Regina v Emily Georgina Wilkinson

[2019] EWCA Crim 702

Before: Lord Justice Coulson Mr Justice Spencer His Honour Judge Leonard QC

Thursday 4th April 2019

Representation

Ms S Murray appeared on behalf of the Applicant.
Mr J O'Higgins appeared on behalf of the Crown.

Judgment

Mr Justice Spencer:

1 This application for leave to appeal against sentence has been referred to the Full Court by the Registrar.

2 The applicant, Emily Wilkinson, is now 21 years of age. On 11th March 2019, just over three weeks ago, she was sentenced to a term of six months' imprisonment by His Honour Judge Tindal in the Crown Court at Worcester for an offence of causing death by careless driving, contrary to section 2B of the Road Traffic Act 1988 . The applicant had been convicted of the offence on 23rd January 2019 after a trial. She was also disqualified from driving for a period of two years and three months.

3 There was a co-accused, Balvinder Sangha, who was also convicted of causing death by careless driving in relation to the same incident. He was sentenced to twelve months' imprisonment.

4 In short, the grounds of appeal are that the judge was wrong to impose a custodial sentence at all, rather than a community order with an unpaid work requirement, and that in any event any sentence of imprisonment could and should have been suspended.

5 We are grateful to Ms Murray for her written and oral submissions, and to Mr O'Higgins on behalf of the prosecution for his written and oral submissions.

6 It is widely recognised that sentencing for causing death by careless driving in cases such as this is one of the most difficult and demanding tasks any judge in the Crown Court is called upon to undertake. This appeal presents a paradigm example.

7 The facts of this tragic case are as follows. The deceased, Mr Ross Fawthrop, was a very fit and active 58-year-old gentleman. At 7.40 am on Thursday 15th June 2017 Mr Fawthrop was riding his bicycle uphill along Bromsgrove Road, Romsley, Halesowen. He had got up very early that morning to accompany his wife who was cycling to work to celebrate 'National Clean Air Day' as part of her job with the local council. He wanted to ensure that she got there safely. He had completed that journey and was making his way home again.

8 The applicant, then aged 19, was driving to work in her Vauxhall Corsa. She was studying for a Degree in Education and was on her way to a school placement as part of her course. She had been making that same journey for five weeks or so.

9 As Mr Fawthrop approached the junction with Poplar Lane to his right, the applicant was waiting at that junction to turn right out onto the main road, Bromsgrove Road. She saw the cyclist approaching from her left, but she failed to notice a Ford Transit van approaching from her right along the main road, although it would have been in her view for several seconds had she been keeping a proper lookout. The van was driven by the co-accused Mr Sangha. The speed limit was 30 mph, but he was travelling at well in excess of the limit, probably at least 46 mph.

10 The applicant pulled out directly into the path of the van, which, because of its speed, had no chance of avoiding a collision. The front of her car struck the rear nearside of the van. That caused the van to rotate anti-clockwise and collide with Mr Fawthrop. He was thrown violently from his cycle and died as a result of the injuries he sustained.

11 There was agreed evidence that the applicant's view to her right as she was waiting at the junction extended to 136 metres. As she looked to her right, the main road bent slightly to the left as it went uphill, but the van would have been in view for that distance as it emerged from the bend.

12 There was also agreed evidence as to the number of seconds for which the van would have been in the applicant's view at various speeds had she been looking. If the van had been travelling within the speed limit of 30 mph, it would have been in her view for 10.1 seconds; at 40 mph the van would have been in her view for 7.6 seconds; and at 50 mph for 6.1 seconds. There was some further adjustment to those figures during the course of the evidence, as we shall explain in due course.

13 When interviewed by the police the applicant said that she had looked to the left when she reached the junction. She had seen the cyclist. She had looked to the right and there was nothing coming. She looked to her left again and then edged forward out of the junction. Only then was she aware that she had collided with something. She did not see the van at all prior to the collision. She did not know what it was that she had hit.

14 We note that in her defence statement served in advance of the trial she said that almost as soon as she began to leave the junction she felt a bump and was thrown back into her seat. It was at this point she realised she had hit Mr Sangha's van. He had previously not been visible when she had made her observations of the road to the left and right to see if it was safe to pull out. It was said in the defence statement the death of Mr Fawthrop would not have occurred if Mr Sangha had not been travelling at excessive speed:

> "The defence contend that the driving of the defendant was entirely appropriate in the circumstances."

15 The accident took place in broad daylight; the weather was warm and dry; visibility was excellent, with no adverse conditions. For example neither driver would have had the sun in their eyes; the traffic on the main road was light and free flowing.

16 At the trial each of the defendants effectively blamed the other.

17 There was evidence from a police collision expert, and the jury had photographs and plans. There was also some CCTV footage from a building a short distance away which showed the collision with distressing clarity. We have watched that footage.

18 In convicting the applicant of causing death by careless driving the jury were sure that she had driven carelessly in making inadequate observations before emerging onto the main road. The jury were also sure that it could sensibly have been anticipated that if she pulled out without looking she might collide with an oncoming vehicle and that a passing cyclist could be killed in the collision. Those were necessary conclusions of fact reached by the jury in following the route to verdict we have seen which the judge provided as part of his summing-up.

19 Following conviction, the case was adjourned for the preparation of reports. The applicant was a young woman of good character. There was a pre-sentence report, which stated that she was fully aware of the impact of her actions on Mr Fawthrop's family. She told the probation officer that she could not believe she had impacted someone's family in such a negative way and she would have to live with that for the rest of her life. To the probation officer she expressed remorse and was tearful throughout the interview. Following the offence, the applicant had been diagnosed with post-traumatic stress disorder, depression and anxiety. She had received counselling for six months. That was before the prosecution was launched. She had then relapsed. The assessment in the report was that there was a low likelihood of reoffending. It was noted that the applicant was terrified of the prospect of prison. The recommendation in the report, on the basis (it should be noted) that this was a momentary lapse for the purpose of the sentencing guidelines, was a twelve-month community order with an unpaid

work requirement, although it was recognised by the author of the report that the court might view the offence as so serious that custody was the only option.

20 The applicant herself wrote a letter to the judge a month or so after the trial expressing remorse for the pain she had inflicted on the deceased's family. She described the impact of the fatal impact on her own mental health and on the prospects of her completing her university course.

21 She also wrote a letter to Mr Fawthrop's family, although it is unclear whether that would have reached them before the sentencing hearing. It was certainly provided to the prosecution and was uploaded to the Digital Case System in advance of the hearing. In that letter, which we have read carefully, the applicant said that she had wanted to write to the family for some time in order to show her sorrow and remorse. She had never known what words to use. She said:

> "If only I could have taken the place of your husband …I would've had my own life taken in a heartbeat if it meant allowing you to keep your loved one."

She acknowledged that it would never be enough, but she apologised profusely for the family's loss and for the pain she had caused.

22 In addition, the judge had a host of impressive testimonials from members of the applicant's family, from friends of hers and from those who knew her well, all attesting to her good character and the distress that she had suffered. It has to be said, however, that some of those letters did not grasp the extent of the applicant's culpability, describing it, in one letter at least, as a "minor error of judgment" or a "momentary lapse in judgment".

23 There was a very moving impact statement from Mr Fawthrop's widow and another statement from her son on behalf of himself and his brother. The widow spoke of the devastation of losing her husband after 32 years of marriage, and the impact of his sudden death on their two sons and all the family. She spoke of the additional distress of the trial, and, as she put it, the fact that the defendants had not had the decency to admit what they had done. They had, she said, shown no remorse but had defiantly insisted that it was not their fault, subjecting the family to the agony of a trial.

24 In passing sentence, the judge began by acknowledging the power and truth of what Mrs Fawthrop and her son had said in their statements. As the judge put it:

> "It is tempting to say… if only you had shown the degree of insight and remorse that you are now beginning to show at an earlier stage."

He observed that the pain of the family had been prolonged by the refusal of both defendants to take any responsibility until now for what each of them had done. He continued:

> "Perhaps you convinced yourselves that the other was purely to blame, but the jury had no difficulty whatsoever seeing through that. It was perfectly obvious to them that you were both responsible for Mr Fawthrop's death. You both caused it because you both drove carelessly."

25 The judge accepted the expert evidence that Mr Sangha had been travelling at a speed of at least 46 mph before braking, which was far too fast, with the result that when the applicant pulled out he could not avoid a collision.

26 In respect of the applicant's culpability, the judge said:

> "But that collision and Mr Fawthrop's death would not have happened had you not pulled out. Mr Sangha was there to be seen, whatever speed he was travelling. You clearly saw Mr Fawthrop, and you wanted to get out in front of him, and so it was obvious, at least to me, that you made a quick look to the right, and you saw a car, which you assumed was disappearing round the bend uphill, but the chances are in fact it was Mr Sangha coming downhill. You did not look to the right again, and pulled out in a way which meant you were pretty close to Mr Fawthrop. So, this was not just a case of one mistaken observation, it was a careless and rushed emergence into the junction without looking properly as well."

27 The judge then turned to the Sentencing Council guideline for causing death by careless driving. It was accepted by counsel in mitigating that this could not be described as careless driving arising from "momentary inattention without aggravating factors", which is the description of the lowest level of culpability. The judge said:

> "…whilst the initial quick mistaken observation may have been momentary inattention, it was aggravated by your failure to recheck, and your rushed emergence."

28 The judge passed sentence on Mr Sangha first. He placed the offence in the overlap between the middle and lowest categories in the guidelines. The middle category, described as "other cases of careless driving", has a starting point of 36 weeks' custody and a range from a high community order up to two years' custody. The judge observed that Mr Sangha had finally shown some degree of insight and remorse when interviewed by the probation officer. In deciding

whether to suspend the sentence in his case the judge had regard to the Sentencing Council guideline on the imposition of custodial and community sentences and the factors which should be weighed in deciding whether to suspend a sentence. He said the most telling of those factors was that "appropriate punishment can only be achieved by immediate custody". He reached this conclusion particularly in circumstances where remorse and insight had only come after conviction. As we have said, Mr Sangha's sentence was twelve months' imprisonment.

29 Turning to the applicant, the judge said:

> "In my judgment the custody threshold is crossed in your case as well, albeit I accept that a lower starting point is appropriate given your previous good character, your driving record, your young age, and all the other circumstances of the case. Again I accept all the features of strong personal mitigation: the realistic prospect of rehabilitation, the impact on others, the fact you do not pose a risk. Your previous good character means of course that there is no history of poor compliance with court orders. But bearing in mind that there has been no real insight in your case, and no remorse until after conviction, again I am driven to the conclusion that appropriate punishment in your case can only be achieved with immediate custody. In your circumstances, the sentence of imprisonment will be one of six months."

30 On behalf of the applicant Ms Murray accepts, as she did in the court below, that this was more than "momentary inattention" and therefore the offence fell within the middle bracket described as "other cases of careless driving". She does not accept that in pulling out as she did the applicant was rushing to get ahead of Mr Fawthrop. She accepts that this was a conclusion that was open to the judge to reach on the evidence, but she says he was wrong to treat it as an aggravating factor because it is not one of those aggravating factors set out in the guideline. That seems to us to be a misreading of the guidelines. Those set out are examples of aggravating factors. A judge of course is not precluded from taking into account any particular further aggravating or mitigating factor arising from the circumstances of the particular case.

31 In the course of his oral submissions and in his respondent's notice Mr O'Higgins explained to us a little more of the evidential foundation for the judge's finding that the applicant had rushed in that way to get ahead of the cyclist. It seems that on the calculations which were performed by the police collision expert (and, as we understand it, this was not a matter of any controversy) although, but for the intervention of Mr Sangha's vehicle, the applicant would have pulled out in front of the bicycle and not hit it, she would only have been in front of it by a matter of a second or two. The inference, therefore, was properly

to be drawn, and was drawn by the judge, that she was hoping to pull out in front of the cyclist. Mr O'Higgins points out that the journey, once she emerged onto the main road, would have taken her uphill, and it might have been a disadvantage to have found herself behind a cyclist toiling uphill with no opportunity to overtake for quite some distance. Be that as it may, we are quite sure the judge was fully entitled to take into account as a factor aggravating the seriousness of the case his view of that aspect of the evidence.

32 Ms Murray submits that, although the offence fell into the middle category, it should have been treated as being at the very bottom of the range, and therefore a high community order was appropriate and not a custodial sentence at all. She points out that none of the aggravating factors specified in the guideline were present, which is correct. She submits there was the mitigating factor under the guideline that a third party had contributed to the commission of the offence. That is true of course, in the sense that Mr Sangha was also guilty of the same offence, although her own carelessness was not contributed to in any way by his driving.

33 Ms Murray also submits that there was a further mitigating factor under the guideline in that she had only been driving for a year or so and had only been travelling this route for five weeks. One of the additional mitigating factors under the guideline is "the offender's lack of driving experience contributed significantly to the likelihood of a collision occurring and/or death resulting". We are bound to say that we do not regard Ms Murray's submission in that regard as well founded. Those, in our view, are not the sort of circumstances which that mitigating factor was designed to embrace.

34 Ms Murray submits that the judge failed to acknowledge and take into account the remorse which the applicant had shown or the extent to which she had struggled to come to terms with the death of Mr Fawthrop in the intervening two years. She submits that the judge failed to have sufficient regard to the applicant's young age - only 19, as we have said, at the date of the offence, and her positive good character attested to by the references. The applicant's own mental health had suffered greatly. She had been diagnosed with post- traumatic stress disorder, anxiety and depression, and although she had undergone treatment, the trial process had caused her to suffer a relapse.

35 Ms Murray submits that the judge should have followed the recommendation in the pre-sentence report by imposing a community order with an unpaid work requirement. That would have restricted her liberty, whilst providing punishment in the community, and it would have enabled her to finish her school placement and qualify as a teacher. Ms Murray suggested - although there is no evidence of this - that the fact of a conviction resulting in any prison sentence may even jeopardise the applicant's teaching career. In the alternative Ms Murray submitted that, if the custody threshold was passed and imprisonment was necessary, the judge had failed sufficiently to consider suspending the sentence.

36 We have considered all these submissions very carefully. We are quite satisfied that this offence fell squarely within the middle bracket, described as "other cases of careless driving". We note from the guideline at page 14, paragraph 6, under the heading "Factors to take into consideration", that one of the examples given of "low culpability" falling within the bottom bracket, is an offender who turns without seeing an oncoming vehicle because of restricted visibility. There was no such restricted visibility here. Nor, as it was conceded, was this a case of "momentary inattention": the van would have been in view for around six seconds, or possibly a little less. There was further expert evidence during the trial which favoured at least the possibility of four seconds.

37 Mr O'Higgins in his oral submissions explained to us that the other way of arriving at four seconds was this: that when she was at the junction she would have spent two seconds of the six available seconds when the van would have been in view, looking to her left for the cyclist and it was the balance of the six seconds (four seconds) that was available for her to have looked again to the right and seen the van approaching. Whatever the precise position in respect of timing, the fact remains that the applicant drove directly into the path of the approaching van without ever seeing it. It was the clearest case, in our view, of careless driving.

38 The judge had presided over the trial and had heard and seen all the evidence, including the applicant's own evidence in the witness box. He was entitled to find that it was a careless and rushed emergence into the junction because she wanted to get out in front of the cyclist approaching from her left.

39 The starting point under the guideline for an offence in the middle bracket is 36 weeks' custody (nine months). The judge did give her credit for her young age, her good character, her clean driving record and, as he put it, "all the other circumstances of the case". We think there is force in the point made by Mr O'Higgins in his written submissions that the judge would have been conscious of the need to tailor his oral sentencing remarks to the fact that members of the deceased's family were present in court. That is not to say that he had not taken into account fully all the material placed before him. Far from it. He must have had well in mind the impact of the incident on the applicant herself, including post- traumatic stress disorder, depression and anxiety. We have no doubt that those are matters which would have featured in the mitigation advanced very capably, we are sure, by Ms Murray in the lower court.

40 The judge came down significantly from the starting point of nine months, and made an even larger distinction between the applicant's sentence and that of Mr Sangha. His sentence was twice hers. Having considered the matter very carefully we are quite unable to say that six months' imprisonment was manifestly excessive.

41 That leaves the question of whether the judge was wrong to pass a sentence of immediate custody. Complaint is made that he did not consider suspending

the sentence in accordance with the relevant Sentencing Council guideline on the imposition of custodial and community sentences to which we have referred.

42 That submission, we regret to say, is wholly ill-founded. In the last part of his sentencing remarks from which we have already quoted, the judge was clearly carefully working through the factors in that guideline for and against suspension. On the positive side, he accepted that there was a realistic prospect of rehabilitation, there was strong personal mitigation, and immediate custody would lead to significant harmful impact upon others. On the other side of the equation, he accepted that two of the three negative factors were absent, in that the applicant did not present a risk or danger to the public, and there was no history of poor compliance with court orders. The judge, however, identified the one key factor which in his judgment militated strongly against suspending the sentence and in the end tipped the balance.

43 We remind ourselves that the guideline says "the following factors should be weighed in considering whether it is possible to suspend the sentence". The judge did weigh the factors. He was satisfied that appropriate punishment could only be achieved by immediate custody. He explained that this was because the applicant had shown no real insight and no remorse until after conviction.

44 For completeness we should say that we have considered a number of authorities, helpfully referred to in Banks on Sentence, Volume 2, at paragraph 238.10, which we drew to counsel's attention lest they be of any assistance in their submissions.

45 In *R v Larke [2010] 1 Cr App R (S) 5* , the 74-year-old defendant pleaded guilty to causing death by careless driving by pulling out from a lay-by in front of an approaching motorcycle. She caused two deaths. The judge sentenced her to two years' imprisonment. This Court reduced the term to 39 weeks and suspended the sentence in the particular circumstances. The Court concluded that bearing in mind all the mitigation, including very early expressions of remorse and a very early guilty plea, suspension was appropriate.

46 In *R v Campbell [2010] 2 Cr App R (S) 28* , the defendant pulled out of a side road and failed to see a motorcycle in front approaching. He pleaded guilty on the second day of the trial. The judge imposed a suspended sentence of imprisonment of 24 weeks with an unpaid work requirement. The pre-sentence report indicated that he accepted responsibility and was devastated that an unintentional momentary lapse of concentration had led to fatal consequences. This Court allowed the appeal and substituted a community order with an unpaid work requirement, on the basis that the judge had not factored in that the deceased motorcyclist had been travelling at more than 57 mph in a 40 mph limit. We note that the Court stressed that each case turns on its facts and each piece of driving has to be viewed objectively in relation to the surrounding circumstances. The judge had been correct to treat it as falling into the middle category. It could not

be characterised as momentary inattention.

47 In *R v Odedara [2010] 2 Cr App R (S) 51* , the defendant intended to make a right turn but failed to see a motorcyclist approaching and turned into his path causing a fatal accident. He pleaded guilty to causing death by careless driving. The judge imposed a sentence of four months' immediate imprisonment. The Court substituted a community order with an unpaid work requirement. The Court was satisfied that this was a "momentary failure of attention" and said that it was a case which "after a plea of guilty at least, and probably not in the absence of it", did not pass the custody threshold. We note again that there had been an early acknowledgment of responsibility, early remorse, and an early guilty plea.

48 Finally, in *R v Dhuck [2014] EWCA Crim 2865* , the defendant pulled out of a junction onto the main road and failed to see a motorcyclist who was killed in the ensuing collision. He pleaded guilty and showed early and genuine remorse. The judge imposed a sentence of six months' imprisonment. This Court allowed the appeal, taking the view that the case fell at the top of level 3 or the bottom of level 2, and that an immediate custodial sentence was not justified. A high level community order would have been appropriate, but as the applicant had already served six weeks in prison the sentence was reduced to three months' imprisonment to enable his immediate release.

49 We observe that these cases merely provide examples of how the guideline has been applied. Although there are some similarities to the present case, every case turns very much on its own facts. What is striking about these other cases, however, is that in each there was a guilty plea and an early expression of remorse.

50 It is quite evident that the judge conducted this trial with great care and sensitivity. That is spoken of by the applicant herself and by members of her family in their letters. No one was better placed than the judge to assess the applicant's culpability. No one was better placed to make the judgment as to whether appropriate punishment could be achieved by anything other than immediate custody. Some judges might have taken a different view, but that is not the test. We are quite unable to say that the judge's decision not to suspended the sentence was wrong in principle or that it rendered the sentence manifestly excessive.

51 This was one of those cases where an early guilty plea, with a clear acceptance of responsibility and demonstration of remorse which went with it, might well have made all the difference. The applicant chose to contest the case because she was not prepared to accept her obvious responsibility for this tragic fatal accident. The judge was entitled to have that very much in mind, not least because of the additional distress to the deceased's family as a result.

52 For all these reasons, we are not persuaded that the judge passed a sentence

that was even arguably wrong in principle or manifestly excessive. The application for leave is therefore refused.

53 We wish to add that we hope very much that this aberration on the part of the applicant, resulting in this fatal accident and a prison sentence, will not have adverse consequences for her career as a teacher. We would like it to be brought to the attention of those who need to know these things that this is our view.