Neutral Citation Number: [2020] EWCA Crim 407

Case No: 201904423 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2020

Before:

Lord Justice Simon
Mr Justice Fraser
and
Mr Justice Hilliard

- -

Between:

Regina	**Appellant**
and	
A	**Respondent**

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- -

Mr Wayne Cleaver for the prosecution

Mr Richard Dawson for the defence

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Approved Judgment

The provisions of s.71 of the Criminal Justice Act 2003 apply to these proceedings. [See para.2.3 at p.8 of the Practical Guide to Reporting Restrictions in CACD]. By virtue of those provisions, no publication may include a report of these proceedings, save for specified basic facts, until the conclusion of the trial unless the Court orders that the provisions are not to apply.
In the present case, an issue of law is involved, and it is appropriate to lift the restrictions, in part, so that the decision may be reported, albeit anonymously.

Lord Justice Simon:

Introduction

1. This is an application by the prosecution for leave to appeal against a terminating ruling in the Crown Court, under s.58 of the Criminal Justice Act 2003.

2. The respondent faced two charges: count 1, causing death by dangerous driving and count 2, causing serious injury by dangerous driving.

3. She was jointly charged with a man (L) who pleaded guilty to these charges as well as a further count of causing serious injury by dangerous driving (count 3).

4. The circumstances giving rise to these charges arose from a collision on the M1 in November 2017.

5. The prosecution case was that in the early hours of the morning a truck driven by L struck the rear of a car driven by the respondent, at a time when the car was stationary on the hard shoulder, some 500 m from an exit slip road.

6. The respondent and her 3 friends (M, C and K) had been out clubbing. The respondent was the designated driver, and at the end of the evening her intention was to drive her friends back home. They set off at approximately 3.30 am and headed north up the motorway. In the course of this journey the respondent and M began to quarrel. The passengers were drunk and were beginning to annoy the respondent; and she became so irritated by them that she pulled over onto the hard shoulder of the motorway. She remained there for a few minutes before continuing on the journey, before again pulling onto the hard shoulder and remaining there for about 15 minutes. It appears that K got out of the car and would not return. The respondent remained in the driver's seat. No hazard or other lights were displayed on the car.

7. At some point, another driver proceeding in the same direction (AC) had to take evasive action to avoid a collision with the open door of the respondent's car. He swerved into the middle lane and sounded his horn to indicate the danger being caused. It appears that the door was then closed.

8. Another prosecution witness (S) described L's truck passing him in the outside lane at about 70 mph, before suddenly swerving across the other lanes and into the hard shoulder. The truck struck the respondent's car. C died as a result of the collision, and both M and the respondent suffered serious injury.

9. The prosecution was unable to say what had caused the truck to veer to the nearside, but it was believed that L had fallen asleep.

10. L and the respondent were jointly charged with causing death by dangerous driving (count 1) and causing serious injury to M by dangerous driving (count 2). L, alone, was charged with causing serious injury to A by dangerous driving (count 3)

11. The prosecution case was that both L and the respondent were responsible for the collision. Although the respondent's car was not moving at the time, (1) as a matter of

law the respondent was 'driving', (2) that driving was dangerous, and (3) it was a contributory factor in the collision.

12. In September 2019, an application was made on the respondent's behalf to dismiss both charges against her under Schedule 3 paragraph 2(2) of the Crime and Disorder Act 1998 and *Galbraith* (1981) 73 Cr App R 124. The Judge hearing the application ruled on the papers that there was sufficient evidence to prove each ingredient of the offence and therefore a case to answer.

13. At the close of the prosecution case at the trial which followed, a further submission of no case to answer was made before the trial Judge, who was not the judge who had heard the earlier application.

The ruling

14. In his careful and considered ruling, the trial Judge dealt with the two key factors in issue: dangerousness and causation.

15. In relation to dangerousness, he rejected the respondent's submission of no case in the following terms:

> … there is evidence upon which a properly directed jury could conclude that this was not an emergency or was one within the power of [the respondent] to control to an extent that would have allowed her to move on. The question of dangerousness is one for a jury.

16. Doubtless consideration of the relevant provisions of the Highway Code would inform an answer to this question.

17. However, the Judge accepted the respondent's submission in relation to causation.

18. He referred to the case of *Girdler* [2009] EWCA Crim 2666, to which we will return later in this judgment, and said this:

> There is evidence that [the respondent] had at one point her door open into lane 1 of the carriageway and was sitting with her legs out of the car, causing those in lane 1 to swerve or take evasive action. If the collision had in any way been connected to such action, then there would be a basis for the jury to reach an adverse finding. However, that is not the case.

19. Later, he added:

> In my judgment the prosecution evidence at its highest cannot provide a sound basis upon which a jury properly directed could conclude that it was reasonably foreseeable that a third party - at 4.30am on a Saturday morning when the traffic was very light - would be so distracted by tiredness or some other prevailing condition that he would suddenly at high speed career across all three lanes of the motorway and into the hard

> shoulder, coming to his senses too late to avoid colliding with [the respondent's] stationary car …
>
> I am satisfied that in the very case-specific circumstances of these allegations, L's dangerous driving can only constitute a free, deliberate and informed act, that is a new and intervening act that broke the chain of causation created by the presence of [the respondent's] car on the hard shoulder, whether or not her presence there would be found by the jury to constitute dangerous driving. It is not open, in my judgment, for a jury properly directed to conclude that [R] caused (as in caused in law) the collision that led to the untimely death of [C] and the serious injury to [M]'

The grounds of appeal and response

20. For the prosecution, Mr Cleaver submitted (without risk of contradiction) that issues of fact were for the jury. In order to prove causation of death by the dangerous driving, the prosecution needed only to establish that the respondent's driving was *a* cause, it need not be *the* cause, nor even *the principal* or *a substantial* cause of the collision. The respondent had created dangerous conditions by stopping where she did, and those conditions became increasingly dangerous the longer the car remained there. The longer this period, the more reasonably foreseeable it became that a collision would occur. The test of reasonable foreseeability was an objective one to be determined by the jury. Among the relevant factors was the action by C in sounding his car horn and taking evasive action to avoid a collision when the car door was open.

21. The Judge's approach to the issue of what he described as 'legal and imputable causation' was too confined. A defendant does not have to reasonably foresee that a collision would occur in the precise circumstances in which it in fact occurred. It would be open to a jury to find that it was reasonably foreseeable that by stopping her car on the hard shoulder a collision might occur with a vehicle travelling in the same direction.

22. In resisting the prosecution's appeal, Mr Dawson submitted that the Judge was correct to rule that there was no case to answer for the reasons he gave. It had always been accepted that the respondent's driving needed only be more than a minimal contribution to the death and injury. The prosecution evidence, taken at its highest, could not provide a sound basis upon which a properly directed jury could conclude that it was reasonably foreseeable that a third party, at 4.30 am on a Saturday morning, when the traffic was very light, would suddenly cross from the outside carriageway onto the hard shoulder, and collide with the respondent's stationary car. L's dangerous driving had broken the chain of causation. His driving had effectively superseded the respondent's driving as the cause of the death and serious injuries. The Judge had correctly interpreted the case of *Girdler* and the specimen direction formulated by the court in that case.

Consideration of the arguments

23. Although the appeal is put in a number of ways they can be conveniently be stated in the form of two questions: first, whether the Judge's interpretation of *Girdler* resulted in an approach to the issue of causation that was too confined; and if so, whether there was a case for the Jury to consider on the facts?

24. In *Girdler*, the court was concerned with a collision on a major road in different circumstances. The appellant had driven into the back of a taxi. The collision propelled the taxi into the fast lane leaving it broadside to the oncoming traffic. A car in the fast lane collided with the taxi, killing the driver of the car and the taxi. In that case the Court considered how a jury should be directed when, in a prosecution for causing death by dangerous driving, a defendant submits that he did not cause the death, but that the driver of another car did so. The context was the hearing of an appeal against conviction based on a misdirection by the trial judge. After a full review of authorities on what the court described as a 'new and intervening act or event', the Court said this at [43]:

> … We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were sure that his dangerous driving was more than a slight or trifling link to the death(s) then:
>
> > the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.
>
> The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary, it could be made clear to the jury that they are not concerned with what the defendant foresaw.

25. The issue on this appeal is how to apply the words 'in the circumstances' in the phrase, 'it could sensibly have been anticipated that a fatal collision might occur in the circumstances' in which the collision occurred.

26. The respondent's argument is that the Court must look at the particular circumstances or specific chain of circumstance in which the collision occurred. On this basis, in the the present case, the jury would have to be sure that it could be sensibly anticipated that another driver would, in the Judge's words, 'be so distracted by tiredness or some other prevailing condition that he would suddenly, and at high speed, career across all three lanes of the motorway and onto the hard shoulder.'

27. In our judgment the law does not require that the <u>particular</u> circumstances in which a collision occurs should be foreseeable.

28. In *R. v Maybin* [2012] 2 SCR 30 the Canadian Supreme Court considered a case concerning two violent attacks on a victim. The defendant and his brother initially punched the victim in a bar room brawl rendering him unconscious. Soon after this, the bar's bouncer punched him on the head. The victim later died of a brain haemorrhage. The medical evidence was inconclusive as to which blows had caused

the death. The trial judge acquitted the brothers and the bouncer of manslaughter. The Court of Appeal of British Columbia allowed a prosecution appeal in respect of the brothers and ordered a new trial. The case was then taken on appeal to the Supreme Court, which dismissed the brothers' appeal.

29. The judgment of the Court (LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ) was given by Karakatsanis J. Her judgment, which was closely reasoned by reference to principle, authority and academic opinion reached this view on causation:

> 34. In my view, the chain of causation should not be broken only because the specific subsequent attack by the bouncer was not reasonably foreseeable. Because the time to assess reasonable foreseeability is at the time of the initial assault, rather than at the time of the intervening act, *it is too restrictive to require that the precise details of the event be objectively foreseeable*. In some cases, while the general nature of the ensuing acts and the risk of further harm may be reasonably likely, the specific manner in which it could occur may be entirely unpredictable. From the perspective of moral responsibility, it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts. ...
>
> 38. For these reasons, I conclude that it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. *Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct ...* (emphasis added throughout).

30. The judgment concludes:

> 60. Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused's acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending on the factual context. However, the analysis must focus on first principles and recognise that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death.

31. Although the expressions 'moral responsibility' and 'moral connection' find little echo in the domestic approach to issues of causation, an argument that allows a

defendant to avoid criminal responsibility on the basis of arguments about the particularity of circumstances would not appear to be consonant with the approach that is taken in this jurisdiction.

32. In *Wallace (Berlinah)* [2018] EWCA Crim 690, this court was concerned with an argument about an intervening act in very different circumstances. However, the court referred to this statement at [84]; and, although it did not specifically endorse it, the approach was at least consistent with the direction that was proposed by the Court at [86] paragraph 3(b).

> "(b) Are you sure that at the time of the acid attack it was reasonably foreseeable that the defendant would commit suicide as a result of his injuries? In answering this question consider all the circumstances, including the nature of the attack, what the defendant did and said at the time and whether or not [the victim's] decision to undergo voluntary euthanasia fell within the range of responses which might have been expected from a victim in his situation. If your answer is yes, your verdict on count 1 will be guilty. If your answer is no, your verdict on count 1 will be not guilty.

33. Our view that the particular circumstances of a collision would not have had to be foreseen is supported by the editorial comment in Blackstone's Criminal Practice 2020 at §A1.32:

> … even an accidental or unintended intervention may break the chain of causation if it was not reasonably foreseeable in the circumstances (*Girdler* [2009] EWCA Crim 2666). This does not mean that the exact form of any such intervention must have been foreseeable at the time of the original assault etc. in order for the chain of causation to remain unbroken. If the general form and risk of further harm was reasonably foreseeable, *it may not then matter if the specific manner in which it occurred was entirely unpredictable* (*Wallace* [2018] EWCA Crim 690, [2018] 2 Cr App R 22 (325) at [84], citing *Maybin* 2012 SCC 24 (SC Canada)) (emphasis added).

34. Perhaps unsurprisingly, the views of the editors of Smith, Hogan & Ormerod 18th Ed, at p.71 are to similar effect.

35. What had to be sensibly anticipated was that another vehicle might leave the carriageway and collide with the respondent's parked car. It would not be necessary for the jury to be sure that the particular circumstances of the collision or 'the exact form' of the subsequent act was reasonably foreseeable.

36. It follows that, in our view, the Judge adopted too confined an interpretation of the *Girdler* formulation, and as a consequence he erred in his conclusion that there was no case to answer.

37. If a driver leaves a car, on the hard shoulder of a motorway for 15 minutes at 4.30 am on a November morning, without displaying any lights**,** a jury could properly conclude that some form of collision could occur, and that, if it were occupied, death or serious injury could be caused.

38. Accordingly, in the words of s.67 of the Criminal Justice Act 2003, the Judge's ruling was either wrong in law or involved an error of principle.

39. In these circumstances, and as provided by s.61(4)(b) of the Act, we will order a fresh trial of the respondent on count 1.