Neutral Citation Number: [2009] EWCA Crim 1571

Case No: 2009/01281/D1

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT CARDIFF
MR RECORDER MURPHY QC
T20081189

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/07/2009

Before :

LORD JUSTICE THOMAS
MR JUSTICE COLLINS
and
MR JUSTICE OWEN

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Between :

Regina	**Respondent**
- and -	
Craig Bannister	**Appellant**

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- -

Nicholas Hilliard QC and **C Rees** for the **Appellant**
Greg Taylor QC and **M G Hammett** for the Respondent

Hearing date : 29 June 2009

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Approved Judgment

Lord Justice Thomas :

The facts

1. On 13 January 2008 at about 18:00, the appellant, an experienced Road Traffic Police Officer, joined the M4 motorway near Swansea and travelled in a westbound direction. His speed accelerated from 88 mph to 120 mph. There was torrential rain and a lot of surface water on the road. It was dark with no lighting. Between 18:05 and 18:10, the car slid and spun out of control. It appears that although the appellant had seen water on the surface of the road he did not think it was deep. At this stage he was travelling at 113 mph, the car aqua-planed and crashed into a small copse of trees at the motorway's edge and was so substantially damaged that it was a write-off. Fortunately the appellant suffered relatively minor injuries.

2. He was charged with dangerous driving and tried at the Crown Court at Cardiff before Mr Recorder Murphy QC and a jury in February 2009. There was a substantial amount of evidence in relation to the question as to whether the appellant was responding to an emergency call or whether he had finished that response. It is not necessary for us to set out the evidence. Although the question as to whether he was on an emergency call or not would have been relevant to any breach of the speed limit, it was common ground that it is irrelevant to the issue of dangerous driving. No emergency or police duty permits a police officer to drive dangerously.

3. It was also part of the appellant's case that the appellant had completed an advanced driving course in November and December 2007 which taught him to drive up to very high speeds; at the conclusion of the course he passed as a Grade 2 advanced driver and was posted as a road traffic officer. It was his case that training had enabled him, because of that special skill, to drive at speeds in the conditions described safely, even if that would not be the case for the ordinary competent and careful driver. That evidence was said to be relevant to the issue of whether he was driving dangerously on the basis of a decision of the Administrative Court in *Milton v CPS* [2007] EWHC 532 (Admin).

4. The Judge summed the case up with *Milton v CPS* in mind. It was, however, contended on behalf of the appellant that the summing-up did not make clear to the jury the correct position in law based on that decision. It was also contended that the summing-up was unsatisfactory in other respects and the conviction for dangerous driving was not, in any event, safe.

5. On 13 February 2009 the appellant was convicted of dangerous driving. He was sentenced to 20 weeks imprisonment and disqualified from driving for two years and required to pass an extended driving test. He appealed against conviction and sentence. He was released on bail, having served 20 days imprisonment, by the Single Judge. On 10 June 2009 this Court (the Lord Chief Justice of England and Wales, Collins and Owen JJ) allowed the appeal against sentence and substituted a fine of £50 for the sentence of imprisonment and a disqualification from driving of 12

months. They substituted what was described as a "nominal fine" in view of the fact that the appellant had spent time in prison: see [2009] EWCA Crim 1350.

6. The appeal against conviction was not heard on that occasion, as the Court considered it was necessary that there be full argument as to whether *Milton v CPS* was correctly decided. It directed that the point be argued and authorised the instruction of leading counsel for that purpose. We are therefore greatly indebted to Mr Hilliard QC and Mr Taylor QC for their detailed arguments, both in writing and orally. At the conclusion of the argument, we allowed the appeal against conviction for dangerous driving and substituted a conviction for careless driving. We also, in the light of that decision, reduced the period of disqualification to 3 months and quashed the requirement that the appellant take an extended driving test. We said we would give our reasons at a later date. These are our reasons. We will first set out our reasons for concluding that *Milton v CPS* was not correctly decided and then our reasons for concluding the conviction was nonetheless unsafe.

Was the decision in *Milton v CPS* correct?

7. The offence of dangerous driving is set out in the Road Traffic Act 1991, as amended. Section 2A provides:

> "2A. – (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)—
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> (a) the way he drives falls far below what would be expected of a competent and careful driver, and
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> (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.
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> (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.
>
> (4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

8. The meaning and scope of the section was considered by this Court in *R v Woodward* [1995] 2 Cr. App. R. 388 in a court presided over by the then Lord Chief Justice, Lord Taylor. The question before the court was whether the fact that the driver was adversely affected by alcohol was a relevant circumstance in determining whether he was driving dangerously. The court reviewed the change in the statutory definitions of dangerous driving and the decisions of the court on those provisions prior to the enactment by the Road Traffic Act 1991 of the definition which we have set out. It was contended by the appellant that the approach to dangerous driving set out in the decision in this Court in *R v McBride* [1962] 2 QB 167, a five judge constitution of this Court presided over by the then Lord Chief Justice, Lord Parker of Waddington, was no longer applicable. The court concluded:

> "On the contrary, the definition of dangerous driving in section 2A is entirely consistent with McBride. Subsection (3) of section 2A makes it mandatory "in determining … what would be expected of, or obvious to, a competent and careful driver (to have regard) to any circumstances shown to have been within the knowledge of the accused". 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. Again, by subsection (2) a person drives dangerously "if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous". 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. This point was made by Professor Smith under the previous legislation by analogy with the case of Crossman [1986] R.T.R. 49 . Now, however, Parliament has specifically enacted subsection two to deal with dangerous vehicles and has introduced a subjective element in subsection three."

9. That decision was subsequently applied in *R v Marison* [1997] RTR 457 when evidence of a driver's knowledge that he was subject to hypoglycaemic episodes was admitted as a relevant circumstance under s.2A(3), and in *R v Pleydell* [2006] 1 Cr. App. R. 12 where it was held that evidence of the consumption of cocaine by the driver was a relevant circumstance admissible under that section. These decisions are all binding on us.

10. In *AG Reference No. 4 of 2000* [2001] EWCA Crim 780 [2001] 2 Cr. App. R. 22 on a point of law to this court, Lord Woolf, the then Lord Chief Justice, giving the judgment of the court, reaffirmed the objective nature of the test for dangerous driving in these terms:

> "Section 2A sets out a wholly objective test. The concept of what is obvious to a careful driver places the question of what constitutes dangerous driving within the province of the jury. It

> is the jury who should set the standard as to what is or what is not dangerous driving."

11. The decision in *Milton* must be considered in the light of that consistent line of authorities. Milton was a police officer and a Grade 1 advanced driver. He was tried before a District Judge at the Magistrates' Court at Ludlow for dangerous driving in circumstances where he drove at very high speeds on ordinary roads to practice his driving skills. His driving had been on a motorway at a speed of between 148 and 149 mph. The District Judge acquitted him of dangerous driving. The prosecutor appealed, by way of case stated, to the Divisional Court. The Divisional Court (Hallett LJ and Owen J) [2006] EWHC 242 (Admin) allowed the appeal and remitted the matter to the Magistrates' Court. One question was whether the Magistrates' Court had been correct in taking into account the driving skills of Mr Milton when considering whether the driving was dangerous. In giving the leading judgment, Hallett LJ, after reaffirming that the test for dangerous driving was an objective one concluded that, insofar as the District Judge had imported a subjective element into the test of dangerous driving, he was wrong in law to have done so.

12. On the re-hearing in the Magistrates' Court, Mr Milton was convicted of dangerous driving before District Judge Hollis. He concluded that the test was an objective one and no account should be taken of the experience or inexperience of the driver. The fact that Mr Milton was a Grade 1 advanced police driver was not a relevant circumstance within s.2A(3). A further appeal by way of case stated was made to the Divisional Court. One of the questions of law for the court was whether the District Judge had been right in construing the section to take into account a Government White Paper. The Divisional Court concluded that he was wrong in doing so. It was common ground on this appeal that the issue of construction should not be approached by reference to the White Paper; the words of the statute spoke for themselves.

13. The main question before the court and the issue relevant to this appeal was whether the advanced driving skills of Mr Milton were a relevant circumstance. Smith LJ in giving the first judgment reached the conclusion that the special driving skills of the police officer were a relevant consideration for reasons set out at paragraphs 26-28:

> "26. It is clear that there is no suggestion in the words of section 2A(3) that only adverse circumstances should be taken into account. Nor does there seem to me to be any basis on which one could infer that that was the intention of Parliament. Consumption of alcohol would be known to the accused; it must be taken into account….
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> 27. I cannot accept that section 2A(3) requires that a circumstance relating to a characteristic of the individual accused driver should be taken into account if it is unfavourable to him but cannot be taken into account if it is favourable. In my view, the favourability of the circumstance is irrelevant. Accordingly, it seems to me that the fact that the driver is a

> Grade 1 advanced police driver is a circumstance to which regard must be had, pursuant to section 2A(3). The weight to be attached to such a circumstance is entirely a matter for the fact finder. In the instant case, the fact finder might conclude that the driving was thoroughly dangerous regardless of the skill of the individual driver. On the other hand, he might conclude that, whereas for a driver of ordinary skill, such driving would have been dangerous, for a man of exceptional skill it was not. Such a thought process does not offend against the requirement that the test for dangerous driving is objective. It simply refines the objective test by reference to existing circumstances.
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> 28….. Mr Sullivan argued that, if exceptional driving skills are to be relevant to the issue of dangerousness, so will inexperience or previously demonstrated incompetence. He postulated that it would be open to the prosecution to demonstrate that the accused had failed his driving test on a number of occasions and at the time of the alleged offence had only recently passed it. It seems to me that there will not be cases in which the driver's personal skill or lack of it will be capable of making a difference to the objective assessment of the dangerousness of the driving in question. It will, in my view, only be the extremes of 'special skill' and 'almost complete lack of experience' that will be such as could affect the mind of the decision maker. The mere fact that a driver has driven for 30 years without an accident will not be relevant; nor will evidence that a driver does not drive frequently. If, where the circumstance is such as could properly affect the mind of the decision maker, for better or worse, then so be it. Section 2A(3) appears to me to require that regard should be had to such circumstances."

14. In giving the second judgment Gross J agreed. He said at paragraph 34(v):

> "As a matter of authority, in my view, section 2A(3) has been applied so as to bring into consideration circumstances unfavourable to the driver: R v Woodward [1995] RTR 130 (alcohol) and R v Marison [1997] RTR 457 (hypoglycaemia). The good sense of such decisions is, with respect, apparent; but the result could not have been achieved by section 2A(1) alone. I am, however, unable to accept that if the wording of section 2A(3) enables circumstances unfavourable to the driver to be taken into account, then the same wording somehow precludes consideration of circumstances favourable to the driver; nor, with respect to him, was Mr. Sullivan able to articulate why that should be so."

15. In his succinct and persuasive argument, Mr Hilliard QC contended that the decision in *Milton* was correct. It was right in principle that circumstances favourable to the

driver should be taken into account in the same way as circumstances such as drunkenness or illness which were unfavourable. Such circumstances could be taken into account without in any way affecting the objective test. This could be demonstrated by a model direction to the jury.

> "The prosecution must prove two matters:
>
> "(i) Even when regard is paid to the fact that the defendant has special driving skills did the way he drove fall far below the standards which would be expected of a competent and careful driver, having regard to the defendant's speed in prevailing road and weather conditions."
>
> (ii) It would be obvious to a competent and careful driver that driving at that speed in prevailing conditions would be dangerous, even taking into account the defendant's special driving skills."

16. We do not agree. It seems to us that, however the matter is phrased, whether in the suggested questions posed by Mr Hilliard QC or in the judgments in the second decision in *Milton*, taking into account the driving skills of a particular driver is inconsistent with the objective test of the competent and careful driver set out in the statute. If the special skill of the driver is taken into account in assessing whether the driving is dangerous, then it must follow inevitably that the standard being applied is that of the driver with special skills and not that of the competent and careful driver, because the standard of the competent and careful driver is being modified. In *Milton,* the argument addressed to the court was that construing the statute to allow 'special skill' to be taken into account would mean that it would become relevant to consider matters such as repeated failures to pass the driving test or many years experience. Smith LJ rejected that contention and considered that it would only be "the extremes of 'special skill' and 'almost complete lack of experience' that would be such as could affect the mind of the decision maker" that would be relevant. It is difficult to see how the line can be drawn between 'special skill' and a lesser degree of skill; but putting that aside, the acknowledgment by Smith LJ that 'almost complete lack of experience' was a circumstance that could be taken into account demonstrates that the inevitable consequence of taking skill into account is that the court would be providing for a lower standard than that of the competent and careful driver in some circumstances. Parliament can never have intended that consequence. It did not use words that had that consequence.

17. It cannot make a difference to the issue of the construction of the statute that drivers charged with dangerous driving may give evidence of their good driving record when the credibility of the account of the events surrounding what happened is before the jury. It is possible to see how it can be said that is relevant to credibility, but the fact that such evidence is admitted on that basis cannot affect the test to be applied to the question of standard of driving.

18. The decisions of this court on taking into account matters such as knowledge of circumstances such as drunkenness or susceptibility to hypoglycaemic attacks are based on a different premise. Such matters do not go to the standard of the competent and careful driver, but are facts relating to the condition of the driver which are as relevant as the driver's knowledge of the unroadworthiness of a car or the conditions of the weather or the road. Those facts can be taken into account without in any way departing from the test of the competent and careful driver – an objective test to be applied by the jury or other decision maker. In contradistinction to that, taking into account the special skill of a driver would be to substitute the test of the ordinary competent and careful driver set out in the statute and in effect to re-write the test Parliament clearly laid down.

19. We note from the passage in the judgment of Gross J in *Milton* to which we have referred that counsel was unable to articulate the reasons for a contrary view to that reached by the court. We have had the benefit of full argument and had the opportunity to consider the contrary view. That contrary view is clearly right and the decision in *Milton* reached without the benefit of that argument was not correct. It therefore follows that the special skill (or indeed lack of skill) of a driver is an irrelevant circumstance when considering whether the driving is dangerous.

The summing-up

20. Although we have reached the conclusion that the Judge was incorrect in taking into account the decision in *Milton* and summing up on that basis more favourably than the law permits to the appellant, nonetheless we cannot regard the whole of the summing-up as providing a proper basis for a safe conviction for dangerous driving. As we have pointed out at the outset of the judgment, it was irrelevant to the issue of dangerous driving as to whether the officer had or had not been on police duty at the relevant time. Policemen are not entitled to drive dangerously when on duty or responding to an emergency. However, evidence on this aspect featured extensively in the evidence and in the summing-up. There was a real and substantial risk that the jury were confused by the summing-up as to the proper way in which the clear test set out in the statute should have been applied. Mr Taylor QC very responsibly on behalf of the Crown accepted that a conviction for dangerous driving would not be safe in the circumstances.

21. Mr Hilliard QC, for the appellant, accepted that in these circumstances on any re-trial a conviction for careless driving would be inevitable, given the standard of driving that the appellant had displayed. He contended, however, that there should be no re-trial on the issue of whether the driving was dangerous, bearing in mind the sentence of imprisonment that this serving police officer had undergone after his conviction. Mr Taylor QC accepted for the Crown that no useful purpose would be served by a re-trial on the question as to whether driving which was accepted to be careless would also be dangerous, given the prison sentence that the officer had served and the obvious effect it had had on him. In those circumstances, therefore, we quash the conviction for dangerous driving, do not order a re-trial but substitute a conviction for careless driving.

Sentence

22. Mr Hilliard QC contended that in those circumstances the court should mark the different offence for which the appellant had been convicted by a substantial reduction in the penalty. He contended that the fine should be set aside, a conditional discharge imposed and there be no period of disqualification.

23. We cannot accept that submission in full. There was, in our view, no proper reason for the officer to have driven at these considerable speeds in the driving conditions to which we have referred. Plainly a court would have marked that driving by a significant financial penalty. We see no reason, therefore, to change the financial penalty imposed by this court on the hearing of the appeal on 10 June. However, we do consider that a period of disqualification was one that should only have been imposed for a short period. We therefore substitute a period of three months disqualification for the period of 12 months. In our judgment no useful purpose whatsoever would be served by requiring the appellant to take an extended driving test and we quash that part of the sentence. To that extent, and to that extent only, the further appeal on sentence is allowed.