

Neutral Citation No - [2019] EWCA Crim 1623

No: 201902272/A3

**IN THE COURT OF APPEAL**  
**CRIMINAL DIVISION**

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Tuesday 10 September 2019

**B e f o r e:**

**LORD JUSTICE SINGH**

**MR JUSTICE FRASER**

**MRS JUSTICE THORNTON DBE**

**R E G I N A**

**v**

**MARINA HELEN TILBY**

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**Mr D Thomas** appeared on behalf of the **Appellant**

**Mr S Heptonstall** appeared on behalf of the **Crown**

**J U D G M E N T**  
(As Approved)

MR JUSTICE FRASER:

1. The appellant Marina Tilby appeals against sentence with leave of the single judge. She pleaded guilty to one count of child cruelty, contrary to section 1(1) of the Children and Young Persons Act 1933, in respect of an incident concerning her four-week-old son Darrian. He was born on 2 March 2017 when she was 24 years of age. The incident in question occurred on the night of 29 March 2017 and into the morning of 30 March 2017. Darrian died on 31 March 2017. The indictment charged the appellant with child cruelty, consisting of wilful neglect of Darrian, in a manner likely to cause unnecessary suffering to him, or injury to his health. She was sentenced on 7 June 2019 in the Crown Court at Swansea by the Recorder of Swansea, His Honour Judge Thomas QC, to a period of two years and four months' immediate imprisonment.
2. This is undoubtedly a very tragic case, and the facts are as follows. The appellant was not in a relationship with Darrian's father at the time of his birth, although we have a victim impact statement from Darrian's father stating that he wished to be involved in his son's life. Whilst the appellant was under the care of a health visitor immediately following Darrian's birth, she was provided with advice, including the risks of co-sleeping with the baby and the increased risk associated with alcohol misuse. No issues were raised as to the care being provided to Darrian prior to the offence itself.
3. On Wednesday 29 March 2017 the appellant and her sister were in a public house in New Quay between 6 and 7 pm. Darrian was with them in a car seat. The two sisters were drinking Guinness before they left the pub at around 8.30 pm. Prior to leaving the pub the appellant's sister went to a local shop and purchased a bottle of gin, a bottle of port and a bottle of lemonade. A taxi then took the two sisters to the Quay West Holiday Park and they arranged for a return taxi at around 11.15 pm.
4. Upon arrival at the holiday park the appellant, and her sister, went to the main bar area and spent the evening in the clubhouse listening to a tribute band. They continued to drink Guinness during the evening. A number of witnesses noticed the two sisters with the young baby, and described how they both appeared to be under the influence of alcohol, and they were also both holding the baby whilst on the dance floor and dancing with him. CCTV footage, which we have looked at with some care, showed the appellant lifting Darrian above her head and throwing him into the air a short distance and catching him on at least four occasions. This was obviously a dangerous thing to do and no right-minded person can conclude that this was a suitable way to behave with such a very young baby.
5. Whilst at the clubhouse, the appellant and her sister met three men who were staying at the campsite, and at the end of the evening went back to the men's caravan with them, having cancelled their return taxi. They took Darrian with them and continued to drink

alcohol. During the course of the evening Darrian was passed around the group for cuddles and was breast fed by the appellant.

6. At about 3.30 am one of the men offered his double bed to the appellant to put Darrian to sleep. This the appellant did, putting Darrian down on top of the bed and she then lay down next to him and promptly fell asleep as well. A short time later the man went to bed himself, laying down on top of the covers fully clothed. There was no interaction between him and the appellant. He noticed that she was lying asleep face down next to Darrian. The other members of the group had no further involvement with Darrian or the appellant until the appellant's sister came into the bedroom about 30 minutes later to look for her.
7. Her sister discovered Darrian underneath the appellant, who was lying with her stomach on top of the baby. The man woke up, pulled Darrian from underneath the appellant and handed him to the appellant's sister. The baby had blood on his nose, he was unresponsive and the appellant's sister tried to provide immediate first aid to the baby. The emergency services were contacted. The appellant could not be roused. After the emergency services arrived, attempts to rouse the appellant continued, and paramedics arrived shortly after that and continued to attempt to revive Darrian. The baby was transferred to an ambulance and taken to hospital. Attempts were made to rouse the appellant. She did not respond. Police officers attended about 40-minutes later and they too tried in vain to rouse her. She was eventually roused at about 5.15 am. There was a bloodstain at the head end of the duvet, near to where the appellant had been lying. She had a similar stain down the front of her top. She was taken to hospital and was able to see her baby prior to him being moved to the intensive care unit, but shortly after 7 am she was arrested on suspicion of child neglect and taken to the police station.
8. A paediatric intensive care team travelled from Bristol to Aberystwyth to assist in Darrian's care, but despite the efforts made to do so, it was agreed that his position was hopeless and intensive care was withdrawn at 5 pm that day. The appellant was allowed to return to the hospital and Darrian died in her arms, and was certified dead later that day at 5.40 pm.
9. A Home Office pathologist, Dr James, noted that Darrian was a normal size for a four-week-old infant and appeared to have been in a good nutritional state and well cared for. With the exception of the events of the evening in question, there was no evidence of anything other than a good standard of care for Darrian. Abnormalities seen on Darrian upon examination were the secondary effects of prolonged cardiac arrest, the precise cause of which could not be ascertained from the post mortem findings. It was possible that the death could have been the sudden unexpected death in infancy, known as Sudden Infant Death Syndrome (or SIDS). It is recognised that such an event is more likely in co-sleeping with a baby, and some children die when an adult, usually intoxicated, lies on top of them whilst bed-sharing.

10. DNA evidence supported the conclusion that the appellant was sleeping with her head in the area of the bed, near to where Darrian's blood was found. There was no blood staining to indicate that Darrian had been moved significantly around the bed whilst bleeding. The blood staining on the appellant's top which was matched to Darrian had soaked through, indicating contact with Darrian's blood for long enough for that to occur. The findings could be explained by the appellant lying on top of Darrian whilst he was bleeding and/or becoming stained with wet blood. The prosecution concluded it could not rule out the possibility that the cause of Darrian's death was SIDS, and that this principal event occurred prior to the appellant lying on top of the baby. As we have said, the other medical evidence indicated that Darrian was a healthy, breast fed, four-week-old baby prior to his death.
  
11. The appellant indicated her intention to plead guilty to the charge of child cruelty at the PCMH and a pre-sentence report was obtained, as well as a psychiatric report. That report made clear that the death of Darrian had had a significant impact upon the appellant's mental health well in excess of that which would normally be expected of any parent whose newborn baby had died. She also has suffered deep depression with clinical depressive symptoms with a moderate degree of severity, as well as suffering from the stress-related skin condition psoriasis, in respect of which, we have been told today, her symptoms have increased in severity. Of course it must be recognised that some consequences will be the direct result of the appellant's own conduct and neglect, and the impact upon any first time mother of the death of their own baby. However the report makes it clear that the symptoms from which the appellant suffers are in excess of those ordinarily to be expected.
  
12. Darrian's father's victim personal statement made it clear not only that he wished to be involved in the baby's life, and upbringing, but also the considerable impact that the death of Darrian has had upon him. He also stated that he would have readily babysat for his son on the night in question, had he been asked by the appellant.
  
13. The sentencing judge placed the offence in Category 2, so far as harm was concerned, and Category A for culpability. He expressly sentenced the appellant on the basis advanced by the Crown, namely that it could not be ruled out that Darrian had died from SIDS. The sentencing judge accepted the medical evidence on that point. He stated that the offence was at the top of the range for Category 2A. That category has a starting point of three years' custody with a range of two to six years. The sentencing judge identified the correct sentence following a trial as being one of three years and six months, which he reduced by one-third to reflect the appellant's guilty plea. He therefore sentenced the appellant, as we have said, to immediate custody of two years and four months.

14. There are four grounds of appeal. They are that it was wrong for the sentencing judge to have placed the offence in Category 2A of the guidelines; that it was wrong to have placed the offence at the higher end of Category 2A; that there was insufficient downwards adjustment to the sentence to reflect the delay in this case which had a significant impact upon the appellant in the two year period following the offence occurring and her being sentenced; and finally that the sentence should not have involved immediate imprisonment, but should have been suspended. That can only apply if the sentence is 24 months or less.
15. The first issue in this case is whether the sentence passed upon the appellant is manifestly excessive, or wrong in principle, such that this court should interfere. We are grateful to Mr Thomas and Mr Heptonstall for the Crown who have assisted us with what is a very difficult and tragic case. We will deal first with the categorisation of the offence within the guidelines. In our judgment, and considering the particular features of this case, the offence ought not to be categorised as one of 2A with high culpability, but rather 2B medium culpability. We consider this to be one evening of neglect involving a lapse of judgment over that period, rather than a more prolonged period of neglect of a baby who was otherwise well cared for. The appellant's behaviour in taking her baby out with her for an evening out, and the amount of alcohol that she consumed, did indeed demonstrate that the baby's welfare was not being correctly dealt with by her, and one of the features of Category 2A is deliberate disregard for welfare.
16. However, in our judgment, the presence of other Category C factors, not least those that show that this is correctly categorised, or would be correctly categorised, as a lower harm offence means, as the guidelines expressly state, that the presence of factors indicating both Category C and Category A balance each other out, leading to a conclusion of Category B.
17. It is however, in our judgment, correct to be placed towards the top end of Category 2B, a point from which counsel for the appellant did not demur. It should be remembered, as this court has said many times, that guidelines are precisely that: guidelines. They are not rigid tramlines. Sentencing is a matter of careful judgment, but in our collective view this offence should properly be categorised as one being in Category 2B.
18. We turn to delay. There was considerable delay caused in this case between the incident itself and the charging of the appellant, caused not least by the difficulty in obtaining all the necessary evidence, and considering what was undoubtedly a complex investigation and a difficult charging decision. It was also necessary for the Crown to consider whether the events of the evening merited a more serious charge being brought against the appellant. We have taken account of this in arriving at the correct sentence, although it must be recognised that sometimes, particularly in difficult cases such as this, a delay prior to charging a defendant may well be inevitable, given the task of collecting

evidence and giving proper and reasonable consideration to the prosecution decision.

19. Turning to the guidelines, the correct starting point for a Category 2B offence is one year's custody with a category range which runs from a high level community order up to two years six months' custody. As we have said, we would go within that category range towards the top end, which would be two-and-a-half years, prior to adjustment for delay. In our judgment the sentence that was passed upon the appellant was one that was manifestly excessive, and in making the adjustment within the range that we have described we would, taking account of delay, move to a sentence of two years prior to discount for a guilty plea.
20. The mitigating features that are present, which have been explained to us very carefully today, include that she is genuinely remorseful and has no relevant previous convictions. When one applies the one-third discount to which she is entitled to the two year period that we have identified, one arrives at a custodial sentence of 16 months.
21. Given that sentence is one of less than two years, we therefore turn to consider whether immediate imprisonment is called for, or whether the sentence should be suspended. This is a matter which the sentencing judge was not able to consider, because the sentence which he arrived at was in excess of two years and so suspension was not available to him. We follow the guidance given in the Definitive Guideline for the Imposition of Community and Custodial Sentences. The feature that is present in favour of suspending the sentence is that of the appellant's personal mitigation. She has a good work record. The effect upon her of Darrian's death has been profound, although that must be balanced against the fact that as Darrian's mother she was duty bound to take care of him, and he was only four weeks old. She was a first-time mother and had no experience of caring for her own baby. It is however inevitable that as a mother who has been involved in an offence of this nature, with the dreadful consequences to which we refer, that she will be severely affected by them for the rest of her life, and we have taken that into account.
22. In all the circumstances, we have decided, after careful consideration, not only that the sentence should be quashed that was passed by the Recorder of Swansea, that the sentence should be suspended. We are going to substitute a suspended sentence order with a custodial sentence of 16 months. That sentence is going to be suspended for a period of 12 months. Her appeal therefore succeeds and her sentence is replaced with a sentence of 16 months imprisonment, suspended for a period of 12 months.

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