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IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019]EWCA 506 (CRIM)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 21 March 2019

B e f o r e:

LORD JUSTICE FLAUX

MR JUSTICE WILLIAM DAVIS

SIR BRIAN KEITH

R E G I N A
v
JACK DIAMOND

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Mr T Smith QC appeared on behalf of the **Appellant**

Mr D Connolly appeared on behalf of the **Crown**

J U D G M E N T

(Approved)

LORD JUSTICE FLAUX:

1. On 13 April 2018, in the Crown Court at Maidstone before His Honour Judge Statman, the appellant pleaded guilty to three counts of causing death by dangerous driving and one count of causing serious injury by dangerous driving. On 8 May 2018, he was sentenced by the same judge to seven and a half years' imprisonment concurrent on each of the counts of causing death by dangerous driving and 3 years' imprisonment concurrent on the count of causing serious injury by dangerous driving, a total of seven and a half years' imprisonment. The judge also imposed a period of disqualification from driving of 7 years. He now appeals against sentence with the leave of the single judge.
2. The facts of this tragic incident can be summarised as follows. On the evening of 23 September 2017, the appellant, then aged 29, had been to two public houses in the Hawkhurst area with two work colleagues, Stephen Jones and Roy Little, and two teenagers, Chelsea-Rose Betts, aged 16, and her brother, Billy Bartley, aged 13. They were all friends. The appellant was the driver of the car in which they travelled, a Volvo Estate, but despite being the driver, he was drinking alcohol.
3. There were witnesses who spoke of his having driven away from the first pub erratically and too fast, but the appellant made no admissions about this in his basis of plea, and Billy Bartley, who provided the police with an ABE interview, did not refer to this, so that, in sentencing the appellant, the judge fairly took into account only his driving on leaving the second pub, The Oak and Ivy on Rye Road in Hawkhurst, sometime around 9.30 pm. A witness at that pub described how, as it pulled away, the car was being driven fast and erratically with a spin of the wheels.

4. Another witness was driving in the opposite direction shortly before the impact occurred. She described driving towards Hawkhurst on the A268 Rye Road. It was a dry night with no street lighting at the relevant part and it was dark. She saw headlights coming from the opposite direction and she could see from the position of the headlights that the car was near enough on her side of the road. It was coming towards her quite fast and she said that the headlights appeared to be on full beam. She slowed down, not knowing what else to do as it was coming towards her so fast. As it passed her she could see that it was a red car but it was driving too fast for her to determine what type of car. She described how her own car made a little wobble as the other car went past. She estimated its speed as being between 50 and 60 miles an hour and there were no other cars on the road.
5. Billy Bartley said in his ABE interview on 18 October 2017 that there was nothing wrong with the appellant's driving at the start of the evening. It was only after going to the one pub and then to the next, that Billy Bartley became concerned and then very concerned about the way the vehicle was being driven. He did say that on previous occasions when he had been in the car the appellant had driven responsibly. He said that the driving was only fast from the last pub.
6. Stephen Munroe was a driving instructor of 25 years' experience. At 9.30 pm he pulled up at his house on Rye Road and heard the sound of a car being driven at high speed. He saw the lights of a car coming round the bend some 150 to 200 yards away and as the car came round the corner he observed the noise from it momentarily stopped, which was consistent with it being airborne, but he then heard a loud noise of the tyres hitting the road and screeching before he heard a thud followed by silence. From his experience he could tell that the vehicle was being driven at excessive speed.

7. WPC Rachael Barker was the first police officer on the scene, having been flagged down by members of the public. She saw the vehicle on its side on the pavement. Billy Bartley was lying on the ground outside the car with a head injury. She observed petrol on the ground and she ascertained that there were two adults within the vehicle. The appellant was conscious and able to speak. The female was also conscious at that time. When the appellant was removed from the vehicle, he said, "I swerved for a car on the corner".
8. Mr Little and Mr Jones died at the scene and Chelsea-Rose Betts sadly died of her injuries in hospital 3 days later. Billy Bartley sustained a number of injuries. A CT scan revealed a pneumothorax, a lung laceration, three rib fractures and a fractured collarbone. He had a laceration to his scalp, two lacerations to his tongue and bruising to the chest wall. He was in hospital for 3 days, of which 2 days were in intensive care.
9. A forensic collision investigation by the police indicated that the accident had occurred at a location where the road bends to the left with a slight incline of 5 per cent. It was a single carriageway with a white painted double line. There was no street lighting and the speed limit was 40 miles an hour. The car, when examined, was severely damaged and deformed, the main impact being to the roof, which was consistent with it striking the kerb with the nearside wheels, and from the reconstruction it would appear the vehicle was travelling around a left-hand bend, harsh steering or braking was applied, causing it to rotate clockwise across the road. By the time it reached the offside kerb it had rotated far enough so that its nearside wheel struck the kerb, which was the most likely cause of the car tipping onto its nearside, whereupon it collided roof first with a brick wall.
10. The investigation could not establish the pre-impact speed, although based upon damage to the car it was likely to be in excess of 40 miles an hour and from witness descriptions

it was likely that the vehicle became airborne over the crest of the road. The expert's opinion was that a vehicle being driven within the speed limit would not have left the road, nor would it have had any difficulty in negotiating the bend. It appeared likely that the driver overreacted to an actual or perceived loss of control while negotiating the left-hand bend and he either braked or steered harshly towards the right or both. That caused the vehicle to yaw clockwise and to cross to the opposing lane, where it struck the kerb and overturned. The expert found there were no contributory road, vehicle or weather factors save that the rear offside tyre had a slow puncture, which would not have been discernible when being driven on a straight road but it was possible that it had a noticeable adverse effect on a bend.

11. The appellant provided a sample of blood and was found to be over the legal drink drive limit. He was found to have 87 micrograms of alcohol in 100 millilitres of blood, where the legal limit is 80 micrograms, but the test was not performed immediately after the collision, but only some 5 hours later and it not been possible in the circumstances to make a precise calculation as to the effect on the blood.

12. The appellant was interviewed. He said he had drunk a moderate amount of alcohol and he did not think it affected his driving. He said he knew the road where the collision had occurred very well. He claimed that he was driving within the speed limit and said he could not understand how the collision had occurred. He denied that he had been driving too fast or had driven erratically at any stage of the evening.

13. The appellant was born on 14 June 1987 and was of previous good character with no previous convictions and he had a clean full driving licence and proper insurance for the car.

14. He pleaded guilty at the PTPH on a written basis of plea which admitted that he was over

the legal limit at the time of driving. He accepted driving away from the Oak and Ivy too fast and that, once on the main road, he was driving in excess of the 40 mile an hour limit. As he approached the bend he was at a speed at or around 50 miles an hour and he appeared to have misjudged the corner and swerved. As a consequence, he tried to correct the position of the car but the rear had swerved dramatically to the left. As it swerved, and either before or as a consequence of hitting the pavement, the car went airborne, before rolling onto its side, coming to rest in the direction it had been driven from. He accepted that had he been driving within the speed limit he should have been able to negotiate the corner.

15. The basis of plea also stated that the car had passed its MOT a few weeks before the accident. It had no obvious defect that would have contributed to the accident. However, examination of the car in the immediate aftermath of the accident indicated that there was a slow puncture to the rear offside tyre and the pressure was 16 PSI when it was recommended to be 29 PSI. There was nothing to suggest that the appellant should have been aware of the deflation prior to the accident. Forensics had noted that the reduced pressure on the tyre could have had an adverse effect on the ability to control the vehicle. During his interview, the appellant had said that the characteristics of the car felt different on the corner and he remembered the back end losing control and forensics said it was possible he was describing the effects of the underinflated tyre. At the conclusion of the forensic report it had stated that the rear offside tyre may have adversely affected the handling characteristics of the car.

16. There were victim impact statements before the judge from Mr Little's mother, Mr Jones' mother, and Chelsea-Rose Betts' mother and grandmother. We have also read these. They speak movingly of the terrible impact of the deaths of Mr Little, Mr Jones and Miss

Betts on their families.

17. In careful and sensitive sentencing remarks, the judge referred to the fact that the appellant had been drinking alcohol at the two pubs they visited that night. He said that, looking at it in its most favourable light to the appellant, on the occasion when he left the second pub it became clear to those in the vicinity, as well as to Billy, who was one of his passengers, that his car was being driven in a dangerous manner. The speed limit on the road he was driving was 40 miles an hour and on any view of his speed it was at least 50 miles an hour, so he was driving having taken alcohol and above the speed limit. There were witnesses who saw him drive who described his driving as being unacceptable. It would seem, he said, from Billy's account that there had effectively been a change in the manner in which the appellant was driving. The consequences of that driving had been catastrophic: three people killed and Billy seriously injured.

18. The judge referred to the forensic investigation report and noted in particular that the report stated that it was likely that the driver overreacted to an actual or perceived loss of control. Those words, "actual or perceived loss of control", the judge regarded as significant, particularly when one bore in mind that he was someone who had taken alcohol in the course of the evening. There were no contributory road, weather or vehicle factors other than the slow puncture. It was a possibility that that had had some adverse effect in the course of his driving around the bend and one which was accepted, in fairness to him, would not necessarily have been noticeable on a straight road.

19. The judge referred to the letters which the appellant had written to the families of the deceased and various testimonials and he concluded that the appellant was genuinely remorseful for what he had done. He referred to the appellant's previous good character and good driving record and he accepted that what he did that evening would be with him

for the rest of his life. However, the judge said that it was important to emphasise that Billy, Chelsea's brother, had had to live through the crash and come to court in circumstances where his sister had been taken from him. Also the court bore in mind the grief of Chelsea's mother. It was particularly significant that no-one had had a chance to say goodbye. That was a very great tragedy.

20. The judge said this was not a case where the defendant had set out in the morning with evil and malice in mind, intent upon causing death, but it was absolutely impossible to quantify the loss which had been sustained by the families, where three people were killed and one seriously injured, and to some way equate that in terms of years to each death in the sentence to be passed.

21. The judge then referred to the Definitive Guideline of the Sentencing Council on causing death by driving. He said this was not an easy case. He said that he had indicated at the outset of the sentencing hearing his concern that the case could not be described as falling at any stage into category 2 in the Guideline. Having considered the Guideline and counsel's helpful submissions, it had become clear that it became a category 1 case, even though it may have started as category 2. The judge considered that in placing the case firmly in category 1, paragraphs 19 to 21 of the Guideline were significant, particularly paragraph 21, which he quoted:

> "Where more than one person is killed, that will aggravate the seriousness of the offence because of the increase in harm. Where the number of people killed is high and that was reasonably foreseeable, the number of deaths is likely to provide sufficient justification for moving an offence into the next highest sentencing band."

22. The judge said that this was a case of higher culpability because the appellant knew how many passengers were in his vehicle and they were all his responsibility because he was the driver. This was to be contrasted with a case of a driver on his own who crashes into

another car which tragically has a number of people in it. So the judge concluded this was higher culpability and greater harm because of the number of deaths. The starting point for category 1 was 8 years' custody and the range 7 to 14 years. The judge noted that that upper limit reflected that Parliament had revisited and increased the earlier maximum for this offence.

23. The judge said that he had to look at the aggravating factors, whilst being careful not to double count, and then balance them with the available mitigation. This was not an easy task. So many had suffered so considerably as a result of his actions and this was yet another case involving a complete lack of understanding, that going to a public house, drinking alcohol, leaving and driving a vehicle and driving that vehicle at speed and being involved in such an incident could only lead to a substantial and immediate custodial sentence to protect the public.

24. Having looked at the aggravating and mitigating features, the judge started at 10 years' imprisonment and reduced that to reflect the appellant's guilty pleas by 25 per cent to seven and a half years' imprisonment concurrent on each of counts 1 to 3. Bearing in mind the maximum for the count of causing serious injury by dangerous driving was 5 years and having given credit for his plea, the sentence came to 3 years' imprisonment concurrent to the other sentences.

25. In his helpful submissions on behalf of the appellant, Mr Tyrone Smith QC contends that the judge's starting point of 10 years' imprisonment before credit for the guilty plea was too high since it indicated that before reduction for mitigating features the judge's starting position must in fact have been significantly in excess of 10 years. Whilst he accepts that the judge was right to increase the sentence to take account of the multiple deaths and the injury caused to Billy Bartley, he submitted in his written advice that care had to

be taken that this did not entirely overwhelm the appellant's culpability. Had the judge started at category 2 before aggravating for the deaths caused, the starting point should have been 5 years, but the judge had effectively more than doubled that, before taking account of the mitigation. Mr Smith submitted that to the extent that the judge had taken account as an aggravating feature the consumption of alcohol, this was, in effect, double counting, since the consumption of alcohol was a matter which put the case in category 2 rather than category 3 in the first place.

26. Mr Smith submitted that the mitigating features were significant. They included that this may have been a case where there would not have been an accident at all but for the unknown defect in the vehicle, namely the slow puncture, of which the appellant was unaware. There was also the remorse shown by the appellant, the fact that those killed were his close friends, which the Guideline says specifically at paragraph 23 may be a mitigating factor, together with his good driving record and his previous good character. Mr Smith also submitted that, of course, the appellant has to live for the rest of his life with having caused these deaths and serious injury.

27. Attractively though the submissions were presented, we cannot accept them. We agree with what is said by Mr Connolly for the Crown in the Respondent's Notice, that within category 1 on the facts of this case, the judge was entitled to take a starting point in excess of the 8-year starting point in the Guideline to reflect a number of serious aggravating features of the case.

28. We consider that the judge was entitled to stand back and look at the overall seriousness of the offending. The aggravating features of the offending included the fact that the appellant caused three deaths, one of them a 16-year-old girl, and that, given that they were passengers in his car, this was a case where he could anticipate the possible deaths

of those passengers. The fact that the appellant was driving at excessive speed whilst over the drink drive limit was, as the judge rightly identified, a very important aggravating feature. We do not accept Mr Smith's submissions that in taking that into account as an aggravating feature the judge somehow was guilty of double counting. As we said to Mr Smith during the course of argument, it seemed to us that many of his arguments in relation to the Guideline tended to adopt the approach of treating it as tramlines, which is an approach which has been deprecated time and time again in this court.

29. Perhaps most importantly in terms of aggravation, the judge also had to take account of the additional aggravating factor of various very serious injuries to a 13-year-old boy, who had also lost his sister through the appellant's dangerous driving. On the basis that the judge was going to pass a concurrent sentence on that count of causing serious injury by dangerous driving, the judge was entitled to take a significantly higher starting point on the causing death by dangerous driving counts to take account of the serious injury to Billy Bartley and to reflect the gravity of the overall offending - see Attorney General's Reference (R v Morrison) [2018] EWCA Crim 981; [2018] 2 Cr App R (S) 31 at paragraphs 23 to 24. We also consider that the judge clearly took full account of the various mitigating factors to which Mr Smith has referred.

30. In our judgment, this sentence cannot begin to be described as manifestly excessive or wrong in principle. The appeal against sentence must be dismissed.

31. It is necessary to say something about the period of disqualification passed by the judge. The judge does not appear to have followed the guidance provided by this court in R v Needham [2016] EWCA Crim 455, that the sentencing court should state the discretionary period of disqualification deemed appropriate together with the extension

period to be added pursuant to section 35A of the Road Traffic Act 1988. In fairness to the judge, he does seem to have complied with the purpose of the legislation in passing a period of disqualification of 7 years. In doing so, he referred to the fact that the appellant would be in custody for the first three and a half years, evidently considering that this was the appropriate extension period under section 35A of half the custodial term, although, because he mistakenly thought the appellant would be entitled to time off his sentence for days spent in custody, he took the custodial term as three and a half years. The appellant had in fact been on bail. So half the custodial term would be 3 years and 9 months.

32. We propose to restructure the period of disqualification so as to comply with the guidance given in Needham. The extension period under section 35A will be 3 years and 9 months. The discretionary period of disqualification will be 3 years and 3 months. Thus, the overall period of disqualification remains 7 years, as does the requirement for the appellant to pass an extended driving test.

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

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