denied being the driver when the car entered Stanley Street. That position was not, however, maintained on sentencing and, for the purposes of sentencing, it was clear and accepted that the appellant was the driver of the car throughout the incident which we have described.
21. The Definitive Guideline for Offences of Causing Death by Dangerous Driving applied to this case. The Crown submitted that this was a level 2 case: that is, one in which the driving created a substantial risk of danger. The judge concluded that it was a level 1 case and sentenced on that basis. Level 1 is for the most serious cases encompassing driving that involves 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. The

Guideline provides that such offences are likely to be characterised by a prolonged, persistent and deliberate course of very bad driving, or consumption of substantial amounts of alcohol or drugs leading to gross impairment -- neither of which applies in the present case or -- "a group of determinants of seriousness which in isolation or smaller number would place the offence in level 2".

22. In placing the offence in level 1 the judge relied on the appellant's demonstrating in his driving a total disregard for the rules of the road. As the judge said: "Driving around as if you were in a rally car, speeding, performing handbrake turns". The judge also relied on the aggravating features that it was obvious that no one was wearing a seatbelt and the fact that the appellant fled the scene. All that was exacerbated by the fact that the appellant had already received a suspended sentence for dangerous driving and this offence placed him in breach of that suspended sentence. He had been disqualified for dangerous driving and was on bail for further offences of driving whilst disqualified and being uninsured. This is of some importance because the Guideline applies to a first-time offender.

23. In this case it seems to us that the judge had regard to all these factors as ones which together raised this to a level 1 case. The sentence that he would have passed was one of 12 years' imprisonment before credit for plea. He gave 15% credit for plea and reduced the sentence to one of 10 years' imprisonment. No issue is raised on this appeal with the percentage credit for plea which the judge gave.

24. Mr Watkins however submits that this was not even a level 2 case but a level 3 case. He submits that the period of dangerous driving, much of which was captured on CCTV, was relatively short and around 3 minutes in total. The roads were all but deserted and the speed, although in excess of the speed limit, was not grossly excessive.

25. We are unable to accept that submission, not least given the nature of the way in which the appellant drove through the junction, which directly caused the collision, and which demonstrated both a complete disregard for the rules of the road and no consideration whatsoever that anyone else might be using the road. The fact that others were using the road and that it was not completely deserted is evidenced by the presence of Mr Gharibyar's car and the passers-by who came to his assistance.
26. The appellant's driving in isolation would, in our judgment, place this offence at least in level 2. What, however, elevates the seriousness of this offence, as the judge rightly in our view said, is the fact that it took place against the background of a still relatively recent conviction for dangerous driving and disqualification from driving, a further offence of driving whilst disqualified and the fact that this offence was committed when on bail. The appellant showed himself to have no regard at all not only for the rules of the road but for the fact that he simply should not have been driving at all.
27. In addition the appellant fled the scene and did not turn himself in to the police for 62 hours after the collision (that is over 2½ days later). It is submitted on his behalf that that is explicable by reason of his previous convictions but that, in our view, far from being a valid explanation, makes matters worse.
28. Taking all these factors into account, in our judgment, the sentencing judge was entitled to elevate the case to a level 1 case. The starting point was therefore a sentence of 8 years' imprisonment and the range 7 to 14 years. The sentence that the judge would have passed but for the guilty plea was therefore towards the top of that range and significantly above the starting point. In our judgment, although the judge was properly entitled to regard the aggravating features as placing the offence in level 1, a sentence towards the top of the range was manifestly excessive. In our judgment, taking account of all the

aggravating features a sentence of 10 years' imprisonment would have been appropriate before credit for plea.

29. Giving the same 15% credit for plea as the judge had done gives a sentence of 8½ years' imprisonment. Accordingly the appeal against sentence is allowed and a sentence of 8½ years' imprisonment is substituted for that of 10 years' imprisonment. The period of disqualification is reduced accordingly to 8½ years and the extended period to 4 years and 3 months. The total period of disqualification therefore is 12 years and 9 months. If the maths is wrong in that respect counsel will no doubt correct us in due course.
30. The appeal has however raised a number of further issues which we now address. Firstly, disqualification from driving. The period of disqualification from driving was itself not the subject matter of the appeal other than in so far as it followed from the appeal against the period of imprisonment. However a query was raised on behalf of the Registrar as to whether the period of disqualification was imposed in respect of count 1 only, or whether some period was, or ought to have been, imposed in respect of count 2. It is common ground between the Crown and the appellant that the judge intended to impose that period of disqualification in respect of the headline offence (count 1). We are satisfied that that is the correct position and we are grateful to counsel for their written notes prior to this hearing which clarified that position.
31. In his sentencing remarks the judge also made reference to the requirement for the appellant to take an extended retest before being eligible to apply for a full licence. The appellant was already subject to such a requirement. It would not have been open to the judge to impose that requirement if the appellant was already subject to such a requirement. That follows from section 36(7) of the Road Traffic Offenders Act 1988 and the decision in R v Anderson [2012] EWCA Crim 3060. The judge was clearly

aware of the existing requirement and indeed made reference to it in his sentencing remarks. There has been no suggestion that the appellant had already taken such a test. It is again common ground between the Crown and the appellant that the judge's remarks should be construed as a reminder or restatement of the requirement to the appellant and nothing more. We agree.

32. So far as count 2 is concerned, there was no separate penalty, so to that extent the count is immaterial to this appeal. As we have already observed, it is, at best, a curious count. The offence is said to be one contrary to section 3ZB of the Road Traffic Act 1988 (causing death by driving whilst uninsured) but the particulars reflect both that section and section 3ZC (causing death by driving whilst disqualified). The latter is a more serious offence attracting a higher sentence. It appears to have been the intention to charge each of these offences but when the indictment was drafted the two offences were rolled up. Information obtained by Ms Carroll for the Crown indicates that this was intentional. A note on the DCS (dated 4 July 2021) further indicates that the drafter recognised that the count might be duplicitous and that he could amend it if it was. There is no sensible explanation for why two offences under two distinct and materially different statutory provisions were rolled into one. Ms Carroll, whom we emphasise was not responsible for the drafting of the indictment, accepts that the count was obviously duplicitous and we agree. We accept the submissions made to us in writing and in response to the enquiries on behalf of the Registrar that we should quash the conviction on count 2. We do so. The conviction on count 2 is quashed. Since there was no separate penalty that makes no difference to the overall sentence.

33. Lastly, the committal for sentence. As we have said, the summary offences committed on 5 January 2021 were committed for sentence to the Crown Court purportedly under

section 20 of the Sentencing Act 2020. There was no jurisdiction in the Magistrates' Court to commit the summary offences for sentence on this basis. However, the summary offences put the appellant in breach of the suspended sentence passed on him on 9 January 2021. It was open to the magistrates to commit to the Crown Court pursuant to paragraph 11(2) of schedule 16 to the Sentencing Act 2020 as the new offences placed the appellant in breach of a suspended sentence passed on him by the Crown Court.

34. We note from the court log that the fact that the breach had not been committed for sentence in this manner was first raised in the Crown Court before HHJ Nield at a hearing on 11 March 2021. It was suggested by the Crown that the failure to commit on that basis could be cured by the Circuit Judge acting as a District Judge. For reasons that are not apparent to us, the Crown then withdrew that proposal and, as recorded on the court log, urged that the matter should be sent back to the Magistrates' Court to go through "the proper process". That did not happen. At a further hearing on 14 May 2021, the same judge asked why the matter had not yet come up from the Magistrates. The judge expressed the hope that the matter would now be dealt with. At a further hearing on 11 June 2021 the appellant was arraigned on counts 1 and 2. The court log reflects that the Crown asked for the committal to be put at sentence but there is nothing to suggest that the committal had by then taken place. On 2 February 2022, when the appellant was sentenced for the offences that form the subject matter of this appeal, the record simply states the breach of the suspended sentence order was put and admitted. The judge proceeded to activate the sentence and sentence for the summary offences.

35. Clarification was sought on behalf of the Registrar from the Magistrates' Court and the defendant's counsel. The response of the Magistrates' Court by email dated 18 March

2022 was that:

"In this case it was the Magistrates intention to commit [the defendant] to the CC on the new offences because he was in breach of his SSO and the omission to include the SSO committal is a mis-recording."

36. Counsel, as we have already indicated, provided a helpful response and it is apparent that no issue was taken by the appellant with the activation of the suspended sentence or with the sentences passed on the summary offences. Ms Carroll for the Crown, who appeared at sentencing but not at any of the earlier hearings, also agrees that no issue arises.

37. Our attention has been drawn to the decision of the Court of Appeal in R v Ayhan [2011] EWCA Crim 3184. It is unnecessary to set out the facts of the case but at paragraph 22, the Lord Chief Justice said this:

"In our judgment, provided the power of the magistrates' court to commit for sentence was properly exercised in respect of one or more either way offences..., a mistake in recording the statutory basis for a committal of summary only offences does not invalidate the committal. The principle is that thereafter the Crown Court must abide by the sentencing powers available to the magistrates' court in relation to the summary only offences..."

38. That is what happened in the present case. We are satisfied that there is nothing unlawful in this aspect of the sentencing.

39. We have recited this procedural history however because it is clear that this issue was identified by the Crown Court at the outset and never resolved. The upshot is that difficulties have been raised and the time of the courts and counsel wasted in seeking to establish the true position. This was entirely avoidable.

40. So far as those offences are concerned, and since they were committed on an occasion prior to the events giving rise to count 1 on the indictment, the judge ought to have imposed either penalty points or a discretionary period of disqualification in respect of one of those offences. That is the combined effect of sections 28(4), 34(2) and 44 of the Road Traffic Offenders Act 1988. The judge did not do so and it is accepted by the appellant that we should do so.

41. Given the lengthy period of disqualification already imposed and despite the fact that these offences were committed on separate occasions, we consider it appropriate to make the period of disqualification a concurrent one. In respect of the summary offence of driving whilst disqualified, we therefore impose a period of 6 months' qualification to run concurrently.

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

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