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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 9 April 2019

B e f o r e:

LORD JUSTICE FULFORD

MR JUSTICE SWEENEY

MR JUSTICE DINGEMANS

R E G I N A

v

DANIEL IAN BUTLER

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Mr T Godfrey appeared on behalf of the **Appellant (Via Video Link)**

J U D G M E N T
(Approved)

1. MR JUSTICE SWEENEY: This is a renewed application for leave to appeal against sentence and for a representation order, following refusal by the single judge.

2. On 25 June 2018, before Her Honour Judge Williams in the Crown Court at Maidstone, the applicant, who is now aged 28, pleaded guilty to causing death by dangerous driving. That was treated by the judge as being the first opportunity for his plea, with the result that it attracted a full one-third discount. On 28 September 2018 the judge sentenced the applicant to 8 years' imprisonment, he was disqualified from driving for 10 years and 269 days (made up of a 7-year discretionary period plus an extended period of 4 years less 96 days spent in custody on remand) and until an extended driving test is passed.

3. The facts, in short, are these. On 20 August 2017, at around 3.00 pm, the applicant was driving a white Ford Transit van that collided head-on with a red Peugeot car driven by Suzanne McLachlan, who was aged 67 at the time. That occurred on the A228 near Mereworth in Kent. Mrs McLachlan was transported to hospital by air ambulance, but she suffered a cardiac arrest and died shortly afterwards.

4. Prior to that collision there had been four near misses as a consequence of the applicant's driving. A witness driving on the A228 saw the applicant's van driving very close to the car in front of it, braking sharply and then drifting across the road onto the opposite carriageway and across the verge. The witness was so concerned that he called the police to report it.

5. The applicant's driving then got worse. He was swerving from lane to lane but not overtaking any cars. At a roundabout the van veered left and hit the kerb, throwing up a lot of dirt and dust, it then bounced back onto the carriageway and went straight again. At the next roundabout the carriageway narrowed from two lanes to one. The applicant's vehicle was heading downhill on the single carriageway. On the opposite side of the road, heading uphill, the carriageway had two lanes. The two carriageways were divided by double white lines. An articulated lorry was driving uphill and a small red car in the second uphill lane was overtaking it. The applicant's van veered, without reason, into the second uphill lane on the opposing side of the carriageway. That forced the red car to brake and swerve. The applicant's van then swerved back onto the correct side of the road. Shortly after that other witnesses driving behind the applicant thought he must be drunk, such was the nature of his driving. They saw the van swerve onto the opposite side of the carriageway causing a black Mini to take evasive action to avoid a head-on collision. The driver of the Mini thought that the van would veer back into the correct lane and was shocked when it did not. As the Mini manoeuvred around the van to avoid the collision the driver noticed that the van had gone even further into the wrong side of the road. Another witness described two further near misses, hence there were four in all.

6. Shortly before the fatal collision with Mrs McLachlan's car a witness was driving behind her. It was dry and sunny, and visibility was good at the time. The witness saw the applicant's van approaching in the oncoming lane. Then suddenly the van swerved from the oncoming lane into the witness's and Mrs McLachlan's lane. The van was about 3 to 4 car lengths in front of Mrs McLachlan. There was no apparent reason for the van to have swerved into their lane and although the applicant's van appeared to have time to move back into the correct lane it failed to do so. Mrs McLachlan, for her part, had no opportunity at all to avoid the collision. The applicant's van hit her vehicle head on. The applicant's van was at least halfway onto the wrong side of the carriageway. Mrs McLachlan's car spun on impact. The witness travelling behind her applied his brakes and skidded in between the applicant's van and Mrs McLachlan's car.

7. Emergency services attended the scene and Mrs McLachlan was freed from the car. She was flown to hospital where she died shortly after her arrival.

8. Paramedics and police attended and spoke to the applicant. He told the paramedics that he was driving and that, all of a sudden, the collision had happened. He said he did not feel as if he was passing out before the collision took place. He was asked by the police to take a breath test which showed a zero reading. An officer, unsurprisingly, wanted a second sample and asked the applicant for a further test. The applicant then became agitated and abusive and refused.

9. He was arrested and cautioned, and two mobile phones were seized. He was put in an ambulance and promptly fell asleep. In hospital it was noted that he again spent most of the time asleep. He was told that Mrs McLachlan had died, and he was arrested for causing death by dangerous driving. He said: "I think I fell asleep at the wheel. I was just driving along. When I looked up, she was there."

10. A blood sample was taken from the applicant and was tested. He was found to have 22 micrograms of cocaine per litre of blood when the legal limit is 10; 259 micrograms per litre of blood of benzoylecgonine when the legal limit is 50; and 1000 micrograms per litre of blood of amphetamine when the legal limit is 250. The level of amphetamine was such that it was determined to be in the toxic range - which is associated with fatalities. The concentrations of cocaine and amphetamine suggested the recent use of drugs, possibly within 6 to 12 hours of the sample being taken.

11. The applicant's van and Mrs McLachlan's vehicle were both examined. Neither had any defects which could have contributed to the collision.

12. In interview, on 22 August 2017, the applicant said that he thought that he had fallen asleep at the wheel. He could not say how he came to be on the wrong side of the road but said that it was likely that he had lost control due to a mechanical defect. He said he had not taken any drugs in the days or hours before the collision. That was plainly untrue.

13. Further investigations were carried out by the police, including downloading data from the applicant's mobile phones. One of the phones was shown to have been in constant use for the days and nights between the 16 August and time of the collision on 20

August. That raised questions as to whether and when the applicant had slept or rested and whether fatigue was a contributory factor in the collision. Data from the tracker fitted to the van showed excessive use of the van out of working hours. Indeed, a combination of the tracker data and mobile phone data indicated that the longest period of inactivity had been 2 hours and 20 minutes over the 4 days from the 16 to 20 August. The longest period of inactivity on the day of the collision was 1 hour and 28 minutes. In other words, over a period of 4 days leading up to the fatal events, the applicant had not slept for more than about 2 hours at any time.

14. When interviewed in respect of those findings the applicant made no comment;

15. A victim personal statement was read to the court from the victim's sister, Elizabeth Sowdon. It was moving in its terms - to which we shall return when relating the judge's sentencing remarks.

16. The applicant had appeared before the court on one previous occasion in 2011, for one offence of harassment, for which he was sentenced to 4 months in a young offender institution suspended for 18 months. He also had three cautions, one of which was for possessing a Class B drug in 2016.

17. No pre-sentence report was before the court and none, in our view, was required. There was however a psychiatric report which indicated that the applicant had been admitted to a psychiatric hospital between the 28 September and 2 October 2017, having taken an overdose and having said that he hoped that he would die. The discharge summary on that occasion recorded a diagnosis of mental and behavioural disorders, due to the use of stimulants, and recurrent depressive disorder. It was recorded that the applicant had been using drugs since he was 17 but that he considered the collision to have been a "simple car accident" and that he did not attribute it to his use of cocaine or amphetamine. He reported remorse for his actions, saying that he had held his hands up to causing an accident resulting in death. He was however reluctant to acknowledge his misuse of drugs in the lead up to the offence. It was recorded that he did not suffer from a mental disorder that warranted his admission to hospital, albeit that his difficulties were long standing. He was prescribed anti-depressant medication for the depressive disorder and prior to his imprisonment he had been using amphetamine and cocaine habitually and frequently. At the material time, the author said, it appeared that he was intoxicated with cocaine, a cocaine metabolite and amphetamine. It was recommended that he access specialist drug treatment services and that the prison mental health authorities should monitor his condition.

18. In her sentencing remarks the judge rehearsed the facts and commented that the applicant had shown some remorse but had lacked any insight into his offending. Suzanne McLachlan, she said, was 67 years old. The court had read the personal statement from her sister on behalf of her family. She was a wonderful, inspirational person. She had fought cancer and helped others diagnosed with cancer. She loved life and had many interests. She had been married to her husband for 40 years, she was a much loved wife, mother, sister and friend. Their pain and grief would be enduring. No sentence could assuage that grief.

19. The sentence that the court would impose, said the judge, did not put a value on Suzanne McLachlan's life. Her loss was incalculable. The sentence would seem harsh to the applicant but not sufficient to the victim's family. The court would nevertheless do its best to achieve justice. The applicant, said the judge, had not set out that day to kill anyone but his driving was grossly irresponsible. It was a persistent, prolonged and deliberate course of very bad driving. He drove whilst under the influence of a large amount of drugs. He was suffering from fatigue. He could have stopped when he had first found himself drifting across the carriageway but had chosen not to do so. There had been a number of near misses before the fatal collision.

20. The applicant, she said, had flagrantly disregarded the rules of the road by driving in that condition and by the manner in which he had driven. He had placed other road users in the greatest danger. His driving fell into level 1, the most serious category of the relevant Sentencing Guideline. The court had regard to that Guideline. Level 1 had a starting point over 8 years with a range of 7 to 14. This fell towards the higher end of the range because of the factors the court had listed. Had the applicant not pleaded guilty the sentence would have been 12 years' imprisonment. It was against that background that the judge imposed the sentence to which we have referred, including allowing 96 days' credit against the period of disqualification for the time spent in custody.

21. The Ground of Appeal is that the judge took too high a starting point and that in consequence the sentence imposed was manifestly excessive. On the applicant's behalf, Mr Godfrey has reminded us of the terms of the relevant Guideline as to the criteria for a level 1 offence and as to the aggravating factors listed in relation to such offences and the fact that none, he submits, are present in this case. Thus, he contends, the sentence imposed was too high.

22. The Respondent in its Notice submits that the sentence was not manifestly excessive and that the exemplar of three characteristics of a level 1 offence, as set out in the Guideline, are disjunctive and that the judge was entitled to consider them cumulatively as part of her assessment as to where in the sentencing range for level 1 this case fell.

23. In refusing leave, the single judge said this:

> "Your counsel argues that the starting point of 12 years was too high, arguing that there was double counting because the factors leading to the case falling within level 1 are conjunctive not disjunctive and were then double counted as aggravating features.
>
> The Crown is correct to point out that the factors leading to a level 1 categorisation are disjunctive not conjunctive (as shown by the bold capitalised words "**AND/OR**" at D.3, page 10 of the Guideline describing the features of a level 1 offence).
>
> This was not a standard level 1 case but a very bad level 1 case justifying an uplift from the 8 year starting point. The aggravating features were: a prolonged course of driving, three [sic] near misses, substantial

impairment through drugs and self-induced fatigue.

Any one of those features would have sufficed to put the offence into the level 1 category. The 8 year normal starting point is near the bottom of the range. The substantial uplift from 8 to 12 years reflected the bad aggravating features but was still well within the range.

The sentence was severe and close to or at the top of the range reasonably open to the sentencing judge, but I do not think, in the light of those very serious aggravating features, it was arguably manifestly excessive."

We agree. This was indeed a very bad level 1 case, in which the applicant drove his van whilst in a condition which made him a fatal accident waiting to happen. In those circumstances, this application is dismissed.

24. We cannot leave this case without commenting that we are precluded from correcting what we have perceived to have been the judge's error in crediting time spent on remand against the period of disqualification - given the clear principles expressed in the case of R v Needham [2016] EWCA Crim 455. In any event, if credit had been appropriate it should have been given in relation to the discretionary element of the disqualification.