

Regina v James Leahy

[2018] EWCA Crim 2858

Before: Mr Justice Popplewell and Mr Justice William Davis

Friday 23rd November 2018

Representation

Miss M Pasteris appeared on behalf of the Appellant.

Judgment

Friday 23rd November 2018 Mr Justice Popplewell:

1 On 22nd June 2018 in the Crown Court at Woolwich the appellant was sentenced by His Honour Judge Raynor to 28 months' imprisonment for the offence of causing serious injury by dangerous driving. No separate penalty was imposed for the offence of driving whilst unfit through drugs. He was disqualified from driving for a total period of 50 months, comprising a discretionary disqualification period of three years and an extension period of fourteen months under section 35A of the Road Traffic Act 1988 . There is some uncertainty about whether the requirements of section 36 of the Act were fulfilled which requires the disqualification to last until an extended driving test has been passed.

2 The appellant appeals against sentence with the leave of the single judge.

3 The facts of the offence are these. At about 10am on a Saturday in June 2017 a collision occurred in Ship Lane in Sutton at Hone, Kent between a hire van being driven by the appellant and a motorcycle being ridden by Garry Layton, who was then aged 63. Ship Lane is a country road running between Swanley and Sutton at Hone. It has no road markings and is mostly single lane with slightly wider passing areas. At the time of the collision the appellant was driving towards Sutton at Hone and Mr Layton was riding in the opposite direction, towards Swanley. Mr Layton was a keen motorcyclist and instructor. He was travelling at an appropriate speed on a road which he had used for 30 years and knew well. The appellant overtook a cyclist at a blind right-hand bend. His van went over to the right-hand side of the road. As a result, the front side of the van struck the motorcycle being ridden in the opposite direction by Mr Layton. Although Mr Layton had slowed as he approached the bend, he was left with no room to avoid the collision.

4 There was footage from a head camera which was worn by Mr Layton which showed that the road would have been wide enough for the two to have passed

had the appellant not been overtaking and been on the other side of the road.

5 The Emergency Services attended because the result of the collision was that Mr Layton was thrown by the force of the collision to the ground. He was taken to hospital where it was ascertained that he had sustained an open fracture of his right knee with a large laceration in the same area. X-rays confirmed a displaced fracture of the knee and of the distal femur. He was admitted to hospital and underwent an operation the following day. He had screws placed in his lower femur and patella. He had also suffered broken bones in his foot and his right toe was broken.

6 Meanwhile, when the police arrived at the scene they questioned the appellant who identified that he was taking medication. When they asked him if he was meant to be driving whilst on that medication he replied: "No, but doesn't everyone?" He failed a roadside test for drugs and was arrested. A urine specimen taken at the police station showed the presence of a number of drugs or metabolites. They included cocaine and a cocaine body breakdown product indicative of the use of cocaine sometime within 24 hours of the specimen being taken.

7 In interview, the appellant agreed that he had moved on to the wrong side of the road to overtake the cyclist and that he was in a blind spot and could not see down the road as he did so. He said that he was not completely on the opposite side of the road and denied that he had driven dangerously.

8 At the plea and trial preparation hearing the appellant entered a not guilty plea. After the trial was fixed a Defence Statement was served still contesting that the driving had been dangerous. The matter returned to court on 22nd May when the appellant changed his plea to guilty. He was given credit of 20 per cent for his guilty plea at that stage.

9 The appellant was aged 48 at the time of the incident. He had no relevant previous convictions.

10 There were before the sentencing judge two Victim Impact Statements from Mr Layton. The second was almost a year after the accident. He still walked with a limp when he became tired at work. His knee ached and he had to take painkillers at night. He had been a keen cyclist and cycling instructor. His cycling activities had been curtailed as a result of the accident and he still did not have the strength and flexibility in his knee to be able to cycle as extensively as he had before. He had had to use about £6,000 of his savings, which were for the purposes of his pension, to supplement his statutory sick pay when he had been off work. He described the whole event as deeply traumatic for him.

11 At the sentencing hearing the defence had initially made an application to adjourn for the preparation of a psychiatric report. In the event, the appellant's sister gave oral evidence to the court as a result of which the judge considered an adjournment unnecessary. She testified that ten to fifteen years ago the

appellant had sustained a back injury when a police officer had run him over. Since then he had suffered chronic back pain, bouts of depression and had had a breakdown. That was about ten years ago when he went into a psychiatric unit for about two weeks. She said that he had not had much help with his psychiatric problems. He also had a lot of emotional problems and family difficulties.

12 The chronic back pain which the appellant suffered as a result of the incident was being treated by prescription medication. There were ten separate medications which he was taking at the time. They included opiates and benzodiazepines.

13 In passing sentence the judge took account of the guidelines for death by dangerous driving, although serious injury, not death, was the harm in the case before him. He said that in respect of seriousness, this was not a prolonged or deliberate course of very bad driving, but that the appellant must have been aware of the risk of driving of this nature and of the absolute necessity for people to take bends slowly and to be aware of what was going on around them. He identified the relevant aggravating factors as the consumption of illegal drugs and the consumption of the legal drugs where they impaired the appellant's ability to drive. The judge concluded that the appellant's driving was partly caused by the ingestion of cocaine and was contributed to also by having taken the prescription drugs. He observed that, in respect of personal mitigation, the appellant had the benefit of a good driving record. He had been a driver for some time and had no previous driving matters recorded against him. Regard was also paid to the remorse which he expressed.

14 The judge found the appellant to fall within level 3 of the guidelines; his driving created a significant risk of danger. The judge had regard to a number of cases which dealt with causing death by dangerous driving. They included: *R v Abbassi* [2017] EWCA Crim 779 , *R v Bennett* [2017] EWCA Crim 748 , *R v Sandulache* [2015] EWCA Crim 1502 and *R v Vincer* [2014] EWCA Crim 2743 . He took account of the severity of the injuries to Mr Layton and observed that, within a range of harm, this was not the most serious case. He considered that the appropriate sentence after a trial would have been three years' custody, which he reduced to 28 months by giving credit of 20 per cent for the appellant's plea of guilty and rounding it down.

15 The essential ground of appeal is that taking a starting point of three years after a trial was manifestly excessive, given the nature of the harm which was caused, the nature of the offending and the particular mitigating factors.

16 We are persuaded that there is some force in that submission. The judge correctly followed the guidance which this court gave in *R v Dewdney* [2015] 1 Cr App R(S) 36 to consider the sentencing guideline for causing death by dangerous driving. It fell within category 3, involving a significant risk of danger. It did not involve more than a single exercise of judgment in deciding to overtake when it was dangerous to do so. It was clearly aggravated by the appellant's use

of cocaine sometime in the previous 24 hours, which was a contributing factor, and by his driving when on prescription drugs, which he knew was contrary to medical advice and which was also a contributing factor. That aggravation was to a significant extent balanced by the personal mitigation of his good record, his remorse and his own difficulties.

17 A category 3 offence of causing death by dangerous driving attracts a starting point of three years' custody, with a range of two to five years. That offence carries a maximum sentence of fourteen years' custody. The offence of causing serious injury by dangerous driving carries a maximum sentence of five years' custody. The difference between the offences lies in the harm caused. In a case of causing serious injury by dangerous driving, it is always necessary to give weight to the seriousness of the injury in the context of the offence.

18 Whilst not in any way seeking to minimise the impact on Mr Layton, his injuries are towards the lower end of the scale of injuries which are properly described as serious, which is the threshold for the offence. We consider that the gravity of this offending would properly be reflected in a sentence of two years' imprisonment after a trial. After discounting by 20 per cent for his guilty plea, that would result in a sentence for the appellant of about nineteen months. We will, accordingly, substitute a period of nineteen months' imprisonment in place of that of 28 months.

19 We must also adjust, therefore, the disqualification period. It will run for $45\frac{12}{13}$ months, being the three year discretionary period and an extension period, under section 35A of the Road Traffic Act 1988 , of nine and a half months.

20 We will also confirm that there should be imposed a requirement that an extended re-test is passed; and if and in so far as that was not imposed by the judge, it is imposed on this appeal.

21 To that extent and no further, the appeal against sentence is allowed.