IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2024] EWCA Crim 684

No. 202303584 A3

Royal Courts of Justice

Wednesday, 8 May 2024

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE GOSS
HER HONOUR JUDGE MONTGOMERY KC

REX
V
JOHN BATES

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Mr. S. Hunka appeared on behalf of the Applicant.
Ms. S. Allen appeared on behalf of the Crown.

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J U D G M E N T

LORD JUSTICE POPPLEWELL:

1 The appellant's dangerous driving killed one victim and caused serious injury to another. On 26 April 2023 he pleaded guilty in the Crown Court at Warwick at the pre-trial preparation hearing to one offence of causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988, and to a further offence of causing serious injury by dangerous driving, contrary to section 1A of the Road Traffic Act 1988. He was sentenced to a period of imprisonment of 7 years, 1 month for the section 1 offence of causing death, having been given 25 per cent credit for the guilty plea. A concurrent sentence of 27 months' imprisonment was imposed for the section 1A offence of causing serious injury. He was disqualified from driving for 9 years 7 months, comprising a discretionary period of 6 years and an extension period of 3 years seven months and until he passed an extended driving test.

2 He appeals with leave of the single judge on the sole ground that he should have been given full credit for his plea as having been indicated at the first stage of proceedings which took place at Coventry Magistrates' Court, when the district judge (MC), who was sitting there sent the case for trial at the crown court. In those circumstances, it is not therefore necessary to go into the facts of the offences.

3 At the crown court sentencing hearing the question of his guilty pleas were dealt with as follows, according to the advice and grounds which were drafted by Mr Hunka, who appeared on behalf of the appellant before the sentencing judge and has represented him in this court.

> "5. During mitigation I addressed HHJ Cooke on the question of credit, submitting that Mr Bates had entered his guilty pleas at the earliest possible stage, given that the offence of causing dangerous driving is indictable only. I added that in his police interview Mr Bates had made the appropriate admissions that one would expect, given the circumstances. He admitted that he should not have been driving (having drunk so much alcohol) and described the manner of his driving as 'disgraceful', when asked whether it fell far below the standard of a competent and careful driver [..]
>
> 7. I had understood from communication I had with those instructing prior to the first appearance in the magistrates' court that Mr Bates was accepting his guilt -- indeed, although my brief did not specifically set out what had happened in that hearing, it included the words 'Counsel is kindly asked to represent the defendant at the hearing on 26 April [...] and at any subsequent hearings. A pre-sentence report will hopefully have been arranged prior to the hearing.' I had, therefore, assumed that it had been made clear at that first hearing that this matter was not contested.
>
> 8. When I invited HHJ Cooke to apply full credit, he brought to my attention that the sending sheet [...] recorded that the indicated plea was 'Not guilty or none.' I had not noticed that and was rather surprised to see -- I maintain that was not my understanding of the position, particularly in the light of Mr Bates's approach in interview. I asserted that he should be afforded full credit as there had never been any question that he was accepting of his guilt.
>
> 9. HHJ Cooke did not respond any further and I moved on with my mitigation. The next time credit was mentioned was in His Honour's

sentencing remarks, when he declared that 25 per cent would be applied as no guilty indication was given in the magistrates' court.

10. In my attendance note (emailed to those instructing at 13.54 that day) I asked for further information concerning exactly what happened at that first hearing. Mr Mark McNally from those instructing kindly sent a prompt reply at 15.15 in which the following was written:

> '[...] the district judge addressed John, identified him and said that as the matter was indictable, so no indication of plea was required and the case would be adjourned to the crown court [...] I recall the district judge saying he would mark the sending form with an indication that this was likely to be a guilty plea, but I cannot locate that form. Mr Bates was not asked for an indication, but I had told the district judge that it was likely to be guilty, which is why he said he would he endorse the form.'

11. Having received that, I then (at 15.25) asked that that be submitted to the crown court for the attention of HHJ Cooke so that he could consider the matter under the slip rule. I am aware that Mr McNally did so that afternoon.

12. As it happened, I was in HHJ Cooke's court that afternoon on other matters and in a moment between cases I alerted him to the fact that an email had been sent to the court for his consideration concerning the issue. His Honour had an exceedingly busy list and I was not expecting that he take any action that day.

13. Since that day I know that those instructing have asked the court on numerous occasions whether the matter has been considered. Unfortunately, and for a reason I know not, the case was never listed again under the slip rule. We are, therefore, in a position where we must appeal on this discrete point."

4 When granting leave to appeal on this point the single judge suggested that the full court would be assisted by a sworn statement of truth as to what had happened at the magistrates' court. Mr McNally duly provided a signed statement. It included the following passage:

> "Prior to the case being called on, because there was a large number of members of the public, I had addressed the district judge and informed him that Mr Bates would be entering a guilty plea to the charges that he faced but we would not want to say that in front of the members of the public, and by virtue of the fact that the case had to be sent to the crown court, there was no need for a formal indication in the magistrates' court. The matter was, therefore, called on and the district judge dealt with the entire proceeding himself, and identifying Mr Bates, and sent the matter to the crown court, having granted Mr Bates with unconditional bail. Mr Bates remained in court whilst the members of the public filed out and Mr Bates was then released with his father into my company."

5 We made some further enquiries prior to the hearing in order to clarify various aspects of the position as to what had happened, including in particular, whether a Better Case Management form had been completed and survived; how the causing serious injury

offence, which is triable either way, had been dealt with; and the terms in which the indication had been given to the district judge prior to the case being called on.

6 Mr McNally has provided a response, which is in the following terms:

> "1. A Better Case Management form was completed by the district judge Mr Allen-Khimini. He said that he was going to endorse it with the suggested guilty indication by the defendant. When I did not receive a copy of the form, I contacted the clerk, who could not find one.
>
> 2. The offence that the defendant faced in the magistrates' court was the causing death by dangerous driving offence, which is indictable only. That is what I believe the district judge focused on (and so did not ask the defendant to indicate a plea to the either way offence).
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> 3. Before the family of the deceased entered court (and there were a lot of them), the solicitor indicated to the judge that the defendant would be admitting his part in the offending.
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> 4. The indication was given to the district judge before all of the family had entered.
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> 5. The defendant was invited into court with his father, and the victim's family then came in. The district judge addressed the defendant, identified him and said that as the matter was indictable, so no indication of plea was required and the case would be adjourned to the crown court, bail being reinstated.
>
> 6. I recall the district judge saying that he would mark the sending form with an indication that this was likely to be a guilty plea, but I cannot locate that form. Mr Bates was not asked for an indication, but I had told the district judge that it was likely to be guilty, which is why he said he would endorse the form."

7 There were several serious errors in how matters proceeded at the magistrates' court, as described by Mr McNally. First, we are surprised that Mr McNally did not himself fill in the Better Case Management form, as he was required to do. It has two sections. Part 1 is headed "To be completed by the parties before the hearing". It has a box in which it asks the question: "Has the defendant been advised about credit for guilty pleas?", and requires the box to be ticked either "yes" or "no". It has a further box which asks the following question in relation to each of the charges: "Pleas (either way) or indicated pleas (indictable only) or alternatives offered. Warning: this information may affect credit for plea." In that box there are to be entered what are described as pleas to either way offences or indicated pleas to indictable only offences.

8 The second part of the form headed "Part 2" is to be completed by the district judge (MC), if there is one, or by the legal adviser in the case of lay magistrates. It has various provisions intended to facilitate the position at the crown court, including asking the question whether if a guilty plea was entered or indicated, a Pre-sentence Report was ordered and if not why not.

9 Where the defendant is represented it is incumbent on the representative to confirm that they have advised about credit for guilty pleas in the context of how it affects credit for plea and

to identify the plea in an either way offence or the indication of plea in an indictable only offence on the form. That is the task for the representative, not the court, as the form makes clear. When the matter is sent to the crown court for trial or sentencing, a copy of the Better Case Management form must be uploaded to the DCS via the common platform so as to be available to the crown court sentencing judge. In this way there can be no room for dispute at that stage about whether a guilty plea to an indictable offence was indicated at the magistrates' court. This is something which has already been emphasised in this court in *R v Plaku & Ors [*2021] EWCA Crim 568; [2021] 4 WLR 82 at [16], where it was described as essential.

10 Secondly, whilst the section 1 offence of causing death by dangerous driving is triable on indictment only, the section 1A offence of causing serious injury by dangerous driving is triable either way (see the Road Traffic Offenders Act 1988, section 9 and Schedule 2). Mr McNally is wrong to have described the offences as requiring trial in the crown court "by their nature". What should have happened, as required by section 17A(5) of the Magistrates' Courts Act 1980, in relation to the causing serious injury offence was that the appellant should have been asked orally at the hearing whether, if the offence were to proceed to trial, he would plead guilty or not guilty. If an indication were then given of a guilty plea, that would be treated, in effect, as a guilty plea at the magistrates' court on a summary trial, giving rise to a decision to be taken as to whether to commit for sentence to the crown court, pursuant to section 14 of the Sentencing Act 2020 (see section 17A of the Magistrates' Court Act 1980 and the discussion in *R v Dale* [2022] EWCA Crim 207 at [9]). It is for this reason that the Better Case Management form asks for pleas in either way offences, which although strictly speaking, are initially given as indications of plea, are then to be treated as pleas given at a summary trial.

11 Thirdly, it is entirely improper for indications of plea in indictable only cases to be given privately and before the hearing so as to avoid publicity. Hearings are in public so that the public may know of all matters which take place at the hearing, and of all matters which are required to take place. Indications of plea are one of those matters. Rule 9.75 of the Criminal Procedure Rules provides that for indictable only offences, the accused must be asked at the hearing whether he intends to plead guilty in the crown court. That must take place at the hearing. The principle of open justice requires this. If a defendant wishes to gain full credit for an indication of plea at the first stage, which is usually in the magistrates' court for indictable only offences, the indication must be given in public at the hearing itself, not in some private communication to the court outside the hearing, if it is to attract those consequences.

12 Notwithstanding all these errors, what the appellant relies on is not capable of amounting to a sufficient indication of plea, even if it had been given at the hearing in the magistrates' court. It is apparent from the totality of the information given by Mr McNally that what he said to the district judge prior to the hearing was that a guilty plea or guilty pleas were likely. However, in order to attract full credit, what is required is an unequivocal indication of a guilty plea. It is well established that merely saying that a guilty plea is "likely" does not fulfil this requirement, and does not attract the consequence of an entitlement to full credit (see *R v Hodgin* [2020] EWCA Crim 1388; [2020] 4 WLR 147 at paragraph 37, and *R v Plaku* at paragraph 17. In this case the only indication given by Mr McNally was that a guilty plea was likely, which is insufficient.

13 It follows that the ground of appeal for which leave was given must fail.

14 However, there is one small correction to the disqualification period which is required, which we are grateful to the Criminal Appeal Office for drawing to our attention.

Sections 35A and 35B of the Road Traffic Offenders Act 1988 require the discretionary period of disqualification to be extended to ensure that a person who is also sentenced to custody does not serve all or part of their disqualification whilst in custody. Counsel's advice on appeal against sentence at paragraph 16 submits that the appellant is due to be released at the two-thirds point of his sentence because imprisonment was for seven years or more. That is not correct. The requirement to serve two-thirds of a sentence of seven years or more in custody before being eligible for release in certain cases was introduced on 28 June 2022, when section 130 of the Police, Crime, Sentencing and Courts Act 2022 came into force, inserting section 244ZA into the Criminal Justice Act 2003 ("CJA 2003"). This provided that offenders sentenced on or after that date for an offence listed in Part 1 or Part 2 of Schedule 15 to the CJA 2003, for which a life sentence could be imposed, would serve two-thirds of the custodial term before release on licence.

15 The offence of causing death by dangerous driving is listed in Part 2 of Schedule 15, but at the time that the appellant committed the offence it was punishable with a maximum sentence of 14 years. The sentence for this offence was increased to life imprisonment with effect from 28 June 2022, but only for offences committed after that date (see section 86(9) of the Police Crime Sentencing and Courts Act 2022). The index offence was committed on 2 October 2021. The judge was, therefore, right to proceed, as he evidently did, on the basis that the extension required by section 35A was of a period equivalent to half the sentence of imprisonment. That would be 42.5 months.

16 However, the judge appears to have rounded this up to 43 months. There is no power under section 35A to round up in this way. Accordingly, the length of the disqualification needs to be reduced by half a month, so that it becomes a total period of nine years six and a half months, rather than nine years seven months. The nine years six and a half months comprises a discretionary period of six years and an extended period of forty-two and a half months. To that extent, and only to that extent, the appeal is allowed.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.