

[2019] EWCA Crim 2358

No: 201904287/A4

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 17 December 2019

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE CAVANAGH

HIS HONOUR JUDGE PICTON

(Sitting as a Judge of the CACD)

R E G I N A

v

GARETH JOHN EVANS

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Mr P Rogers appeared on behalf of the **Applicant** **Ms J Wood** appeared on behalf of the **Crown**

J U D G M E N T

1. HIS HONOUR JUDGE PICTON: On 4 October 2019, in the Crown Court at Gloucester before the Honourable Recorder of Gloucester (His Honour Judge Lawrie QC), the applicant pleaded guilty to causing death by careless driving. On 1 November 2019, before Mr Recorder Waddington QC, he was sentenced to 7 months' imprisonment and disqualified from driving for 2 years. The learned Recorder also imposed a requirement that the appellant undertake an extended re-test.
2. Given the length of the sentence imposed the Registrar has referred the application for leave to appeal against sentence to the Full Court. We grant leave.
3. At around 5.45 on the morning of 25 September 2018 the appellant was, in the course of his work, driving a tipper lorry on the A435 Evesham Road from the direction of the Teddington roundabout. This was a straight road with clear visibility. He intended to turn right into a Texaco petrol station via a builder's yard access road. In carrying out the manoeuvre he turned early because he was trying to cut the corner by getting in via the exit rather than via the entry lane of the access road.
4. The victim, Jonathan Webley, was riding a Honda 1000 CC motorcycle coming in the other direction on the opposite carriageway. As the appellant turned into the access road he cut across the path of Mr Webley and there was a collision between the motorcycle and the lorry. A witness at the scene rushed over and tried to administer first aid to Mr Webley. The appellant called 999 and then handed the phone to the witness because he was, the witness said, completely shocked by what had happened. An ambulance arrived within 15 minutes. Mr Webley died from his injuries at the scene of the accident.
5. A victim personal statement from the widow of the deceased was read out during the opening and each member of this court has read that as well. It sets out the utterly tragic consequences that flowed from the manner of the appellant's driving on that morning.
6. The Recorder noted that the appellant was on a straight road with clear visibility. He intended to turn right into a petrol station, a manoeuvre he told the police he had undertaken many times before. The Recorder judged that he was complacent about this manoeuvre due to his familiarity with the journey and he did not look as carefully as he should have done for oncoming traffic. The appellant said that he saw cars in the distance but did not pick up the closer presence of the smaller motorcycle.
7. In carrying out this manoeuvre he turned early because he was trying to cut a corner turning across Mr Webley's path and thus causing the collision. The appellant should have given way, which he would have done if he had looked properly to see what was coming. Mr Webley was close to him when he carried out this manoeuvre and had his

headlight on. It was dark but there was street lighting from the petrol station. The appellant's view was unobstructed for a distance of over 400 metres. Mr Webley was driving in a safe manner, he was not breaking the speed limit and was not doing anything untoward. Witnesses saw his headlight was on and that he was on the correct side of the road.

8. The Recorder observed that effectively the appellant was on the wrong side of the road when the collision took place and this was because he failed to notice Mr Webley as he was coming to the point in the road into which the appellant was turning. The Recorder quoted the Highway Code rule 180 and said that the appellant did not follow that rule and Mr Webley had no chance to avoid the collision which the appellant accepted he had caused. He was driving a large and heavy vehicle. He had a prolonged and unobstructed view of road ahead in clear conditions. He turned across the path of Mr Webley's motorcycle when it was too close to Mr Webley to take effective avoiding action.
9. The Recorder commented that references had been made to the phenomenon of 'highway hypnosis', where a motorist might pick up on a car but not see a smaller vehicle like a motorcycle. A driver on a road he was familiar with might take less care than he would if he was on a road he did not know. Some drivers might not look carefully enough to see a bike but, whilst this provided a level of explanation for what happened, the Recorder stated that the appellant did not do anything to mitigate his lack of care in the circumstances.
10. The Recorder referred to the fact that the appellant was aged 26 and with no previous convictions. He referred to his good driving record and the many positive qualities about which the character witnesses spoke. He also mentioned how the appellant stayed at the scene and called the emergency services although he was not in a fit state to provide help. The Recorder identified that these matters allowed him to afford what he described as a "small" amount of credit in respect of the sentence but not much in the context of this type of case. The Recorder said that the guilty plea was the principal mitigation and that from reading the pre-sentence report and references the Recorder was satisfied the appellant was truly remorseful. He would be given full credit for plea.
11. The Recorder stated that in his judgment there was considerably more than just momentary intention on the appellant's part. He was driving a tipper truck across a carriageway. This was a large commercial vehicle which, in a case involving a minor accident, was a relevant feature in deciding the level of culpability. The manoeuvre was one which the Highway Code made clear required a great deal of care and attention particularly to oncoming vehicles. Mr Webley had his light on. He was driving safely. There was nothing he could have done to avoid the accident. It was of great significance that this was a long straight road where the visibility was clear over 400 yards or so with nothing to obstruct the appellant's view.

12. The Recorder stated that he had regard to the Sentencing Guideline and assessed the case fell within category 2 for the reasons mentioned. The starting point was 36 weeks' custody with a range from a high level community order to 2 years' imprisonment. The Recorder identified that the starting point he assessed as being 12 months' imprisonment, but after full credit for plea and taking into account other mitigation the sentence would be one of 7 months' imprisonment. The Recorder stated that in his view there was no reason to suspend the sentence.
13. The pre-sentence report set out that the appellant was devastated to have caused the death of the victim. The appellant expressed remorse which appeared to be genuine. He was assessed as posing a low risk of reoffending and of causing serious harm. The court was asked to consider suspending the sentence with an unpaid work requirement.
14. The grounds of appeal criticise the Recorder's application of the guideline and submit he should have placed the case within the lowest of the three brackets on the basis of "careless or inconsiderate driving arising from momentary inattention with low aggravating factors". That would have indicated a starting point of a medium community order and a range of low to high order. If the correct starting point was custody, then a length of 12 months, prior to the application of mitigation and credit for plea, is argued to be too high. Further, it is submitted that even if 7 months was justified the sentence should have been suspended.
15. On behalf of the appellant Mr Rogers, in clear and helpful submissions today, has sought to advance those arguments albeit focussing principally on the issue of whether the term should have been suspended.

16. Discussion

We do not accept that the Recorder was wrong to place the offence within the middle category of the guideline. The approaching motor bike was there to be seen and should have been seen by the appellant. The appellant was carrying out a manoeuvre that involved cutting a corner by entering the Texaco filling station via an exit. It would appear that this was an approach to the fuel stop commonly adopted by HGVs using that particular garage, but it would not necessarily have been anticipated by the deceased, who was a careful rider and one who habitually exercised caution as to potential hazards ahead of him on the road. Sadly, Mr Webley had no chance of avoiding the appellant's lorry. Furthermore, this unsafe manoeuvre was performed by the driver of a large vehicle which is inherently more likely to cause damage if driven unsafely. Careless driving of a large vehicle is more serious not only because it is more likely to cause serious injury but also because, in circumstances such as these, it blocks the carriageway for longer and therefore makes a collision inevitable. A particularly high level of care is demanded of the drivers of such vehicles - a point underlined in the case of R v Geale [2013] 2 Cr App R (S) 17, an authority to which we shall return on the issue of disqualification.

17. Accordingly, whilst some judges may not have moved up from the starting point of 36 weeks to the extent of this Recorder and, further, the weight to be afforded to the mitigating factors could have been greater, equally the Recorder was arguably over generous in his assessment of the level of credit for plea given that there was no indication of a plea of guilty at the stage that the case was sent to the Crown Court. In our judgment, looked at in the round, the term of 7 months' custody cannot be assessed as being manifestly excessive.
18. There is however the question of whether the Recorder should have suspended that sentence. In that regard the Recorder made no reference to the Imposition Guideline, simply stating that in his view that there was "no reason to suspend the sentence". It has been confirmed this morning that mention was made of the Definitive Guideline on the Imposition of Community and Custodial Sentences in the course of mitigation. With all due respect to this experienced Recorder the decision as to whether the sentence might have been suspended or not called for greater explanation than that which the Recorder provided.
19. Of the factors that the guideline identifies as indicating it would not be appropriate to suspend the sentence, two of the three were absent. The appellant does not present a risk of harm to the public and there is no history of noncompliance with court orders. The only factor that is potentially present is the one that refers to the appropriate punishment only being capable of being achieved by immediate custody. Two of the factors point in favour of suspension that are referred to in the guideline were present, namely a realistic prospect of rehabilitation and strong personal mitigation. We note in particular the content of the letter written by the appellant's father.
20. In the case of R v Wilkinson [2019] EWCA Crim 702, this court reviewed a number of authorities involving causing death by careless driving and emphasised the importance that may attach to a plea of guilty when deciding whether a custodial sentence should be suspended or not. The court identified that a guilty plea and early expression of remorse was something that may militate in favour of the custodial term properly being suspended.
21. Given the absence of explanation by the Recorder as to the factors that led him to reject the option of suspending the sentence we have had to address that issue ourselves. We have concluded that in all the circumstances of this case it was not necessary for an immediate sentence of imprisonment to be imposed. Balancing the nature of the driving and the terrible consequences arising therefrom, as against the immediate deep remorse, the guilty plea entered at the PTPH, the appellant's exemplary character and previously blameless driving record, leads us to the view that the sentence of 7 months' imprisonment should be suspended.

22. We have considered whether that should be combined with an appropriate community order but in the context of the appellant having served 44 days in custody already, we do not think that is a right step to take.
23. So far as disqualification is concerned, there are two elements in respect of that which need to be addressed. When passing sentence the Recorder imposed a disqualification for 2 years and also imposed a requirement for the appellant to take an extended re-test. This offence carries with it a compulsory 12-month disqualification but the imposition of an extended re-test is at the discretion of the sentencer. The Recorder did not identify the reason why he considered an extended re-test was appropriate.
24. In the case of Geale (supra), this court held that the main purpose of disqualification was to protect the public from the risk posed by an offender driving, and that where the risk was very low, a lengthy period of disqualification might be inappropriate particularly if the offender was dependent on driving for his livelihood. However, the court also recognised an element of punishment may be involved in the disqualification signified by the fact that the 12-month minimum period of disqualification is obligatory. Therefore, when considering whether the length of the period of disqualification is manifestly excessive the court must consider it in the context of the sentence imposed and the ancillary orders as a whole.
25. Although cases of this tragic nature are inevitably fact specific, it is perhaps worth noting that in Geale the period of disqualification for a professional coach driver with an otherwise exemplary driving record, was reduced from 3 years to 2 years, where the nature of the offender's driving went beyond momentary inattention and involved an inherently unsafe manoeuvre caused or compounded by distraction by another vehicle travelling ahead in the same lane. We consider that in this case the Recorder was correct in his assessment of the length disqualification and that the period of 2 years correctly reflects the circumstances of this offence and the offender.
26. In R v Tombs [2019] EWCA Crim 1100 however, this court addressed the issue of the imposition of an extended re-test and concluded that, in not wholly dissimilar circumstances, there was no justification for such to be ordered where an extended re-test was not going to increase the level of public safety. The Recorder here gave no indication as to why he considered an extended re-test a necessary feature of the sentencing exercise in the case of this appellant and we can divine none ourselves.
27. The disqualification imposed in fact failed to comply with the requirements of section 35A of the Road Traffic Offenders Act 1968 and was not expressed as it should have been in accordance with the guidance provided by this court in R v Needham [2016] EWCA Crim 455. It would seem that some time later on the day of the sentence the

prosecutor realised that the Recorder had failed to impose the necessary three-and-a-half month extension to the period of disqualification as the legislation, enacted as it was to prevent offenders serving some or all of the period of disqualification whilst in custody, required. The prosecution contacted the court inviting the Recorder to make that adjustment administratively but at the same time suggesting when so doing the Recorder should take account of the period during which the appellant had been subject to an interim disqualification. The Recorder acceded to that request with the result that the court amended its "Notice of Order for Endorsement" sent to the DVLA so as to state that the appellant was disqualified for 2 years, 3 months and 15 days.

28. The court and the Recorder should not have proceeded in this way. By reason of Criminal Procedure Rule 28.4(2B) and (4) the variation, amounting to an increase in sentence, should have been dealt with in open court and with the appellant on notice of the proposed adjustment. The alteration that the Recorder purported to make administratively was of no effect and the sentence in fact remains as pronounced in open court. Further, there was no need to make any order in respect of the interim disqualification as that is accounted for automatically. If we had not concluded that the sentence in this case should have been suspended then the purported change, intended to bring the imposition of the disqualification into line with the legislation and Needham, would have been ineffective and the situation would be as pertained in the conjoined appeal of Aitken as explained at paragraph 129 of the judgment in Needham. Because however we have concluded that the sentence of imprisonment should in fact be suspended the period of disqualification that the Recorder announced in open court can stand, i.e. the appellant is disqualified for 2 years but, for the reason already given, he will not be required to take an extended re-test at the conclusion of that period before being permitted to resume driving. The 3-week period between plea and sentence during which the appellant was subject to an interim disqualification is deducted automatically and does not have to be reflected in the court order. The court record and the DVLA records will have to be amended accordingly.

29. The result of the appeal therefore is the sentence imposed in the court below are quashed and substituted with a sentence of 7 months' imprisonment for 12 months. The disqualification is for the period of 2 years but absent the extended re-test requirement that the Recorder imposed.

30. HIS HONOUR JUDGE PICTON: Mr Evans, that means you will be released. You are subject to a suspended sentence. If you commit any offence during the period of that suspended sentence, you will be liable to serve some or all of that period in custody less of course the 44 days you have spent in custody already. Do you understand that?

31. THE APPELLANT: I do. Thank you very much.

32. MR ROGERS: May I just clarify the period of suspension of the sentence?

33. HIS HONOUR JUDGE PICTON: Seven months suspended for 12 months.

34. MR ROGERS: No order for the re-test.

35. HIS HONOUR JUDGE PICTON: No.

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

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