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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

Strand

London, WC2A 2LL

Tuesday 10 October 2019

B e f o r e:

LORD JUSTICE HADDON-CAVE

MRS JUSTICE COCKERILL DBE

HIS HONOUR JUDGE BATE

R E G I N A

v

PAVEL MAKEVIC

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office or take legal advice.

MR JAMES GRAY appeared on behalf of the **Appellant**

MR PHILIP HOWES appeared on behalf of the **Crown**

J U D G M E N T

1. **LORD JUSTICE HADDON-CAVE**: I am going to ask Cockerill J to give the judgment in this matter. Before I do, can I please say I know the victim's family are in court today. The process that we have been engaged in is analysing the evidence and the submissions which have been very carefully put by counsel, which is their job. The process may seem clinical, but it is a process of logic and applying the law as we see it. We wish the family in court to know that they have the very deepest sympathies of the court, whatever the outcome. Thank you.

2. **MRS JUSTICE COCKERILL**: On 4th February 2014, in the Crown Court at Lincoln before HHJ Coupland the appellant pleaded guilty on rearraignment to a charge of causing death by careless driving when over the prescribed limit under section 3A(1)(b) of the Road Traffic Act 1988. That plea came after the jury was sworn. He was then convicted by the jury on the judge's direction.

3. On 7th February 2019, before the same judge, the appellant was sentenced to 4 years and 9 months' imprisonment, was made subject to a victim surcharge order of £170 and he was disqualified from driving for 5 years and 5 months, that is 3 years extended by 2 years 2 months and until a driving test was passed.

4. The appellant appeals his sentence this morning with the leave of the single judge. He has been represented by Mr Gray of counsel, for whose clear submissions we are most grateful. We are also obliged to Mr Howes, who has appeared for the prosecution on the direction of the Registrar.

5. The conviction and this appeal arise out of a fatal road traffic incident which occurred at approximately 9.35pm on 15th November 2017 on Broadfield Lane, Boston, Lincolnshire. It occurred on a level crossing which divides Broadfield Street from Broadfield Lane. The appellant was proceeding over the level crossing in a south-westerly direction. He was over the speed limit and was one-and-a-half times over the drink drive limit. He drove into the rear of a cyclist, Mr Albert Harding (aged 74), whom he did not see until it was too late. Mr Harding had just left his home which was nearby. It was the Crown's case that the appellant was not paying proper attention to what was in front of him.

6. The collision occurred during the hours of darkness, but the area had the benefit of street lighting and lighting at the level crossing. The road surface was dry. The road as one approached the level crossing was a single carriageway with one lane in either direction. There were hazard markings which started after the left turn to Duke Street, that is a little over 50 metres before the level crossing. The level crossing is on a raised area, so the road rose slightly before, and then dropped back just after the crossing. It was a residential area and the road was governed by a 30-mph speed limit. The appellant was driving his BMW 735i saloon car. He had turned off Liquorpond Street into Broadfield Street. Mr Harding, on his pedal bike, was also travelling over the railway crossing in that same south-westerly direction.

7. No one saw the accident. It was apparent from the forensic investigation that just after the crossing the appellant, despite his efforts to brake, was unable to prevent his BMW from driving into the rear of Mr Harding's bike. Mr Harding was thrown onto the bonnet of the BMW and into the windscreen and landed on

the nearside pavement. The appellant stopped his vehicle at the scene. He told witnesses who arrived shortly thereafter that the cyclist had just come out at him. He said he had been driving at 25 mph.

8. The appellant remained at the scene and carried out CPR on Mr Harding until the emergency services arrived to take over. Paramedics arrived at 9.44pm. Mr Harding was taken to hospital but died later that night from the injuries he had sustained in the collision.

9. The appellant was breathalysed at the scene. The reading at the scene was 46 micrograms of alcohol per 100 millilitres of breath (the legal limit being 35) and he was therefore arrested. At the police station he provided two further breath specimens, the lowest reading of which was 53 micrograms. That is one-and-a-half times the legal limit.

10. The closest thing to eyewitness evidence came from a gentleman called Mr Rob Jennings. He had set off from his home en route to the crossing at 9.34 pm. His journey took him along Broadfield Lane in the direction of the level crossing (and that is in the opposite direction to the appellant). He reached it at about 9.37pm. He did not see any cyclist on the road. About 35-feet after the crossing on the left was a parked car, facing the Liquorpond Street direction, with its hazard warning lights turned on. He would therefore have to pass it. It was at this point that Mr Jennings saw a car turn left from Liquorpond Street into Broadfield Street driving in his direction. His evidence was that it accelerated very fast and his impression was that it got to about 40 mph as it was alongside him. Its speed struck him to the extent that he said to his son that "someone was in a hurry to kill themself". The Crown's case was that this must have been the appellant's BMW. Mr Jennings waited in his lane behind the parked vehicle for the speeding car to pass. Almost at once he heard the sound of a car sliding on the level crossing. He looked in his mirror but did not see any brake lights or any vehicle. He later explained that there were no other vehicles or headlights in this lane when pulled off to continue his journey, a fact which was said to indicate that there were no vehicles in his lane behind him which could have dazzled the appellant as he crossed the crossing.

11. There were no defects on the BMW that could have contributed to the collision. Although the ABS system was not working, the braking efficiency exceeded the minimum MOT requirements.

12. A liquid petroleum gas inspection revealed that the LPG system fitted to the BMW had been installed to a dangerous standard but did not contribute to the collision.

13. The collision investigator calculated from the skid marks on and after the crossing that the BMW was travelling at a minimum speed of 37 mph, as the driver would have had to apply the brakes prior to the marks being made.

14. In interview, the appellant accepted that he was the driver of the BMW and said he just did not see the cyclist. He claimed he had been "dazzled" by the lights of another car. He said he thought he was driving at 25-30 mph. He said he was at the level crossing when he saw the cyclist and hit his brakes very hard at once. He said that he did not have the opportunity to stop in time.

15. The appellant said that after the collision he rang 999 and assisted in attempts to resuscitate the cyclist. His evidence was that he had consumed two beers in the evening but claimed it had not affected his driving.

16. The appellant did not hold a Lithuanian or UK driving licence at the time of the offence.

17. In passing sentence, the judge observed that the area on the lead up to the level crossing where the collision took place was well lit and well marked and Mr Harding was there to be seen. He said that it should have been obvious that the presence of a level crossing required care to negotiate. He noted that the appellant was travelling above the speed limit and substantially above the safe speed for that part of the road. He concluded the speed was likely higher than 37 mph because that did not include speed lost by braking before the car started to skid. He said that the risk created by the decision to drive at an excessive speed was exacerbated by the fact that he had consumed one-and-a-half times the legal limit of alcohol, which was likely to impact on his perception of risks.

18. Although the evidence and reconstruction demonstrated that it was possible to be dazzled by another car on the crossing, the judge did not accept on the balance of evidence that the appellant was dazzled or that was the reason for the collision. He also concluded that even if the appellant had been dazzled by a car coming in the opposite direction, if he had been driving properly and paying proper attention the dazzling would have made no difference. If he had been driving at the right speed and paying attention, he might have been able to stop and avoid a collision altogether, or at least the collision would have been less serious.

19. He noted that the appellant sought in the aftermath to minimise what he had done and rejected that suggestion. He said that the accident took place because the appellant was not paying sufficient attention to the road and road users despite the risks he had created. While the judge accepted there was no intent to cause harm or injury, driving with that much alcohol in his body at that speed in that location created a substantial risk. He said that while the period of driving and distance travelled was not long, in those circumstances the way the appellant drove went far beyond momentary inattention.

20. The judge had read the victim personal statements from Mr Harding's daughters, as we have also done. He noted that the consequences of the appellant's driving were devastating. Mr Harding's family described how it has changed their lives forever. They spoke of feeling robbed of years of his company which they had expected and of a peaceful goodbye with him and of suffering every day since then, that loss then leading to depression and affecting all aspects of their lives, including the lives of Mr Harding's grandchildren. They speak of the difficulty that they have had moving on while this court process has been ongoing.

21. The judge concluded that so far as the level of alcohol was concerned the appellant fell into the middle category of the guidelines and towards the bottom of the bracket, but the culpability fell within the middle category and towards the upper end of that bracket because of speed, drink and lack of attention. He considered that the appellant's position was aggravated by the fact of a lack of a driving licence, the dangerous condition of the vehicle (although it did not cause or contribute to the collision but could have made it far worse) and the appellant's blame of others, including the deceased.

22. The judge noted the mitigation, highlighting the fact that the appellant did not seek to leave the scene but stayed and tried to help, his previous good character, the references which spoke highly of him, his qualities, his assistance to others given in the past and his hard work, and his family situation, including a young daughter with a serious medical condition and a sick mother. He noted that there would be a significant effect on the appellant's family in the event of a custodial sentence. He noted also the appellant's genuine remorse set out in a letter and the fact he had never been to prison before.

23. The appellant had pleaded guilty after the jury were sworn but before the case was opened, and the judge concluded that in respect of this factor the appropriate level of credit was 20% -- a higher percentage than would normally be given for a plea at this stage but reflecting the fact that the case against him changed considerably on the day of trial. He then concluded that the sentence after trial would have been 6 years' imprisonment. With credit for guilty plea, he reduced that to 4 years 9 months' imprisonment and he made the orders we have already mentioned as to disqualification.

24. Permission was granted by the single judge on the grounds submitted, which were that the sentence was manifestly excessive. It has been submitted that the judge erred by: rejecting the possibility of dazzling, improperly accepting aggravating factors, placing the matter into the wrong bracket in the sentencing guidelines and failing to pay sufficient regard to all aspects of the mitigation or to give sufficient credit for plea.

25. The single judge was particularly troubled by the issue of the driving licence, namely that there was a lack of clarity over whether the appellant had a valid Lithuanian driving licence. The position on this point has now been clarified. The appellant had no valid licence here or in Lithuania.

26. In oral submissions before us today, Mr Gray has made the points which are there to be made on behalf of his client extremely clearly and persuasively in the face of some resistance on the part of this court. His general submission is that the starting point of six years was manifestly excessive. Although he broke the argument down into separate points, reiterating the five bases in the grounds of appeal, it is fair

to say that the main thrust of the argument was that, taking into account all of those points together, the judge had effectively started at the wrong point within the bracket.

27. The principal issue on which he focused orally was the question of dazzle, saying that the judge was wrong to accept Mr Jennings' evidence, in part because Mr Jennings said he did not see the car in the rear-view mirror. Mr Gray has submitted that the balance of the evidence ought to have led the judge to question that witness's reliability. Allying that to the fact that he submits it is unfeasible that the appellant's account was not correct, and plausible that it was true, given its coincidence with the experts' agreed findings as to the possibility of dazzle, he submits that the judge should properly have come down in a different position on the question of dazzling. He notes that the physical evidence in terms of the skid marks was consistent with his submission.

28. In the light of dazzle, Mr Gray has submitted, in an extremely clever argument, that the speed was here the only element of carelessness; there was no other basis for the act of carelessness -- though he accepted that if one did not accept his argument on dazzling there would also be an element of inattention. He submitted that the judge's finding that the appellant should have been driving below the speed limit was without evidence and therefore improper. He also placed great stress on the personal mitigation and said that that was simply insufficiently weighted.

29. Finally, he has placed some reliance on the facts surrounding the late plea, saying in those circumstances more than the twenty per cent credit would have been appropriate.

30. Taking these points in turn, we are not unduly troubled by the judge's conclusion that the appellant drove substantially above a safe speed for the road. While there may be technical force in the submission that as a matter of law there was nothing in the level crossing which required a driver to drive below the speed limit, on any analysis the appellant was driving more than twenty per cent above the speed limit, at night, coming up to a level crossing, where a degree of caution would normally be regarded as at least prudent. Twenty per cent above the speed limit is in any circumstances a substantial amount. At 37 mph, as the expert evidence noted, a car will travel 16.54 metres per second: that is more than 2 metres a second more than it would do at 30 mph. We also note that the figure of 37 mph agreed on by the experts was not a maximum, but a minimum figure; and the evidence of Mr Jennings tends to suggest that the speed was more. It is in the circumstances extremely hard to characterise the judge's comments as improper. Nor, we should note, does the question of speed appear to have been taken as a formal aggravating feature. The structure of the sentencing remarks is to deal with the aggravating features later in the sentencing remarks.

31. Nor do we consider that the question of dazzle was improperly rejected by the judge. The terms in which the argument that the appellant was dazzled was rejected was:

1. "Although the evidence and the reconstruction demonstrate that it is entirely possible on that level crossing, on the balance of the evidence I do not accept that you were dazzled or that that was the reason for the collision."

32. We would not accept the submission that this conclusion was one which was not open to the judge. Following *R v Guppy [1995] 16 Cr App R (S) 25* , it might be argued that it was open to the defence to make good the case that the appellant was dazzled. As matters stood on the evidence, it was plainly an arguable point on which the judge was entitled to draw a conclusion against the appellant. But in any event our own view of the evidence persuades us that it was in fact open to the judge to be sure on the evidence that the appellant was not dazzled either by Mr Jennings' car or by any other car. Certainly it cannot be said that on the balance of evidence, it was clear that the appellant was dazzled such that it could have been said that the argument was improperly rejected.

33. As for the suggestion that it was improper to accept Mr Jennings' evidence - while the car seen may or may not have been the appellant's car, we certainly conclude that it was open to the judge to conclude that it was the appellant's car based on the evidence and it cannot be said that he was in error to do so. Indeed given the absence of any other credible contender to be that car, we can see every reason why he could conclude that he was sure this evidence was reliable, even though some small details, such as seeing the turn into Liquorpond Street or whether the car was a saloon or estate, might not have been

entirely accurate; and in any event the point remains that even if there were dazzle, the defendant would have had extra time to notice Mr Harding and take steps to stop if he had not been proceeding at such a speed.

34. As regards the condition of the vehicle, it does appear that the judge counted this as an aggravating factor. We note, and it is conceded, that the guideline permits driving a poorly maintained vehicle to be taken as an aggravating factor.

35. We accept that in circumstances where the fault does not appear to have been demonstrated to make the vehicle capable of making the collision worse and where there was no evidence one way or the other that the appellant knew of the poor maintenance of the vehicle or the inadequacies of the LPG installation, it might be said that this is not a point on which to place much reliance. However, the judge does not seem to have rested heavily on this point; it was simply one of a number of factors taken into account.

36. We certainly do not accept the submission that the judge placed the offence in the wrong category; and indeed, Mr Gray wisely did not attempt to press this point. We would entirely agree with the judge that this case falls into the middle box of the second row on the grid on page 17 of the guideline. While this was not a prolonged case of bad driving, it cannot conceivably be said to be a case of "momentary inattention with no aggravating features". It is, if anything, towards the more serious end of the scale within the category of other cases of careless/inconsiderate driving.

37. The absence of a licence is a specific aggravating factor, as is the attempt to place blame on the victim, albeit that that was not persisted in until trial and the prosecution have not urged it on us as an aggravating factor.

38. Further, the judge was entitled on the evidence to be sure that the dangerous driving was somewhat more than momentary.

39. We do not accept either that the discount for plea was inadequate. The plea was only offered on the day of trial. There was a late change in the case advanced which prompted that decision. Although what was focused on was a narrow issue of whether Mr Harding would have survived if the appellant had been driving at 30 miles per hour, that ignores the fact that the case on careless driving was not simply a speeding case, but a case of careless failure to notice; and the evidence was that Mr Harding would have been visible for some time, and, as Mr Howes noted in his submissions, there were 147 metres' distance from the turn from Liquorpond Street. The case advanced veers into a plainly fallacious suggestion that if one is travelling within the speed limit one cannot be careless. It also ignores the impact of the level crossing, where extra caution was required on the question of speed. In our judgment, the judge plainly fairly balanced these factors in arriving at a discount of twenty per cent and it could not be said that the discount given was inadequate.

40. We do accept that there was an element of double counting, albeit in both directions, in the judge's analysis. The offence fell into category 2 because it was a driving while under the influence of drink offence. Alcoholic consumption is therefore counted at this stage. However, looking at the aggravating factors, the judge did place the offence "towards the upper end of that bracket because of the speed, the drink and your lack of attention for some distance".

41. Further, in looking at the mitigating factors, the judge counted (as is the usual practice under the more modern guidelines) the appellant's good character. However, the causing death by driving guideline is one of the oldest still in use and proceeds on the basis that the starting point assumes that the defendant is a first-time offender. Good character should therefore not properly have counted as a mitigating factor. As a result, these two instances of double counting may be said to balance each other out.

42. We do not accept the submission which Mr Gray made that there was double counting as to speed and inattention. These are necessary factors in placing the offence within the bracket, just as a higher level of alcohol might permit placing higher in the bracket or, Mr Gray submits, that a lower level of alcohol permits placing lower. Once one reaches this stage, the argument becomes one as to the balancing exercise to be performed by the judge. This was a point that Mr Gray accepted in argument. The essence of the case is that the judge has in relation to a number of points pitched his position within the band too high.

43. We entirely understand the submission that the offence was, in terms of the level of intoxication, only just within the middle bracket -- fractionally above the 5-year range bracket and a lower starting point than 5 years could therefore have been appropriate. At the same time, one has to bear in mind the seriousness of the offence in terms of culpability which has to be considered also.

44. We do also agree that the appellant was entitled to the credit of some considerable mitigation. We agree that giving assistance at the scene is specifically identified as one such factor at paragraph 27 of the guideline and therefore must be given due weight. So too must remorse. We accept there were considerable general factors in the appellant's favour. The question is how heavily that mitigation balances against the undoubted serious aggravating factor of the lack of licence and the initial blame cast in the direction of the victim, taken together with the factors as to speed and lack of attention.

45. To arrive at a finishing point of 6 years after taking all of this into account, before twenty per cent credit for plea, suggests that the judge had in mind a starting point of something in the region of 7 to 8 years. This places the offence near the top of the central box in the grid.

46. However, we do not consider that the judge erred in principle at any point and we bear in mind that there is a range of answers at which a sentencing judge can properly arrive. This reflects the important distinction for the purposes of this court between a sentence which is robust and even stern, and one which is manifestly excessive. We conclude that it may be that other judges weighing the factors in this case in the balance would come to a different or lower figure. At the same time, we can perfectly well, on considering the various factors which had to be weighed, see how the factors when balanced could produce exactly the result at which the judge arrived. We would therefore regard the sentence as being relatively robust, but we are certainly not persuaded that it is one which is manifestly excessive. Accordingly, we dismiss this appeal.

47. LORD JUSTICE HADDON-CAVE**:** So the appeal is dismissed. Can we thank you, Mr Gray, very much and Mr Howes for your very clear and helpful submissions? Can we also thank everybody in court today for their quiet dignity in listening to this case?

48. MR HOWES: My Lord, do you want to return to the disqualification because my learned friend and I have discussed it.

49. LORD JUSTICE HADDON-CAVE: Yes.

50. MR HOWES: Five years 5 months' disqualification, comprising 2.5 years and a discretionary term of 3 years. It looks, on my part, my Lord, that he's halved 4 years 9 months and arrived at 2 years 5 months, which is not right.

51. LORD JUSTICE HADDON-CAVE: The maths is not quite right.

52. MR HOWES: My Lord, I have done it by days because it is probably simpler.

53. LORD JUSTICE HADDON-CAVE: Yes. Give us the figures.

54. THE MR HOWES: My Lord, 4-and-a-half years is 1,734; the halfway point is 867 days; 3 years is

1096, which makes a total of 1,963 days, which is different from

55. LORD JUSTICE HADDON-CAVE: And how many is that in months?

56. MR HOWES: I have not reduced it down. I have just done it in days.

57. LORD JUSTICE HADDON-CAVE: Sentences are normally expressed in month and weeks. We can get the learned court associate to do that calculation and I will discuss it with my colleagues. The learned court associate tells me the DVLA actually like it in days. So, the correct figures would be a disqualification for how long?

58. MR HOWES: 1,963 days.

59. LORD JUSTICE HADDON-CAVE: Are we doing the section 35A and B split?

60. MR HOWES: Yes, my Lord: that is 1,096, and the halfway point is 867. So I took the uplift is 867 and the discretionary period is 1,096.

61. (The Bench conferred)

62. LORD JUSTICE HADDON-CAVE: Thank you, Mr Howes. We so order. So the sentence in relation to the disqualification is clarified to reflect a period of 1,096 days' discretionary.

63. MR HOWES: 1,963.

64. LORD JUSTICE HADDON-CAVE: 1,963 days discretionary and the uplift under section 35B is 867.

65. MR HOWES: I am sorry, it is 1,096 and 867 uplift, making 1,963. My Lord, I will speak to your associate.

66. LORD JUSTICE HADDON-CAVE: Thank you all very much.

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