IN THE COURT OF APPEAL
CRIMINAL DIVISION
[2023] EWCA Crim 1112
Case No: 2022/03167/B2

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 1st September 2023

B e f o r e:

LORD JUSTICE MALES

MR JUSTICE HOLGATE

MR JUSTICE HILLIARD

R E X

- v -

BENJAMIN NORMAN

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Miss M Heeley KC appeared on behalf of the Appellant

Mr C Ward-Jackson appeared on behalf of the Crown

J U D G M E N T
(Approved)

Friday 1st September 2023

LORD JUSTICE MALES:

Introduction

1. On 12th January 2022, following a trial in the Crown Court at Luton, the appellant Benjamin Norman (then aged 41) was convicted of causing death by careless driving when over the specified limit for a controlled drug, contrary to section 3A(1)(ba) of the Road Traffic Act 1988 (count 2). He was acquitted of the alternative count of causing death by dangerous driving, contrary to section 1 of the 1988 Act (count 1).

2. On 7th April 2022 he was sentenced to nine years' imprisonment and was disqualified from driving for a period of six and a half years and until he passed an extended test.

3. The appellant now appeals against conviction by leave of the single judge, who also granted an extension of time of 263 days. An appeal against sentence has already been dismissed by this court on an earlier occasion ([2022] EWCA Crim 1738).

4. The issue is whether experts ought to have been allowed to give their view as to which of two possible causes of the collision which occurred was the more likely.

The Facts

5. In the early morning of 1st November 2018, the appellant drove his white VW Transporter van to collect his roofing apprentice, 19 year old Thomas Smith, from his home in Bedfordshire. The appellant then drove at about 60 miles an hour along the A41 dual carriageway heading away from Bedford. Dashcam footage from other vehicles showed that his driving appeared normal at first, but at some point the appellant ceased to have control of the van. Over a period of 15 seconds the vehicle gradually drifted to the left, across both

lanes and into a layby where, shortly after 7 am, it collided with the rear of an articulated lorry. Catastrophic damage was caused to the passenger side of the van and Thomas Smith was killed instantly.

6. The right offside of the van was undamaged and, aside from some small abrasions to his head, the appellant was uninjured.

7. When asked to conduct the roadside drug test the appellant said "I'll fail that, I had a smoke last night". He duly failed the drug test.

8. The appellant gave the following account to PC Thompson at the roadside: "I have no idea what happened. One minute I was driving; I am pretty sure I was in the fast lane; I was maybe going a bit fast. The next thing I remember is being woken by the lorry driver. I don't know if I fell asleep or blacked out. If it wasn't for the lorry driver I don't know what would have happened".

9. At 11.50 am, approximately four and a half hours after the collision, a blood sample was taken which showed that the appellant's blood contained 5.5 micrograms of cannabis per litre of blood, the legal limit being 2 micrograms per litre. This was, therefore, a high reading a considerable time after the event.

10. The appellant answered "No comment" during his police interview.

The Appellant's Defence

11. Causing death by careless driving having taken drugs exceeding the specified limit is an offence of strict liability in the sense that it is not necessary for the prosecution to show that it was the effect of the drugs which caused an offender to drive carelessly so as to cause death.

However, it was the prosecution's case that the cannabis which the appellant had in his body had in fact caused him to be drowsy and to lose consciousness for a short while, thus causing the collision. The appellant accepted that he was a regular and heavy smoker of cannabis.

12. The appellant's defence was that at the time of the accident he suffered an epileptic fit which had caused him to lose control of his vehicle. As a matter of law this defence comes within the definition of insanity as a "disease of the mind", causing a temporary abnormality of brain function not due to any external factor, although it is not a natural use of language to describe a person suffering an epileptic fit as insane.

13. However, it was and is common ground that if the collision was caused by the appellant having had an epileptic fit, the correct verdict would be not guilty by reason of insanity. It was also common ground that in order for this defence to succeed, the burden was on the appellant to prove on the balance of probabilities that the collision was caused by an epileptic fit.

14. The appellant had not previously suffered an epileptic fit and had not been diagnosed with epilepsy. However, after the collision the appellant was diagnosed with epilepsy and had before the trial suffered some epileptic episodes. Thus, if the collision was caused by an epileptic fit, it was the first time that it had happened to the appellant.

15. There were realistically only two possible explanations for the collision: either the effect of cannabis had caused the appellant to become drowsy and briefly to fall asleep; or he had suffered an epileptic seizure. Because of the unusual burden of proof which applies to an insanity defence, unless the jury were satisfied on the balance of probabilities that the accident was caused by an epileptic seizure, the appellant was guilty of the offence.

The Evidence concerning the Appellant's use of cannabis

16. The prosecution maintained that the appellant had smoked cannabis on the morning of the collision. They relied on expert evidence from Dr Sharp that the quantity of cannabis found in the appellant's body indicated that he was most likely to have smoked on the morning of the collision; that his manner of driving, as witnessed by other motorists, was typical of driving while intoxicated by cannabis; and on hearsay statements from the deceased's mother and a family friend that the deceased had told them that the appellant had a propensity to drive while smoking cannabis and that on one occasion he had fallen asleep while doing so. Although this was hearsay evidence to which the appellant objected, the judge ruled that it was admissible and gave suitable warnings about it to the jury in the summing up.

17. The appellant sought to challenge the admissibility of the hearsay evidence on appeal, but the single judge refused leave for that ground to be argued, and it has not been renewed.

18. The appellant gave evidence. He denied that he ever smoked cannabis on the way to or from work. He confirmed that he was a regular user of cannabis but said that he did not smoke during the working day. He denied smoking cannabis in the morning of the day of the collision and said that he had last smoked at 11 pm the previous evening. He did not remember the collision. He had since been diagnosed with epilepsy and had suffered epileptic episodes. He denied ever driving under the influence of cannabis and said that he never felt impaired by cannabis the day after smoking it. He knew that he would fail the drug wipe test as he had been smoking the night before. He denied that the collision was caused by his cannabis use and said that on the day he did not feel intoxicated. He denied ever previously falling asleep at the wheel.

19. There was, therefore, an issue of fact for the jury to resolve as to whether the appellant had smoked cannabis on the morning of the accident and as to the extent to which his driving was affected by the cannabis which he had undoubtedly smoked either on the morning of the collision or the previous evening, as well as whether there had been occasions in the past when his driving was affected by cannabis.

The Expert Evidence

20. Both parties instructed experts. The prosecution called Dr Sharp, an expert on the effects of cannabis on driving, and Dr Derry, an expert on epilepsy. The defence instructed Dr Agarwal, a psychiatrist who was an expert in epilepsy, but in the event decided not to call him as there was no dispute that the appellant suffered from epilepsy and that the collision was consistent with being caused by an epileptic seizure.

Summary of the Evidence

21. There was, therefore, factual evidence before the jury as to the appellant's actual consumption of cannabis, together with expert evidence as to the effect of cannabis on driving. There was also agreement that the appellant had subsequently been diagnosed with epilepsy and expert evidence as to the consequences of an epileptic seizure. In short, the evidence was that the appellant's driving was consistent with being caused by drowsiness as a result of smoking cannabis, but was also consistent with the appellant having had an epileptic seizure.

22. The expert evidence was fairly summed up to the jury, including the criticisms made by the defence of the prosecution expert, Dr Sharp. The jury was helpfully provided with agreed summaries of the expert evidence.

The Agreement between Counsel

23. Before the trial started there was a discussion between counsel as to the ambit of the expert evidence. Counsel agreed that neither of them would ask any of the experts which explanation of the two they preferred. Both counsel took the view that such an opinion would be speculative and outside the experts' respective areas of expertise, and that it would also usurp the function of the jury. Counsel informed the judge of their decision and she approved such a course. The judge was not asked to rule on this and did not do so. In accordance with what they had agreed, neither counsel asked any of the experts for their opinion as to which of the two possible explanations for the collision was the more likely.

The Ground of Appeal

24. The sole ground of appeal for which leave has been given by the single judge is that the trial judge ought to have permitted the various experts to opine on the "ultimate question", namely whether, at the time of the accident, the appellant was suffering from the effects of cannabis use or had suffered an epileptic episode.

25. A short answer to this ground of appeal would be that the trial judge was not asked to make any ruling on that question, but it would not be satisfactory to leave the matter there.

The Submissions

26. Miss Michelle Heeley KC (who did not appear at the trial) submitted that experts are entitled to give their opinion as to the ultimate issue in such a case and that the experts here ought to have been allowed to give their opinion as to the cause of the collision. She submits that the appellant was disadvantaged by the approach taken, particularly when the burden of proving insanity fell on him, and that without the ultimate opinion of the experts being adduced in evidence, the jury did not have their full evidence and therefore the appellant did not have a fair trial. She submitted also that if that evidence had been adduced, it would have been favourable to the appellant because Dr Agarwal's report concluded that it was less likely

that the cannabis led to the appellant's loss of brain function and more likely that it was due to an epileptic fit, albeit he recognised that this was for the jury to decide.

27. Dr Derry (the prosecution expert on epilepsy) had also said in his report that if the appellant had epilepsy, then on balance an epileptic seizure was the more likely cause of the accident.

28. For the prosecution Mr Ward-Jackson, who did appear at the trial, conceded that the old rule that experts are not permitted to give evidence on the "ultimate issue" is now hardly a rule at all and that experts do frequently give their opinion on this. But he submitted that there is an important qualification on an expert's ability to comment on the ultimate issue. This qualification is that experts may only comment on matters within their expertise and are not permitted to stray outside that expertise. Here there were two very different disciplines to consider, namely the effect of epilepsy and the effect of cannabis on a person's ability to drive. An expert in one of these disciplines would not necessarily be an expert in another.

Discussion

29. We accept that the former rule that an expert is not allowed to comment on the "ultimate issue", which is a matter for the jury, is no longer a rule of law. This is apparent from the decision of this court in *R v Stockwell* (1993) 97 Cr App R 260. Giving the judgment of the court, Lord Taylor CJ said this:

> "Mr Clegg's third and final argument is that even if Mr Neave was rightly allowed to state his findings, he should not have been permitted to give his opinion on the very issue before the jury. He said: 'My conclusion on count 1 is that the photos strongly support the view that the suspect and the robber are the same man.' He went on: 'There is limited information, but I think the exhibits reveal that there is support for the view that the robber and the suspect are the same man on count 2, but it is not anything like as strong as the support on count 1'."

(The expert discipline in that case was facial mapping.)

> "Whether an expert can give his opinion on what has been called the ultimate issue, has long been a vexed question. There is a school of opinion supported by some authority doubting whether he can (see *Wright* (1821) Russ & Ry 456, 458). On the other hand, if there is such a prohibition, it has long been more honoured in the breach than the observance (see the passage at page 164 in the judgment of Parker LJ in *Director of Public Prosecutions v A and BC Chewing Gum Ltd* [1968] 1 QB 159 and the cases cited at page 501 of *Cross on Evidence* (7th ed.).
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> Professor Cross at page 500 of that work said:
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> > 'It is submitted that the better and simpler solution, largely implemented by English case law, and in civil cases recognised in explicit statutory provision, is to abandon any pretence of applying any such rule, and merely to accept opinion whenever it is helpful to the court to do so, irrespective of the status or nature of the issue to which it relates.'
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> The same view is expressed by *Tristram and Hodkinson* in their work on *Expert Evidence Law and Practice* at pages 152 to 153, where, after referring to the case of *Wright*, they say that in that case the expert witness could not express an opinion as to whether the particular facts before the court constituted an act of insanity. He could, however, state what types of behaviour demonstrated insanity in persons generally, from which the jury could draw inferences in the particular case. The learned authors went on as follows:
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> > 'There is little doubt however that such a distinction is not now rigorously observed, and given that expert evidence of this kind is to be put before a jury, it may be suspected that the often casuistic distinction between the general and the particular is either ignored by juries, or seen as a distinction of form rather than substance. It has been suggested too that some defences in criminal proceedings can in effect only be raised by adducing expert evidence, and that: 'it would put an insuperable difficulty in the way of insanity' if such evidence were to be excluded by an ultimate issue or other analogous rule.'
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> The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel

> can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work referred to say, a matter of form rather than substance.
>
> In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should made clear to the jury that they are not bound by the expert's opinion and that the issue is for them to decide."

30. This principle was applied in *R v Constantini* [2005] EWCA Crim 821, a case which is similar in some respects to the present case. The appellant in that case was convicted of causing death by dangerous driving. His defence of insanity, as a result of having suffered an epileptic fit, was rejected by the jury. In that case there was agreed expert medical evidence that on the balance of probabilities the appellant did suffer a spontaneous disorder of brain function immediately prior to the accident and that this is what had caused it to take place. The jury nevertheless convicted. The argument on appeal was that this was essentially a perverse verdict. The appeal against conviction failed. Giving the judgment of the court, Rix LJ said this:

> "20. However, Mr Shaw also accepted that the ultimate effect of the expert's evidence (and we stress again that we do not have a transcript of that evidence) reflected the joint report which the two neurologists made, the critical paragraph of which was as follows:
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> > 4. We understand that Mr Costantini's behaviour while driving the car just before the accident was very abnormal to the extent that it is unlikely that it could be explained by merely careless or dangerous driving, bad road conditions or suicidal intent. This being the case, it is in our opinion probable that he experienced some alteration of cerebral function producing, for example, altered awareness, confusion, visual impairment or spatial disorientation.'
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> We do not say that that was necessarily the precise terms in which the evidence finally emerged, but Mr Shaw accepts that, in effect, it was the essential terms.
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> 21. Precise or essential terms or not, the fact remains that in

> effect what the experts were being asked to do was to give their legitimate medical opinion based upon their understanding of the facts of the case. So far as the facts of the case are concerned, by which we mean not only the mechanical facts of what the car did but all the possible explanations of how that had come about, whereas they had of course to have some substratum of fact for their medical opinion, nevertheless the decision of what the actual facts were and how those facts were to be weighted, one possibility against the other, was ultimately a matter for the jury. Unless we could say that the jury's verdict was a perverse one, unless it was, in effect, a verdict to which no jury could properly come properly directed, we have to conclude, as is our duty, that the jury are the deciders of fact and the ultimate tribunal and it would not be right for us to interfere."

Rix LJ added at [22] that on this ground of appeal the jury's verdict could not be said to be perverse or unsafe. Ultimately, it was for them to say on all the evidence whether the doctors had persuaded them that some unknown medical condition had caused the accident.

31. Accordingly, *Constantini* was a case where the experts were asked to give their opinion as to the cause of the accident and did so in a way which was favourable to the defence. This court regarded that expression of view on the part of the experts as legitimate. However, the decision was that the jury is not bound to accept the experts' view and that this court will only interfere if the verdict is perverse which, on the facts of that case, it was not.

32. In the present case the judge was not asked to give a ruling whether the experts would be permitted to give their opinion as to whether one cause of the collision was more likely than the other and she did not do so. There can, therefore, be no criticism of her conduct of the trial.

33. However, we would go further. In our judgment the view taken by counsel that the "ultimate issue" should not be explored with the experts was reasonable and appropriate in the circumstances. We accept Mr Ward-Jackson's submission that there were two very

different expert disciplines in play in this case and that an expert on the effects of cannabis would not necessarily be able to comment usefully on the relative likelihood of cannabis on the one hand and epilepsy on the other being the cause of the collision. Indeed, Miss Heeley in her submissions did not seek to demonstrate that the epilepsy experts had any relevant expertise on the issue of the effect of cannabis on driving.

34. We note that when Dr Sharp (the cannabis expert) was asked in preparing her report to express a view as to which was the more likely cause, she said that it would be outside her area of expertise to do so.

35. Neither of the experts on epilepsy claimed any expertise on the effect of cannabis on a person's ability to drive without becoming drowsy and falling asleep, or on how long-lasting the effect of smoking cannabis may be, or the significance of the quantity of cannabis which the appellant had in his blood when tested. There was nothing in the manner of the incident itself that could lead any of the experts to conclude that one cause was more likely than another. Both causes could have been responsible for the drifting seen in the dashcam footage. To the extent that the epilepsy experts expressed a view in their reports that epilepsy was the more likely cause of the collision, it was wholly unclear on what basis they were able to reach such a conclusion. It appears to have been based on no more than the fact that an epileptic fit can cause a loss of consciousness. But as it was not in dispute that in principle smoking cannabis can have the same effect, the experts failed to explain why one conclusion was more likely than the other.

36. In any event, we do not accept that the epilepsy experts would have given evidence of any assistance to the appellant. The views expressed in their reports are heavily qualified.

37. Dr Derry (the prosecution expert) said in his supplementary report that in his opinion if the appellant has epilepsy now, then on the balance of probabilities an epileptic seizure was

the most likely cause of the accident. But, as we have said, he does not explain how or on what basis he is able to regard that as more likely than the smoking of cannabis. In any event, he goes on to say that before accepting this to be the case, he would like to be able to review the raw EEG data himself, the interpretation of EEG not being an exact science. He comments that a common problem in epilepsy diagnosis is the "over-reporting" of minor changes on the EEG, which can lead to people who do not in fact have epilepsy being misdiagnosed. He says that if he has that raw data he would be able to give a more definitive comment on the likelihood of epilepsy in this case.

38. Dr Agarwal (the defence expert), who in the event was not called, said this in his report:

> "6.7 Based on the available information, it is my opinion that one of the extrinsic factors in [the appellant's] case is consumption of cannabis, which could have extinguished [the appellant's] brain functions for a brief period at the material time. However, [the appellant] has reported to have been using cannabis regularly for many years prior to the alleged index offence. He has not reported taking an excessive amount of cannabis and has not reported any side effects after using cannabis the night prior to the alleged index offence. His blood levels indicated that there was some cannabis in his body. However, based on the limited information, in my opinion, it is less likely that the cannabis would have led to [the appellant's] episode of loss of brain functions for brief period. Nevertheless, it is a matter for the jury to decide if his use of cannabis led to totally extinguishing [the appellant's] brain functions at the material time, thereby leading to automatism.
>
> 6.8 Based on the reports from various experts in the field of neurology, I note that [the appellant] has received a diagnosis of epilepsy. In my opinion epilepsy is one of the medical conditions that can totally extinguish brain functions for a brief period when an individual is experiencing an epileptic fit. If the Court accepts that [the appellant] had an epileptic fit at the material time of the alleged index offence, in such instance, on the balance of probability, it is my opinion that [the appellant's] epileptic fit is likely to have totally extinguished his brain functions for a brief period."

39. This falls some way short of amounting to clear evidence that the collision in this case

was caused by an epileptic fit. Indeed, the final observation that if the appellant had an epileptic fit at the material time, that is likely totally to have extinguished his brain functions is no more than circular. If he had an epileptic fit, then it is a statement of the obvious that that was likely to be the cause of the collision. But that was the question which the jury had to determine.

40. Moreover, the question whether cannabis or epilepsy was the more likely cause of the collision cannot sensibly be answered without taking a view on the facts, in particular as to whether the appellant had smoked cannabis on the morning of the collision and whether he had smoked in the car on previous occasions and on one occasion had nodded off. Clearly a view about those matters would be highly relevant to the jury's consideration of the cause of the collision, but these were factual matters for the jury and not maters on which the experts could express any view.

41. Miss Heeley submits that it was not fair that the road traffic expert was allowed to give his opinion that the collision was caused by the appellant's consumption of cannabis. However, his evidence does not take matters further. It was given in a report prior to the appellant's diagnosis of epilepsy, and that was a factor which the road traffic expert simply did not consider at all. It was therefore of no value in assisting the jury which of the two possible causes was the more likely. That was a point which the defence was well able to make and no doubt did make in submissions.

42. Miss Heeley submits that the agreement between counsel that the experts would not be asked to express an opinion as to the more likely view was based on a misunderstanding of the law by both counsel to the effect that experts were not permitted to give their opinion on the ultimate issue in the case. We do not accept that submission. Counsel appear to have correctly taken the view that experts could not express an opinion as between two possible

causes, as it would be outside their expertise to do so. We agree with that position. We also agree with Mr Ward-Jackson's submission that that was in fact the situation in this case.

43. Accordingly, there is no basis on which to conclude that the jury would have been assisted by the experts expressing a view about the more likely cause of the collision. It would have been speculation on the experts' part, straying outside their proper area of expertise, which is not permitted. There is, therefore, no reason to doubt the fairness of the appellant's trial. On the evidence the jury were entitled to conclude that the appellant had failed to discharge his burden of proof on the issue of insanity.

44. For these reasons the appeal against conviction will be dismissed.
