Neutral Citation No:*[2019] EWCA Crim 1141*

**2018/04710/A2**

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 27 th June 2019

B e f o r e:

LORD JUSTICE IRWIN

MR JUSTICE GOOSE

and

HIS HONOUR JUDGE POTTER

(Sitting as a Judge of the Court of Appeal Criminal Division)

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**R E G I N A**

*- v -*

**JAMES SAMUEL WILSON**

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**Mr L Masters** appeared on behalf of the Appellant

**Mr J McGuinness QC** appeared on behalf of the Crown

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**J U D G M E N T**

**(Approved)**

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Thursday 27 th June 2019

**LORD JUSTICE IRWIN:**

1. On 16th February 2018, following a trial in the Crown Court at Birmingham before His Honour Judge Bond and a jury, the appellant was convicted of count 2 on the indictment he faced, namely an offence of causing death by driving whilst uninsured, contrary to section 3ZB of the Road Traffic Act 1988. On 19th October 2018, following a retrial before the same judge and a different jury, he was also convicted of count 1, namely causing death by driving without due care and attention while over the specified limit for a specified controlled drug (cannabis), contrary to section 3A(1)(ba) of the Road Traffic Act 1988. He was sentenced by Judge Bond to six years' imprisonment, and was disqualified from driving for a period of six years (three years with an extension period of three years) and until an extended re-test is passed.

2. The appellant appeals against his sentence by leave of the single judge. At the direction of the Registrar of Criminal Appeals, counsel has appeared on behalf of the Crown.

3. The facts may be summarised as follows. On the evening of Saturday 4th June 2016, the appellant got into a Mercedes A180 motor vehicle belonging to a friend's mother. He was not insured to drive it. He had been smoking cannabis. For a period of five and a half hours he drove his two friends, Remi Kuti and Luke Chambers, around Birmingham. The car had a telematic system (a black box) fitted, from which it was possible to monitor its speed and movements after the event. The telematic data from the Mercedes showed that on several occasions in the early hours of 5th June the appellant was driving over the speed limit. At 12.33am, he drove at 66.5 miles an hour in a 30 mile an hour zone; at 3.25am, he drove at 69.3 miles an hour in a 40 mile an hour zone. During the period of driving, he had a high level of THC (the metabolite of cannabis) in his blood. At around 3.30am, he drove at an average speed of just over 40 miles an hour along the A34 Birmingham Road in Great Barr, which has a speed limit of 30 miles an hour. As he drove, he approached a pelican crossing.

4. Charlie Heywood, then aged 19, had just got out of a friend's Vauxhall Astra motor vehicle. He moved towards and into the road on the other side of the pelican crossing. He crossed the road without checking properly to see if there was any oncoming traffic. He was affected by his considerable intake of alcohol and, to a small degree, by

his consumption of cocaine. It appears to be common ground that he emerged directly into the road from an area of darkness. The appellant's vehicle collided with Charlie, who died as a result of the injuries he received. The appellant's passengers had heard him shout "Watch out" just before the collision.

5. The appellant stopped at the scene. He failed a roadside drugs test. Later analysis showed that he had 6.3 micrograms of THC per litre of blood three hours after the collision. The prescribed limit is 2 micrograms per litre.

6. In interview, the appellant said that the pedestrian had "darted out of nowhere". He accepted that he had been driving at 40 miles an hour in a 30 mile an hour zone. He claimed to have only smoked "a couple of drags" from an unnamed friend's cannabis joint that evening. This was clearly wrong, since it was inconsistent with the levels found in his blood.

7. The appellant was a young man effectively of good character. He was aged 21 at the time of sentence. He had no previous convictions, although he had received a caution for possession of cannabis when he was much younger. He had the support of his own family and of a range of character statements underpinned his regret at the death of Mr Heywood.

8. A pre-sentence report provided some background to the appellant's offending. He informed the probation officer that he had smoked cannabis since he was 15 years of age. He knew that alcohol could impact on a driver's reactions, but he said that he had not considered at the time that cannabis could do so. He knew now that this was the case. He had not smoked cannabis since Mr Heywood's death, and he had no intention of doing so. The author of the report noted that the appellant had pleaded not guilty to these offences, but nevertheless recorded that in his judgment the appellant was very sorry for the death and not only because of his own prospect of imprisonment. He directly expressed sorrow for the position of the Heywood family.

9. As the sentencing judge noted, this was a terrible case for its impact on the appellant, but much more so for the family of the young man who died. Victim Personal Statements were provided by both of Mr Heywood's parents. He was clearly a very talented indeed gifted young man. He was an undergraduate at University College London. He had wide interests and a huge future in front of him. His parents and family are clearly terribly distraught. This court also acknowledges the real suffering on the part of the Heywood family.

10. We turn to the appellant's driving. Forensic collision experts, Police Constable Took for the prosecution, and Mr Keenan (a former police expert) for the defence examined the evidence and then discussed it together in a meeting. It is not necessary to repeat all the detail of their discussion. In our judgment, the critical points are as follows. The Mercedes motor car in question was a powerful vehicle. It was fitted, as we have said, with a telematic device able to monitor the manner in which the vehicle was driven. Over the 434 metres before the collision, the car was travelling at an average speed of 42 miles an hour, with an overall range of speed between 21.2 and 43.6 miles an hour. During that journey, the car broke its "acceleration threshold" and its "deceleration threshold". In other words, the driver put the car through maximum acceleration and maximum deceleration. From this evidence the experts could not be certain of the vehicle's speed at the time of the collision.

11. In approaching sentence, the judge made a number of remarks relevant to his thinking. Given the mitigation advanced in this case, it is helpful to quote extensively from the judge's sentencing remarks. He said this:

"On the evening of 4th June 2016, you were aged 19. You got into a Mercedes motor vehicle that did not belong to you. You were not insured to drive that vehicle and you knew it. In addition, you had been smoking, in my judgment, a considerable amount of cannabis. I am confident in my conclusion because you were found to have 6.3 micrograms per litre in blood at least three hours after the collision. This is just over three times the limit. When I say 'the limit', I am referring to the amount of THC that you are entitled to drive with in your bloodstream. I am sure that this would have considerably slowed down your driver reaction times when faced with any unexpected situation that may have presented to you as you drove. At the time of the collision, I am also satisfied, on the evidence that we heard in the trial, that the level of THC in your blood would have been even higher and these are the two separate reasons why, putting aside your driving, two separate reasons why you should never have got behind the wheel of the Mercedes in the first place."

12. A little later he described the driving in terms very much as those we have done and added this comment:

"This is not a case, in my judgment, as you told the police in your interview, that you had just taken a few drags from a spliff. This is far more than that.

… You then chose to drive, as you admitted in your police interview, at approximately 40 miles an hour along the A34 Birmingham Road in Great Barr. This was well in excess of the speed limit of 30 miles an hour. As the jury determined, your speed, in the circumstances, including your approaching a pelican crossing at night where the level of THC in your bloodstream, meant that you were driving without due care."

12. He then described the events as Charlie Heywood left the Astra vehicle and crossed the road. He said:

"In this case, Charlie took the decision to cross the road without checking it properly to see if there was any

oncoming traffic. No doubt, he was affected by his intake of alcohol and, I choose my words carefully in view of the evidence we heard, to a very small degree by his consumption of cocaine. Your vehicle collided with Charlie and he died as a result of the injuries he received. The evidence that we heard from your passengers demonstrates that you did see him before the collision. You shouted out, 'Watch out' …"

13. little later, the judge said this:

"There is no escaping the conclusion that Charlie himself contributed to the collision. In my judgment, he moved across the carriageway without checking to see if there was any oncoming traffic. However, if you had been driving at the speed limit, 30 miles an hour, Charlie would have crossed the road at a point where you were much further down the road. Although the evidence showed that a collision was unavailable at 30 miles an hour, this was 30 miles an hour at the point of impact. I repeat, [if] you had driven within the speed limit that night, Charlie would have crossed the road with a far, far greater distance between you and him. At a lower speed, you would have had the opportunity to have braked before the collision and your reaction times would have been far, far quicker if you had not been smoking cannabis. In reality, he would have crossed the road safely before you even reached the point he crossed the road."

13. The judge then considered once more the level of cannabis in the appellant's blood. As a consequence, he placed the appellant in the top category for drug consumption within the relevant guidelines. We shall address those guidelines later in this judgment. The prosecution had submitted to the judge that there cannot be a direct comparison in the guidelines between levels of alcohol and levels of drugs because of the different structure of the guidelines. The judge accepted that distinction. He went on to say:

"In my judgment, it is arguable that it [this offending] does fall into the top category but I am willing to conclude, just, that this falls into the middle category of drug consumption. I also have to assess your degree of carelessness. This was not, in my judgment, a case of momentary inattention. Your driving also did fall short of dangerous driving. The data from the telematic device on the Mercedes reveals that on many occasions during your drive around you ignored the road speed limits and, in those circumstances, I place you into the bracket of culpability for, and I quote, 'other cases of careless or inconsiderate driving'. In any event, the offence of using the Mercedes with no insurance is an additional aggravating feature which I have to have regard to when I sentence you on count 1. That raises the level of sentence."

14. The judge then considered that the starting point, bearing in mind the guidelines, should be five years' custody, with a sentencing range of four to eight years. He indicated that there should be an increase in that to reflect the high level of THC in the appellant's blood and to reflect the element of driving without insurance. He

then went on to say this:

”Then I must impose a discount for the fact that you were not the sole cause of the collision. I can give you some credit for your age at the time of this offence. You were only 19. I also have regard, in looking at the level of sentence, to all of the references that I have read that have been placed before me. There are nine in total, all from members of your family, friends and from your reverend from your church. They all speak of you in glowing terms. You are well thought of and you are hugely liked by others. Some of your referees speak of your remorse. I do accept that you are sorry that you were involved in this incident. I do accept that you are truly upset and sorry that a man, as he was then, of your age died in these circumstances. But I do have to say that you have shown no remorse for the way that you drove that vehicle, no remorse for having no insurance, no remorse for having that amount of cannabis in your body, no remorse for the speed that you were going at.

I say that because you have had two trials now in which you blamed Charlie fairly and squarely for this collision and the fact that he died. I am afraid you would not take any responsibility for the manner of your driving.”

15. After those remarks, the judge passed the sentence of six years’ imprisonment, as we have indicated.

16. The central ground advanced by the appellant is expressed as follows:

”In view of the prosecution evidence that the collision was unavoidable, even if the appellant had been travelling within the speed limit and had not consumed any cannabis, the appellant was not responsible for causing the collision.”

17. The same ground has been elaborated in the written submissions that this was an exceptional case which warranted an exceptional disposal; that it was not a case simply where the actions of the victim contributed to the collision and the death, but “most unusually, one where the appellant bore no responsibility for causing the collision”. The appellant, in his written submissions, claims that the judge did not give any or any sufficient weight to this factor.

18. We pause to note that in oral submissions made today, that proposition made in writing has been considerably moderated. Mr Masters, on behalf of the appellant, does accept and inevitably so in our view that the appellant bears serious responsibility for causing the collision.

19. In further arguments, the appellant submits that the judge appeared wrongly to rely upon the impact speed being at the highest point of the range established by the experts and that for that reason inflated the risk of fatality derived from the vehicle's speed. It is said that the judge placed too great an emphasis on the earlier instances of speeding, demonstrated on the data retrieved from the car, given that the most extreme speeding took place on a dual carriageway in good conditions, with very little traffic, did not continue for long, and hence, as it was said, there was no evidence of any prolonged driving without due care and attention. A taxi driver witness who had been following the appellant at the time of the collision expressed no concern at his driving. The judge is said to have given insufficient weight to the appellant's age of 19 at the time, to his lack of previous convictions and to his lack of driving experience. He is also said to have given insufficient weight to the genuine remorse shown by the appellant and to the strain of the retrial. Finally, the appellant submits that the judge gave insufficient weight to the character evidence submitted in the case.

20. In the Respondent's Notice and Grounds of Opposition, Mr McGuinness QC for the Crown firstly addresses the Sentencing Guidelines Council's Definitive Guideline on Causing Death by Driving and the degree to which the judge had reference to that in sentencing. Mr McGuinness points out that those guidelines were published in July 2008, before the amendment to section 3A of the Road Traffic Act 1988, which amendment took effect on 2nd March 2015 and created the offence for which the appellant was convicted and sentenced. The Crown emphasised that the Sentencing Council has issued a guidance document in relation to the offences under section 3A. The guidance does not have the authority of the definitive guideline. Nor does it address causing death whilst driving with excess drugs, contrary to section 3A(1)(ba). In general terms, the document makes it clear that, in formulating the offence of driving with illegal drugs in excess of the prescribed limit, a particular approach was followed, bearing on the applicability of the excess alcohol guidelines. The relevant passage reads as follow:

"The limits for illegal drugs are set in line with a zero tolerance approach but ruling out accidental exposure. The limits for drugs that may be medically prescribed are set in line with a road safety risk-based approach, at levels above the normal concentrations found with therapeutic use. This is different from the approach taken when setting the limit for alcohol, where the limit was set at a level where the effect of the alcohol would be expected to have impaired a person's driving ability. For these reasons it would be wrong to rely on the Driving with Excess Alcohol guideline when sentencing an offence under this legislation."

21. Despite that caveat, the Crown submit that it was proper for the judge to make reference to the 2008 guideline. Such an approach was approved by this court in *R v Bravender [2018] EWCA Crim 723* . The Crown also note that all the different offences of causing death by careless driving when under the influence of drugs, including the instant offence, carry the same maximum penalty of fourteen years' custody.

22. Given the analysis of the appellant's specimen of blood obtained three and a half hours after the fatal collision, and the fact that he had over three times the permitted limit of THC, the Crown submit that the judge was entitled to find, for the purposes of the 2008 guideline, that the case fell within the middle category for the purpose of drug consumption. The Crown submit that the judge was correct to place the appellant in the second category,

namely, other cases of careless or inconsiderate driving, given what the telematic evidence had revealed. This was not an isolated episode of careless driving, but a course of excessive speed. The judge's categorisation under the guideline, noted above, led him to the sentencing range of four to eight years' custody and the starting point of five years. The Crown note that the grounds of appeal do not take issue with this part of the judge's approach. That is a point confirmed by Mr Masters today.

23. The Crown also note that there is no challenge in the grounds of appeal to the judge's logic that the starting point should be lifted to a higher point in the range to reflect the relatively high concentration in the blood of the relevant illegal drug and in relation to the aggravating factor of driving without insurance. The Crown thereafter submit that the judge was correct in concluding that the appellant had indeed caused the death of the victim and was correct in acknowledging and taking account of the fact that the victim had also made a contribution to the collision.

24. The Crown say that, having heard the evidence at the trial, the judge was entitled to form a view that the appellant's speed was at the higher end of the estimate, not least because the appellant had admitted in interview that he had been driving at around 40 miles an hour long the relevant road when the collision occurred. The judge did not place undue emphasis on the earlier instances of speeding. He referred to them briefly and adduced them as context.

25. As to the appellant's age, character, and other personal mitigating features, these were properly reflected in the sentence.

26. We turn to our analysis and conclusions. We begin by acknowledging that this case represented a truly difficult sentencing exercise for the judge. The appellant's central point is that this was an exceptional case in which (as originally it was put) he made no contribution to the death. We say straightaway that we reject that proposition. Had the appellant not been speeding as he drove the Mercedes motor car, he would never have struck Charlie Heywood  Charlie would have crossed the road before the Mercedes arrived; and, on the evidence, nor would any other vehicle have done so. But there is more. In our judgment, the judge was fully entitled to conclude that the appellant was driving well in excess of the speed limit immediately before the collision. On what basis was the judge to conclude otherwise? We know that the vehicle reached maximum acceleration and maximum deceleration over the relevant short period and distance. Why was the judge to assume that the braking took place at some random point over that drive? Why should it be assumed that the appellant was driving markedly below what we know to be his average speed over that short part of his journey before the critical moment? That would make no sense. There is positive evidence from the appellant in interview that he was travelling at around 40 miles an hour at the relevant time. The judge noted that. We also know that the appellant saw Charlie come into the road at the last minute, so that he was able to call out to his passengers. What reason did he have to slow down before that point? The logical inference is that he braked heavily then. Indeed, it would have been terrible if he had not.

27. In our view, the judge was quite right to sentence on the basis that the appellant was travelling at 40-plus miles an hour in a 30 speed limit, until the very last moment, and under the influence of cannabis. Thus, the appellant's driving made two clear contributions to the collision and the death: his speed and his speed of reaction. If he had not been speeding, he would not have collided with Charlie at all. If one makes the illogical

assumption that, despite travelling within the speed limit, he would for some reason have reached the critical point on the road when Charlie came out from the shadows into the carriageway, then his reaction time would have been better, his braking fractionally sooner, and his pre-braking speed markedly lower. One cannot say with any certainty what the outcome of such a hypothetical episode would have been, but this analysis makes it perfectly clear that the appellant made a real contribution to the death of Charlie Heywood.

28. We also reject the submission that the judge placed unwarranted weight on the earlier episodes of speeding that evening, as revealed by the car's telematic device. He did not. This was a factor properly taken into account by him to set the context for the critical events. The careless driving was not a momentary matter of misjudgement, but a continuation of a sustained course of driving too fast. That is an important piece of context when considering the appellant's culpability.

29. We have noted with care the respondent's remarks in relation to the judge's use of guidelines. We have noted the contents of the guidance note. However, with zero tolerance principles in mind, this is not a case where the appellant just exceeded minimum levels of THC in his blood. In this case, those levels were exceeded rather more than threefold and the drug will have had a real effect on the appellant's driving.

30. We consider that all of those matters mean that the judge's starting point of five years was entirely appropriate. The judge proceeded to reflect the aggravating circumstances in particular, the driving without insurance and the lack of remorse (as he described it) in contesting the charge in two successive trials. Thereafter, he did not reduce the sentence from the six years, which reflected those matters of aggravation, to address the personal mitigation in the case. We understand that the judge took it as an aggravating feature that the appellant contested the principal charge through two trials.

31. It is relevant to note that, on 23rd May 2018, in a previous appeal before this court, the appellant challenged his conviction at the first trial for the offence of driving whilst uninsured, contrary to section 3ZB of the Road Traffic Act 1988. He formulated that challenge in terms that the conviction had been based on causing an accident. That challenge was unsuccessful. The principal basis on which the Crown suggest that a lack of remorse can properly be put at the appellant's door in contesting the second charge follows from the unsuccessful appeal on that ground.

32. Although this is not wrong in principle, in our view it may have sounded too loud in the facts of this case. Save for the expert interpretation, in which respect the experts reached agreement, the appellant and his representatives never denied the facts of this tragic collision. The trials, including the second trial, were clearly conducted following specific legal advice to the appellant, and on a technical point of law. The pre-sentence report makes it clear that there was evidence of real sorrow and understanding on the part of the appellant sorrow at the death of Charlie Heywood and understanding of the impact on his family. That is, in our view, relevant to the culpability and mitigation in this case. It is clear that the appellant is a young man who has many qualities, and it is also clear that he has been profoundly chastened by the damage he has caused.

33. Perhaps the most troubling aspect of sentencing in this difficult case is how, and to what extent, the sentence should reflect the contribution made by Charlie Heywood himself to the accident. That is a hard thing for any court to articulate when we all have his death in our minds. But the court must do so to be fair. As we have said, it is wrong to suggest that the appellant was not to blame. He was. But Charlie, too, made a real contribution to his death. Although the judge said so, it is not clear that it had much impact on his eventual sentence.

34. At page 13 of the relevant guidelines, allowance is made for a mitigating factor arising from a contribution to the death by the victim. In our view, the proper analytical way to consider this is that the harm here was the tragic death of Charlie Heywood, to which two people contributed.

35. Having considered all these matters and as will be clear from the length and detail of this judgment we have given very close consideration to the factors involved we have concluded that the sentence passed was somewhat too high. We quash that sentence and substitute a term of imprisonment of five years. To that extent the appeal succeeds.

36. As a consequence, the extended disqualification must also be altered from six years to a period of five years and six months, that is to say, three years, plus two and a half years, pursuant to section 35A of the Road Traffic Offenders Act 1988. All the other orders remain unaltered.

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