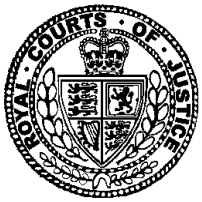

Neutral Citation Number: [2021] EWCA Crim 802

Case No: 2020/02668/B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
HULL CROWN COURT
HHJ TREMBERG
T.20197310

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

LADY JUSTICE MACUR
MRS JUSTICE YIP
and
MRS JUSTICE FOSTER

- -

Between:

REGINA	**Respondent**
- and -	
ISRAR MUHAMMED	**Applicant**

- -
- -

Mr Andrew Semple (instructed by **Harrison Bundey Solicitors**) for the **Applicant**
Miss Claire Holmes (instructed by **CPS**) for the **Respondent**

Hearing date: 5 May 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 9am on Friday, 28 May 2021.

Macur LJ:

1. This is an appeal against convictions for causing death by dangerous driving, causing serious injury by dangerous driving, and causing death by driving whilst uninsured. There are two grounds of appeal. The first centres on the chain of causation between the appellant's driving and death or serious injury. The second relates to the condition or use of seat belts in the appellant's car.

Background

2. The appellant was convicted of four offences said to arise from his dangerous driving on the M62 on 1 July 2018. The appellant's wife and three children were travelling in the vehicle with him. A serious road traffic accident occurred. The appellant did not suffer any significant injuries as a result of the collision but, tragically, his 3-year-old son, Sayhaan died at the scene and his wife and 11-year-old daughter, Z, suffered very serious injuries. The appellant was uninsured at the time.

3. Shortly before the accident, a silver Honda vehicle, being driven by the co-accused, Adam MOLLOY, was seen to be travelling close behind the appellant's vehicle in the outside lane. Other road users who gave evidence at trial, formed the impression that the two vehicles were racing or engaged in 'competitive driving'. Both vehicles were travelling at speeds more than 100 miles per hour and in close proximity. Neither car ceded the outside lane, even though the middle lane was clear of traffic. Some of the eyewitnesses referred to the two men as "driving like idiots" and correctly, predicted grave consequences.

4. A blowout to the rear offside tyre of his vehicle immediately preceded the appellant obviously losing control; the vehicle travelled from the outside lane, across the two inside carriages of the motorway and down an embankment, where it collided with a tree. No other vehicles were involved. The co-accused continued to drive away.

5. Other drivers stopped to offer what assistance they could. Emergency services arrived subsequently. It seems that the appellant had been able to exit the car unaided before anybody arrived on the scene, but the combined effect of the eyewitness evidence suggests that the other occupants were still in situ in the car post impact. The appellant's daughter appeared to have been thrown forward between the front seats of the car. Sayhaan was still in his child seat on the rear nearside, but it was turned towards the rear nearside window. The appellant's other son, W, was removed from the rear offside passenger seat.

6. The situation relating to the car's seat belts was, perhaps understandably in the traumatic circumstances of the scene that confronted them, not consistently observed by the eyewitnesses. Mr Viney, an expert in road traffic accident investigation, who examined them subsequently, was able to establish that the appellant's wife had been wearing a seat belt at the time of the impact, but he could not be sure whether the older children were or not. However, despite the appellant saying in interview that he had ensured that the child seat was secure prior to him starting the return journey, Mr Viney's examination of the vehicle did reveal that the child seat in which Sayhaan had been traveling, had not been adequately secured by the rear nearside seatbelt.

7. During interview, the appellant was also asked about the mechanical state of his vehicle. He confirmed that he was responsible for maintaining his car, but when asked when he had last checked its roadworthiness prior to the collision and when he had last inspected/looked at the tyres on his car said, "No comment." He said the tyre pressure would be checked every two or three weeks saying, "It's done by the garage man", but he declined to answer when asked which garage he used for this purpose.

8. The appellant denied travelling at excessive speed. He thought the accident had been caused by the following car hitting him to the rear, pushing him first against the central reservation and subsequently across the inner two lanes of the motorway.

The Trial

9. The Prosecution case was that the appellant and his co-accused were driving dangerously and that there was a foreseeable risk of emergencies, such as the blowout which occurred, and the vastly excessive speed at which they travelled, meant it would be impossible for either of them to negotiate it safely. Consequently, the dangerous driving of each caused or contributed to causing the fatal and serious injuries referred to above. Further, the appellant's vehicle should not have been driven on the tyre which had suffered the blowout; it was 16 years old whereas manufacturers and experts recommended replacement after 10 years. The chance of a blowout increased with the age of the tyre and the speed at which the appellant was travelling. Also, the car seat in which Sayhaan was sitting had not been fitted correctly; the adult seatbelt had not been used to secure the car seat in place.

10. The appellant and his co-accused denied all offences. They challenged the fact of the dangerous driving, and/or the causation of death or serious injury. In the alternative, the appellant relied upon the defence of duress, saying in effect, that the dangerous manner of his co-accused's driving forced him to drive in the way that he did. He could not pull over to the left since he believed if he did so his car may "somersault" at the speed at which he was travelling. In so far as the state of his vehicle was concerned, he was not aware of the tyre damage discovered post impact that had led to the blowout and could not reasonably have discovered it. The vehicle had passed an MOT four months before the accident, and the tyre pressure had been checked every two to three weeks since and nothing untoward had been apparent. The seat belts were in good order and had been used correctly. In any event, the situation regarding the seatbelts did not transform the manner of his driving into dangerous driving. Due to the nature of the collision, the lack of restraint was not causative of death or serious injury.

11. Both were convicted of causing death by dangerous driving, two counts of causing serious injury by dangerous driving and the appellant also of causing death by driving whilst uninsured. He was sentenced to a total of four and a half years imprisonment and disqualified from driving for a period of 6 years and three months and disqualified until passing an extended driving test.

Evidence regarding the blowout

12. Two expert witnesses were called. Mr Viney, the road traffic investigator, determined the cause of the appellant's car leaving the carriageway was because of the driver's inability to control the vehicle after the evident blowout to the rear offside tyre. This he determined from his viewing of dashboard camera footage and markings on the road

and verge. He could not rule out a similar catastrophic loss of control following a blowout at 70 miles per hour, but the higher the speed the greater the risk. Speed was relevant to the degree of control.

13. Mr Price, an accident investigator and tyre expert, gave detailed evidence about the condition of the tyre. His inspection had revealed that the tyre had old latent damage to the tread structure; it was 16 years old. He observed "cracking and crazing" to the tyre which would suggest that the rubber was deteriorating; the more obvious the cracking and crazing the more serious the deterioration. The previous damage to the tread was most certainly the trigger for the blowout that occurred. Asked about the relevance of the tyre being used at a speed more than 100 miles per hour, he said that "the high speed could well hasten that damage to the tread, the separation occurring within the tread structure." He said that blowouts tend to occur usually at high sustained speed but there are factors such as turning which will increase the forces and make it more likely. If a rear offside tyre burst and the car was steering to the left "at moderate or particularly at high speeds, that is when one can have a loss of control." He said, "the higher the speed the more difficult to control it is." The driver would not know that the tyre was going to burst but, "may see damage or they may feel vibration, something like that." In re-examination, when asked if the blowout would cause the vehicle to turn to the left, he said: "No. It would be a reaction of the driver. For example, the driver would be certainly well aware that something dramatic had happened and then might choose to turn towards the hard shoulder.

14. Both experts agreed, from analysis of dash camera footage that the cars were travelling at speeds over 100 mph. The appellant's car was pulling away from the following car driven by his co-accused at the time of the tyre blowout.

Submission of no case

15. A submission of no case to answer was made at the conclusion of the Prosecution case. Mr Semple, who also appeared below, submitted that whilst there was evidence from which a jury could infer that the standard of driving amounted to dangerous driving, there was no evidence that it was the manner of the driving which caused the death or the serious injuries. The cause of the crash was the tyre blowout, due to the latent damage to the tyre and there was no evidence that the appellant ought to have known about the condition of the tyre. The expert evidence was that the blowout could have happened at 70 mph. Further, whether the appellant's youngest son was properly restrained within the vehicle, was not relevant to the manner or quality of the appellant's driving. Whilst not being properly restrained could be a contributing factor in causing death, it would not make driving that otherwise is not dangerous amount to dangerous driving.

16. The Judge ruled that there was sufficient evidence that the appellant and the co-accused were driving dangerously. The Prosecution were only required to prove that the dangerous driving was a significant, that is more than a negligible, cause of death or serious injury. The jury were entitled to consider whether the way in which the appellant and the co-accused were driving "created the conditions" which contributed to the failure of the tyre and would be entitled to conclude, on the evidence that the faster the speed driven the greater the risk of failure of a defective tyre and the greater the risk of a catastrophic loss of control, regardless of whether the precise mechanism of the loss

of control was immediately foreseeable to them. The state of the appellant's knowledge about the state of the tyre was a matter for the jury:

> *"He claimed in interview to cause it to be checked professionally every two to three weeks. It was 16 years old. It was displaying evident signs of age in the cracking around the side wall of the tyre and there was evidence of a long-term under inflation."*

So far as the lack of appropriate seat belt restraint was concerned:

> "*When considering whether the manner of a person's driving is dangerous, the manner in which a person within the vehicle is restrained is clearly relevant to the risk of death and/or serious injury to that person and if the jury accepted the evidence that the defendant's youngest son was not properly restrained, in my judgment they would be entitled to take that into consideration when considering whether his driving was dangerous and if that danger was a cause of the child's death."*

He went on to conclude:

> *"I am satisfied that a reasonable jury, properly directed, could find, taking the case of each defendant separately, that the manner of his driving was dangerous and that that dangerous driving was at least a contributory cause of death and serious harm."*

17. The appellant then gave evidence in accordance with the summary of his case in [10] above. He denied being annoyed with the co-accused driving so close behind him but said he had speeded up to get away from the following car. He denied that he was racing. He feared that if he tried to move left his car would somersault and did not believe that it would have been safe to move lanes. He was unaware of the damage to the rear tyre. The vehicle had passed an MOT in February 2018 and there was no indication of anything amiss. Alternatively, if the appellant was found to have driven badly, this was because he was compelled to do so by the actions of the co-accused and he was acting under duress of circumstances and his actions were reasonable in the circumstances. Alternatively, if there were shortcomings in the manner of his driving, this was not causative of death/serious injury.

18. The Judge summed up the case with the assistance of written legal directions and route to verdict, neither of which documents are criticised by Mr Semple. However, shortly after the jury had retired, they sent a note which read:

> "*The offences of dangerous driving, page 4, Routes to verdict:*
>
> *'A person is also to be regarded as driving dangerously if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.'*

> *What does 'current state' mean? Is this a mechanical functional state of the vehicle, or does this also apply to the interior fixings of the vehicle – ensuring loads/passengers are secured?"*

19. The Judge answered the question in terms:

> *"a deficiency in the restraint mechanism of an occupant is capable of being considered as a factor in this offence if, and only if, the prosecution has made you sure: firstly, that that deficiency would have been obvious to a competent and careful driver; and, secondly, that that deficiency created an obvious danger of injury to any person or serious damage to property. So, a deficiency in an internal restraint mechanism is capable of feeding into your consideration of whether a defendant drove dangerously. Whether you regard it as part of the manner of that person's driving, or as being to do with the current state of the vehicle, it's capable of being relevant provided those threshold criteria are met."*

20. The jury retired again. They concluded their deliberations the following day. The appellant and his co-accused were convicted.

The Grounds of Appeal

21. The appeal is advanced on two grounds. First it is said that the Judge was wrong not to accede to the submission of no case to answer since a break in the chain of causation had been established between what, for the sake of argument had been conceded to be dangerous driving and the death and serious injury which had resulted from impact. Second, that his direction to the jury in response to their note (see [18] and [19] above) was wrong since the lack of proper restraints was not relevant to a finding that the driving was 'dangerous'.

22. As he did in his submission of 'no case to answer', Mr Semple concedes that there was evidence upon which the jury could conclude that the appellant had been guilty of dangerous driving and not by reason of duress. He accepts that there does not need to be a direct line of causation but submits that there is a "world of difference" in making a deliberate decision or engaging a particular course of driving upon which a secondary event is overlaid, and the extraneous event which befell the appellant.

23. In support of the first ground, he argues that the death of Sayhaan and the serious injuries sustained by the appellant's wife and daughter Z were directly attributable to the appellant's lack of control following on from the unexpected blowout, and not a lack of control due to his 'competitive driving'. The blowout effected a break in the chain of causation. The expert evidence was that the blowout could have occurred, with equally disastrous consequences, if the appellant had been driving within the legal speed limit at 70 mph. Therefore, in the absence of any evidence that the appellant was aware of the dangerous condition of the tyre due to aged and latent defect the judge should have withdrawn the case from the jury.

24. Mr Semple concedes that there are two ways in which the jury could have approached the evidence in relation to the seat belts. The first went to credibility. If the jury determined that the appellant had not told the truth about the seat belts being in use, or

the car seat being properly fixed, this would undermine his evidence regarding his driving at speed through necessity. The second would come into play if the jury were not sure that the manner of his driving by itself was dangerous. In that case, the fact that the seat belt was not properly fitted may, in other circumstances have been causative of death.

25. However, he submits that notwithstanding that the jury may find that the appellant was driving dangerously if they found he was racing, any blame for the apparent lack of proper restraint by seatbelts, ought not be capable of independently grounding a finding of dangerous driving. Obvious defects in the vehicle which impacted how it was driven or caused danger, such as the vehicle being overloaded, could fall within the remit of 'manner/ambit of driving', but not the failure to use seat belts correctly. The jury's question was inevitably a reference to the issue over whether appropriate seat belts for the children were being used. The Judge was wrong to direct the jury that a known deficiency in the use of seatbelts "is capable of feeding into your consideration of whether a defendant drove dangerously whether you regard it as part of the manner of his driving or as being to do with the current state of his vehicle".

26. Miss Holmes, on behalf of the prosecution, opposes the appeal. She endorses the Judge's further directions to the jury in answer to their note, and the ruling on the submission of no case to answer.

27. She argues that the point is not whether the blowout may have occurred at 70 mph but that it did occur at more than 100 mph. The blowout was an unexpected situation which the appellant, should have appreciated may occur when he was driving at speed and call for his immediate reaction, in the same way as if a pedestrian had unexpectedly crossed his path. The speed at which the appellant was travelling at the time of the blowout made it impossible for him to react to it. Blowouts are known to happen. The appellant knew he was driving on an old tyre. In this case, the appellant said he was afraid the car was going to somersault before the blowout occurred, he had obviously been unable to control his vehicle at the speed he was travelling.

28. Miss Holmes submits that the jury's determination relating to the evidence of the seat belts can be discerned from the verdicts they delivered. It was clear from Mr Vinney's evidence that the child seat was not properly secured but there was evidence that the appellant's wife was wearing her seat belt when the impact occurred, and the jury convicted the appellant of causing her serious injury by dangerous driving. Logically, the jury would not have based their verdicts in relation to the appellant's wife and children upon a different footing. That is, it was the manner of the dangerous driving per se that had contributed to the death and serious injuries and not mechanical defect.

Analysis and conclusions
The submission of no case to answer.

29. We are in no doubt that there was evidence from which the jury could conclude that the appellant was driving competitively, that is at a speed greatly more than the speed limit and refusing to concede the outer lane of the motorway to the car driven by his co-accused and travelling at an equivalent speed some 10 metres behind him. The jury would be entitled to conclude that the manner of this driving fell far below the standard of a careful and competent driver. That is, it amounted to dangerous driving. Mr Semple

realistically conceded the point, albeit for the sake of his main argument in the submission of no case to answer.

30. Equally, Mr Semple realistically conceded that the defence of duress would be a matter for the jury. The defence would be dependent upon the appellant's evidence.

31. At the close of the prosecution case, there was evidence that (i) Mr Price had observed "crazing and cracking" on the rear offside tyre wall that suggested that the tyre was deteriorating; (ii) the appellant in interview had refused to answer questions about when he had last checked the roadworthiness of his vehicle, and particularly his tyres, prior to the fateful journey, (see [7] above); (iii) both cars were travelling in excess of 100 mph in the third lane of the motorway; (iv) both experts agreed that the greater the speed the greater the risk to the tyre's integrity and to the loss of control if the tyre did burst; and, (v) Mr Vinney's inspection of the car post impact revealed an unsecured child car seat. Therefore there was evidence of patent damage to the tyre, inadequate restraint and the possible adverse inference as to the state of the appellant's s knowledge about the condition of his offside rear tyre by reason of his refusal to answer, when questioned, something he later relied upon in his defence, quite apart from independent eye witness reports of excessive speed and 'competitive driving'. Whether the evidence established a course of dangerous driving that caused or contributed to the death and serious injury of Sayhaan and Z was, as the judge rightly found, a matter for the jury.

32. In this last regard, the judge correctly identified, and subsequently directed the jury that (i) the dangerous driving did not have to be the sole or major cause of the death or injuries; (ii) the Prosecution did not have to establish that the precise mechanism of the collision leading to death or serious injury was foreseeable; and, (iii) the question of the seat belt deficiencies, whether as to use or facility, could establish in the appropriate context, dangerous driving in accordance with the provisions of Road Traffic Act 1988, section 2A, of which we say more below.

33. We need not address the issues in [32] (i). This principle is well established on the authorities. It is the issue of foreseeability that featured large in this aspect of the appeal. Mr Semple's basic argument being that, if the blowout could have occurred at 70mph in the third lane of the motorway then, absent any other untoward driving or mechanical context, there would be no question of prosecution, and that this settles the point of lack of legal causation since it establishes a novus actus interveniens.

34. Mr Semple's arguments on his submission of no case to answer at the close of the prosecution case, and therefore also before us, ignore the factual evidence that the judge in the court below, and we, identified in [31] above. The jury's determination of the factual scenario is "the first step in establishing causation [-] the "but for" analysis" . See R v *Wallace [2018] EWCA Crim 690* @ [53]Mr Semple's arguments, based upon one answer by the experts and taken somewhat out of context, see [11] and [12] above, then appear to resurrect the narrow interpretation of the test proposed by *R v Girdler [2009] EWCA Crim 2666 on* the question of foreseeability; that is, he effectively submits that the prosecution must prove that the appellant could sensibly anticipate the exact event which led to the impact, to secure conviction.

35. His submissions in this last respect mirror those of the respondents in *R v A [2020] EWCA Crim 407.* However, this Court in *R v A,* having particular regard to the decision of the Canadian Supreme Court in R *v Maybin [2012] 2 SCR 30* on the analytical

approach to determine when an intervening act absolves the accused of liability, which was "closely reasoned by reference to principle, authority and academic opinion" and as subsequently adopted in *Wallace[2018] EWCA Crim 690,* rejected the respondent's interpretation of the decision in *Girdler @ [43]* as too narrow. The reference in *Girdler* to *"the circumstances"* of the intervening event did not mean the particular circumstances or specific chain of events. If the general form and risk of further harm was reasonably foreseeable, it may not matter that the specific manner in which it occurred was entirely unpredictable.

36. We do not accept Mr Semple's argument that *R v A* can be distinguished on the facts. The decision is not confined to the actions of third parties. As several critiques and articles generated by *R v A* describe, foreseeability of the intervening act may be tested by considering what sensible 'ex ante' advice would be tendered to the driver on the risks inherent in the manner in which they were driving, including any number of unpredictable situations regarding road conditions, vehicle malfunctions or other road user behaviour.

37. We are satisfied that the judge was right to leave the case to the jury. We find no merit in the first ground of appeal.

The Jury question and the Judge's response

38. Mr Semple's argument that known deficiencies in the seat belt mechanisms, or knowledge that they were not appropriately engaged to secure his children in the rear of the car, cannot elevate otherwise faultless driving into the criminal offence of dangerous driving runs contrary to section 2A (2) of the Road Traffic Act 1988, which expressly provides that:

> "*A person is also to be regarded as driving dangerously … if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous",*
>
> Further, section 2(4) provides that in assessing
>
> "*the state of the 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. (s 2(4))".*

39. It would be wrong to speculate about the reason behind the jury's question or the stage of deliberations based on the timing of the question. Seen in isolation, we would be concerned that that last sentence of the judge's response may have confused the jury in that it seems to conflate different scenarios in which the appellant may have driven dangerously. In the absence of a 'Brown' direction (*R. v Brown (Kevin) [1984] 79 Cr. App. R. 115 CA*, this could raise the prospect that the jury were not unanimous as to the basis of the guilty verdicts they returned.

40. However, we agree with Miss Holmes that the fact of the convictions in respect of causing serious injury to the appellant's wife by dangerous driving, indicates that the jury were unanimous in approach to the issue. That is, the evidence was clearly to the effect that the appellant's wife had been wearing her seat belt at the time of impact. It is illogical to suppose that the jury would have reached verdicts in respect of the

children on a different basis. Moreover, it is totally divorced from the factual situation in this case; subject to the defence of duress, there was evidence of dangerous driving that would place any unsecured passengers at risk of harm even absent a collision, and evidence from which the jury could be sure that the dangerous driving caused or significantly contributed to the fatal and other serious injuries.

41. There is no merit in this ground of appeal.

Overview

42. The appellant's credibility, as to his state of knowledge of the roadworthiness of the car, the efficacy and utilisation of the rear seat belt restraints, the manner of his driving and the issue of duress, was a live issue in the case. These were matters for the jury, as was their assessment of the factual causation of the tragic consequences that followed.

43. We are satisfied that in summing up the judge correctly and appropriately directed the jury. His written directions (which were shared with Counsel before he ruled on the submission of no case to answer) correctly identified the test of dangerous driving and causation. The written route to verdict was clear. The judge specifically reminded the jury of the appellant's case that was driving under duress, and in the alternative that the blowout could have occurred at any time and therefore broke any causative link. As indicated above, Mr Semple does not take issue with the summing up.

44. The convictions are not arguably unsafe. The appeal against conviction is dismissed.