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2018/05050/A1
IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 19th March 2019

B e f o r e:

LORD JUSTICE SIMON

MR JUSTICE SWEENEY

and

THE RECORDER OF NEWCASTLE
(His Honour Judge Sloan QC)
(Sitting as a Judge of the Court of Appeal Criminal Division)

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R E G I N A

- v -

ROSS JOHN MIDDLETON

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Miss A Bright appeared on behalf of the Applicant

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J U D G M E N T
(Approved)

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Tuesday 19th March 2019

LORD JUSTICE SIMON: I shall ask Mr Justice Sweeney to give the judgment of the court.

MR JUSTICE SWEENEY:

1. This applicant's applications for leave to appeal against sentence, and for an extension of time of fourteen days, have been referred to the full court by the single judge.

2. On 6 June 2018, in the Crown Court at Winchester, the applicant, now aged 37, pleaded guilty to Count 2, possessing a controlled drug of Class B (cannabis).

3. On 15 October 2018, which was the day otherwise fixed for his trial at the same Court, the applicant pleaded guilty upon re-arraignment, with a written basis of plea, to Count 1, causing serious injury by dangerous driving. The basis of plea was to the effect that the applicant accepted that the night before the dangerous driving he had smoked cannabis; that he accepted that his blood sample taken after the offence demonstrated that there was THC-acid in his bloodstream; and that he did not know whether the drug or tiredness had affected his driving at the time of the offence.

4. On 8 November 2018, the applicant was sentenced by His Honour Judge Barnett to one year and eight months' imprisonment on Count 1. No separate penalty was imposed on Count 2. The applicant was also disqualified from driving for a period of 70 months – comprised of a disqualification period of five years and an uplift of ten months. He was also ordered to take an extended re-test. A destruction order was made in relation to the drugs, and a victim surcharge order was made in the appropriate amount.

5. The applicant had one previous conviction in 2004 for driving a motor vehicle with excess alcohol. He pleaded guilty to that offence and was fined £150 and disqualified from driving for sixteen months - which was reduced by four months on the completion of a rehabilitation course.

6. The facts, in short, are these. At around 8.45pm on Friday 3 November 2017 the victim, Steven Ballard (then aged 61) was cycling along a virtually straight, unlit stretch of the A33 near Basingstoke towards a public house called the Wheatsheaf Hotel, where he was planning to meet with friends. The conditions were fine and dry, with clear visibility. Mr Ballard was wearing a helmet and reflective clothing. His bicycle was equipped with high quality lights, both front and rear. He was a cautious and regular cyclist, with twenty years' experience of cycling in that area.

7. The applicant was driving in the same direction, in his wife's black Ford Fiesta, when he struck the rear of Mr Ballard's bicycle from behind with the nearside wing of the Fiesta. The impact buckled the rear wheel of the bike. Mr Ballard was thrown off the bicycle and down an embankment, where he came to rest in bushes in a ditch. His pelvis had been broken. It required plates and screws to fix. He had also suffered a broken lower vertebra, a severe laceration to his leg, and multiple cuts and abrasions.

8. Although the applicant clearly knew that he had hit someone, he did not stop. He drove on for about 0.8 of a mile past the well-lit Wheatsheaf Hotel, and then pulled over into an unlit layby. CCTV footage from a kebab van parked in the layby showed the applicant getting out of the Fiesta and checking the damage to the car, which was substantial. He then got back into the car and returned to the scene of the crash, where there was an obvious trail of debris in the road. He then drove just under one third of a mile to Popham Court Lane (a side road off the A33),

where he deposited the car in the entrance to a field and walked back to the crash scene, where Mr Ballard was still lying in the ditch. About seven minutes had by then elapsed since the crash. The applicant then called an ambulance and remained at the scene until an emergency paramedic crew arrived. He pretended to the paramedics that he was a pedestrian who had stumbled across Mr Ballard.

9. The applicant was walking away from the scene when the police arrived. An officer, having spoken to paramedic personnel, ran after him and caught up with him. He immediately noticed the smell of cannabis and that the applicant appeared confused and was unsteady on his feet. The applicant lied to the officer. He said that he had been walking from his house in Kings Worthy when he had chanced across Mr Ballard and dialled 999. The officer was immediately sceptical of this story due to the distance from Kings Worthy, where the applicant lived, to the scene and suspected that it was the applicant who had hit Mr Ballard and that his car was parked nearby. The officer arranged for other officers to search for it and the Fiesta was duly found. The applicant was arrested at the scene for driving whilst impaired through drugs. He failed impairment tests and was later found to have traces of both cocaine and cannabis in his blood. The cannabis the subject of Count 2 was found on his person.

10. In police interview, the applicant admitted that he had been the one driving the Fiesta and that he had hit Mr Ballard. He said that he had attempted to overtake him. That explanation did not, however, fit with the examination of the Fiesta and the bicycle, which showed that the Fiesta had actually hit the bicycle squarely in the rear.

11. Mr Ballard was in hospital for eleven days. He only remembers setting off for the pub on the Friday evening and that his lights were on. His next memory is of waking up in hospital the following day. He spent six weeks on crutches and was still undergoing weekly physiotherapy

at the time of sentencing. Four months after the accident, in a statement, he indicated that he had not worked since the accident, suffered from double vision, could no longer drive, could not stand fully upright, and found it difficult to read and write. In an update eleven months after the accident, he indicated that he still had double vision and thus still could not drive, had difficulty reading, writing and using a computer, and that he had lost a lot of agility and some sense of balance, a lot of feeling on the left side of his body, and deterioration in his hearing.

12. The prosecution invited the judge to take into account the Definitive Guideline in relation to causing death by dangerous driving, together with the very profound effect of the offence on the victim, who was a vulnerable cyclist, and the applicant's actions in the immediate aftermath.

13. The pre-sentence report recorded that the applicant had told the author that he had felt under pressure around the time of the offences as he was holding down two jobs. He had bought cocaine and cannabis from old friends in order to relax and unwind. The author of the report further recorded that the applicant had been unable to give an explanation as to why he had not seen the victim sooner, but that when pressed he had accepted that his previous cannabis use may have affected his judgment, albeit that he insisted that he would not have driven if he had thought that he was still under the influence. The author observed that there was telephone evidence which showed that the applicant had made and received calls during the relevant period and that it was possible that he had thereby been distracted. It was also noted that the applicant had expressed remorse and had demonstrated victim empathy. The applicant was assessed as presenting a low risk of re-offending, but a medium risk of harm to the public. The author of the report recognised that the custodial threshold had been crossed but opined that if the court was considering an alternative to an immediate custodial sentence, consideration of a Community Payback Requirement of 180 to 200 hours may be appropriate.

14. There were six character references in relation to the applicant, variously from his wife, sister and others, which spoke highly of him, of his remorse for the offences and of the reliance of others upon him.

15. The applicant, who with his wife has two young children, wrote to the judge himself expressing his apologies to Mr Ballard and his remorse. He explained the effect that the loss of his licence had had upon him, and invited the judge to impose a suspended sentence.

16. In passing sentence, the judge rehearsed the facts. He underlined the applicant's drug consumption prior to driving and his short-lived attempt to avoid responsibility (albeit that he was the one who had summoned help). As to aggravating features, the judge recognised that the applicant's conviction for driving when under the influence of alcohol had been some time before, but still took it into account "to some extent". He further recognised that there was no Definitive Guideline in relation to the offence in Count 1 and that the sentences imposed for causing death by dangerous driving involved a greater maximum sentence (of fourteen years' imprisonment), whereas the maximum for the offence in Count 1 was five years' imprisonment.

17. Having balanced out the aggravating and mitigating features (with the latter including the applicant's otherwise good character and other features that "did him proud"), the judge identified a notional sentence after trial of two years' imprisonment, reduced after discount for the late guilty plea to twenty months' imprisonment. He could not, he said, reduce it lower than that. He continued that he had considered long and hard whether, as implored by the applicant's counsel, he could suspend that sentence; but in view of the gravity of the offence and its aggravating features, he had concluded that he could not do so. It was against that background that the judge imposed the sentence to which we have already referred.

18. On paper there are, effectively, three Grounds of Appeal, namely, that the judge erred:

> (1) In having regard to the Definitive Guideline in relation to offences of causing death by dangerous driving and in thereby wrongly inflating the sentence on Count 1;
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> (2) In giving too much weight to the applicant's previous conviction; and
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> (3) In failing to apply the Definitive Guideline on the Imposition of Community and Custodial Sentences when deciding whether the term of imprisonment imposed should be immediate or suspended.

19. In advancing her submissions on the applicant's behalf, Miss Bright has concentrated on the first and third of those Grounds. We can deal with the first Ground shortly. In a number of cases, beginning with *R v Dewdney* [2014] EWCA Crim 1722, [2015] 1 Cr App R(S) 5, and *R v Jenkins* [2015] EWCA Crim 105, [2015] 1 Cr App R 70, this court has indicated that it is appropriate for a judge, when sentencing for an offence of this type, to have in mind the Definitive Guideline in relation to causing death by dangerous driving, provided that it is clearly understood that cases of this type do not involve a death and involve a maximum sentence which is significantly below the maximum sentence which applies in relation to causing death by dangerous driving. A recent example of a case in which those authorities and the approach indicated in them have been followed is *R v Naher* [2018] EWCA Crim 29.

20. Accordingly, it is clear that, in principle, the judge was entitled, as invited by the prosecution, to consider the causing death by dangerous driving Guideline. Miss Bright submits, nevertheless, that in the particular circumstances of this case he was in error in doing

so. We disagree. The judge was plainly entitled to take the course that he did – the more so as he specifically recognised the significance of the difference in penalty between the two offences. Accordingly, in our view, it is not arguable that he erred in principle in that regard; nor, indeed, that that in any way inflated the sentence.

21. Equally, there is no arguable merit in the second Ground.

22. We therefore turn to the third Ground and the second of the topics upon which Miss Bright has concentrated her submissions, namely, the suggestion that the judge failed inappropriately to take into account the Definitive Guideline on the Imposition of Custodial Sentences and in particular to perform the balancing exercise set out therein.

23. This is an extremely experienced criminal judge, but it is correct that he did not express himself in the terms of the balance mandated in the Guideline. Accordingly, we propose to test whether this Ground is arguable by conducting the exercise required by the Guideline afresh ourselves.

24. As Miss Bright pointed out during the course of her submissions, the Guideline mandates consideration of a balancing exercise which requires the balancing, on the one hand, of factors indicating that it would not be appropriate to suspend a custodial sentence, namely, whether the offender presents a risk or danger to the public, whether appropriate punishment can only be achieved by immediate custody, or whether there is a history of poor compliance with court orders; and, on the other hand, the factors indicating that it may be appropriate to suspend a custodial sentence, namely, that there is a realistic prospect of rehabilitation; that there is strong personal mitigation; and that immediate custody will result in significant harmful impact upon others.

25. Miss Bright submits that on the side of the balance weighing against suspension the applicant does not present a risk or danger to the public, as his risk of re-offending was assessed as being low by the author of the Pre-Sentence Report. Nor, albeit that he has the previous conviction in 2004, does the applicant have a history of poor compliance with court orders. Miss Bright realistically accepts, however, that the remaining factor is engaged, namely the question, which clearly weighed significantly with the judge, given the terms of his sentencing remarks, of whether appropriate punishment can only be achieved by immediate custody.

26. On the other side of the balance, Miss Bright submits that there is a realistic prospect of rehabilitation; that there is strong mitigation to the extent that the applicant is aged 37, a married man with two young children, of previous effective good character (other than the one matter to which we have referred); that he is self-employed; that he is responsible for others; and that both the letter which he wrote to the sentencing judge and the letters which were written on his behalf together present a picture of genuine remorse, of fulsome apology and of general decency of behaviour which ought to weigh strongly in the balance in this regard. As to the third factor of significant harmful impact to others, there was reference in the Pre-Sentence Report to the possibility of the applicant's wife and children losing their accommodation as a result of his incarceration, but it is clear from what Miss Bright has now told us that that has not come to pass and is not, at least at the moment, a strong possibility.

27. Weighing all the matters on the side of the scales in favour of suspending the sentence, Miss Bright submits that it is plainly arguable that each has considerable weight in the applicant's favour.

28. We, however, must weigh that against the single factor weighing against a suspended

sentence, namely, that appropriate punishment can only be achieved by immediate custody. This was undoubtedly a very serious offence of its type. The applicant drove whilst significantly impaired when he had a previous conviction for driving under the influence of alcohol. He drove straight into the back of the victim, who was clearly highly visible, and he drove off initially, although he knew that there had been a collision. When he returned, albeit having summoned help, he tried initially to avoid his responsibility. Not only was the driving of a very seriously dangerous type, it would equate to Level 2 in the Guideline for causing death by dangerous driving. There have been very considerable and serious consequences for the victim. He suffered very serious injuries which required substantial hospitalisation. He has suffered ongoing effects of a life-changing variety: in particular, in the limitation of his life to what it was previously, both at work and at home. Therefore, it seems to us that, carrying out the requisite balancing exercise, the weight in the factor that appropriate punishment can only be achieved by immediate custody significantly outweighs the combined weight of the three factors weighing in favour of suspension.

29. In those circumstances, it seems to us that, even if it is correct that the judge failed to conduct the balancing exercise – or certainly only referred to having done so in the most cryptic terms – when the exercise is appropriately carried out, the result of it it is clear and all one way, namely, that in this case it would not be appropriate to suspend the custodial term. Accordingly, there being no dispute with the length of the term itself, we conclude that this ground is also unarguable.

30. For those reasons, this application must be refused.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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