IN THE COURT OF APPEAL
CRIMINAL DIVISION
Case No: 2022/02129/A4
NCN: [2022] EWCA Crim 1295

Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday 12 August 2022

B e f o r e:

LORD JUSTICE WARBY

MRS JUSTICE O'FARRELL DBE

MRS JUSTICE CUTTS DBE

R E G I N A

- v -

MARTIN ANTHONY FARNELL

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Mr A Payne appeared on behalf of the Appellant

J U D G M E N T
(Approved)

LORD JUSTICE WARBY:

1. On 29th March 2022, in the Crown court at Birmingham, the appellant, Martin Farnell, changed his plea to guilty of an offence of dangerous driving, contrary to section 2 of the Road Traffic Act 1988. On 9th May 2022 he pleaded guilty to failing to surrender to bail, contrary to section 6 of the Bail Act 1976 and was sentenced for both offences. His Honour Judge Henderson imposed a sentence of 18 months' imprisonment for the dangerous driving and a consecutive term of one month's imprisonment for the Bail Act offence. The appellant was disqualified from driving for three years, with an extension period of 38 weeks and until an extended re-test is passed.

2. The appeal papers were lodged 30 days out of time. Before us today, therefore, is an application for an extension of time in which to apply for leave to appeal against the sentence for dangerous driving, which has been referred to the full court by the Registrar. Also before us is an application to extend time in which to appeal against the sentence for the Bail Act offence. Leave for such an appeal is not required, because the Bail Act provides for an appeal as of right.

Extensions of time

3. We grant the extensions of time. We see that counsel's advice and grounds of appeal were completed and dispatched promptly, on 19th May 2022, just ten days after the sentencing and therefore 17 days before the papers had to be lodged. The solicitors then instructing counsel promptly passed on the advice to the appellant's new firm of solicitors. The late filing turns out to be an administrative error involving a junior member of the new team. That is unsatisfactory and hard to excuse, but as there has been no prejudice to the administration of justice we grant the necessary extensions of time in both instances and proceed to consider the merits.

The facts

4. The dangerous driving charge arose from a series of events which started at around 1 pm on 26th June 2020 and which lasted a total of 30 minutes, in the course of which the appellant was involved in at least one collision with a DAF Tipper lorry driven by Kieran Patten.

5. The whole incident was captured on dashcam footage taken from the lorry. This shows front, rear and side views of the lorry's surroundings. The court has viewed that footage. It shows that, whilst waiting at a set of traffic lights, the appellant cut in front of the tipper lorry. The appellant was later to say that both drivers sounded their horns, which sounds entirely plausible. These events seem to have initiated what was described in the Crown Court as a "road rage" incident.

6. The appellant got out of his car and started to argue with the lorry driver. The lorry drove off. The appellant followed in his car, moved past the lorry and cut in again sharply, causing the lorry to strike the car on its rear offside corner. The car spun around. The lorry continued, without stopping, on to the M6 motorway. The appellant pursued it onto and along the M6. Having followed for a while, he drove dangerously, switching lanes, undertaking and overtaking the lorry. He slowed down to as little as 14 miles an hour and then braked hard in front of the lorry, which caused it to stop. There appears to have been a second collision.

7. The appellant stopped in front of the lorry, got out of his car and started to shout and gesture at the lorry driver. Two passengers in the appellant's car also got out, but the lorry driver set off again. The appellant returned to his car and started to follow the lorry again for over ten or

15 minutes. For much of this period the appellant was at a reasonable distance behind the lorry, but at times he veered from lane to lane in the busy lunchtime traffic. On one occasion he pulled very close indeed behind the lorry. For a period of time later he pulled alongside it and stayed there for well over a minute.

8. While the pursuit was taking place, the appellant was on the phone to a police operator. He was told on numerous occasions by the operator to stop following the lorry, but he ignored that advice and kept up the chase. Eventually, police intervened and all parties pulled over.

9. In interview the appellant said that he could not remember who had started it, but remembered that they had both sounded their horns at each other and had exchanged words. He said that he had managed to get in front of the lorry and began to weave across his path to try to slow him down, but at a very low speed. He was then hit and spun. He therefore chased the lorry onto the motorway. His friend was on the phone to the police. He accepted that when he reached the motorway he tried to stop the lorry. He said that it hit him again. He said, indeed, that he was hit for a third time and then managed to stop the lorry. When they all got out with the intention of getting the driver out, he drove off.

10. The appellant admitted that it was "probably a bit mad" to get in front of a lorry and that he probably saw "red mist". He said that he had done some things that he should not have done and agreed that his actions were unsafe. He said that he was an experienced and knowledgeable driver who had been driving for a long time. He did not think that what he had done was acceptable, but he denied driving dangerously. He said that he was an experienced and competent driver, but he accepted that he had no lawful authority to do what he had done.

11. The proceedings were protracted. The case was listed for plea on several occasions, on some of which the appellant failed to attend. He stated that he had Covid. This led eventually to his remand in custody and the Bail Act charge.

Sentencing information

12. The appellant, who was aged 32 at the date of sentence, had nine previous convictions for 17 offences between 30th May 2002 and 1st April 2008. These were mainly for theft and kindred offences, but there were several driving offences. In 2004 the appellant was convicted of driving without a licence or insurance and an offence of aggravated vehicle taking, for which he received a 12-month supervision order. In 2007 he was again convicted of driving with no licence or insurance and of taking a vehicle without consent. For those offences he received a 40-hour community punishment order. There had, however, been no offences since 2008.

13. A pre-sentence report assessed the offending as demonstrating a propensity for reckless and impulsive behaviour. The appellant had taken responsibility for his behaviour and expressed remorse, but he had shown limited insight or victim empathy, had very limited emotional control and lacked anger management skills.

14. The appellant reported to the author of the pre-sentence report that until his remand in custody he had been living with his partner of 15 years in a stable relationship and was actively involved in the care of their 6-year-old daughter. He feared that they would suffer undue hardship if he was sentenced to custody, as his partner relied on him for emotional and practical support. The appellant said that he had been suffering with depression and anxiety while in custody, for which he was taking medication.

15. The author of the pre-sentence report said that she believed that the appellant's risks could be effectively managed in the community. If the court was willing to consider such a disposal

she recommended an 18-month community order, or, alternatively, a suspended sentence with a Thinking Skills Accredited Programme requirement, a rehabilitation activity requirement and, if punishment in the community was required, unpaid work or a fine commensurate with the seriousness attached to the matter by the court.

Sentencing

16. In sentencing the appellant, the judge described the primary offence as "a desperately serious bit of dangerous driving" that was not over in moments or minutes, but lasted about half an hour and continued, despite many warnings from the authorities. He said that the CCTV footage showed that the appellant and those in the car with him had been "furious and out of control" following what was a "relatively trivial" cutting-up dispute. Such behaviour was, said the judge, near the top of the scale for dangerous driving.

17. The judge did not regard the appellant's previous convictions as an aggravating feature. He treated him as effectively a man of good character, because he had lived down his troubled past and stayed out of trouble for more than 12 years, prior to the road rage incident. Nonetheless, the sentence would have been one of 21 months' imprisonment after a trial. This was reduced by one-seventh to reflect the late guilty plea, which resulted in a sentence of 18 months' imprisonment.

18. The judge said that he was "in no doubt that this needs to be marked by a sentence you have to serve" because people needed to know that behaving like this on a motorway for such a long time would result in them being sent to prison. The consecutive term of one month's imprisonment for the Bail Act offence was then imposed.

Grounds of appeal

19. There are two grounds of appeal against the sentence for dangerous driving. First, it is said that the judge took too high a starting point, bearing in mind the maximum sentence of two years' imprisonment for this offence and the appellant's effective good character. Mr Payne, who has presented the appellant's case attractively, concisely and compellingly, accepts that the driving was "undoubtedly appalling" and that it was accompanied by a number of aggravating factors. But he points to the absence of factors that could have increased the seriousness of the offence. There was no suggestion, for instance, of drink or drugs, no showboating, no police chase and no injury to anyone. He submits that there were also mitigating factors. He points to the failure of the lorry driver to stop after the collision, which is said to provide an excuse or at least an explanation for the pursuit, and he points also to the unexplained delay in the sentencing exercise, which seems to have attracted no reduction from the judge.

20. Secondly, and in any event, Mr Payne submits that the judge erred in concluding that the offending was so serious that only an immediate custodial sentence would be sufficient. He argues that the judge failed properly to undertake the necessary balancing exercise, taking account of factors supporting the suspension of the sentence. 13. Reliance is placed on the appellant's caring responsibilities, his guilty plea and the recommendation in the pre-sentence report. It is said that the appellant had a good past record of compliance, that he was not a risk to the community, and that the case presented unusually strong personal mitigation to which insufficient weight was attached by the judge. Indeed, this is said to be overwhelming. A realistic prospect of rehabilitation is said to have been demonstrated in the pre-sentence report.

21. Mr Payne expands on what was reported to the author of the report, in particular by telling us that the appellant's partner suffers from severe psoriatic arthritis which, he says, covers the

entirety of her body, causing joint swelling, with the consequent need to visit the doctor frequently. The appellant used to take his partner to these appointments, as well as taking and fetching his daughter to and from school.

22. The sentence for the Bail Act offence is challenged on the basis that the starting point was manifestly excessive and that the sentence failed to have regard to the principle of totality.

Assessment

23. We are grateful to Mr Payne for his submissions. He has persuaded us that his ground 1 is arguable, but has not persuaded us that we would be justified in interfering with the length of sentence imposed by the judge for the offence of dangerous driving. The notional sentence after a trial was a stiff one, but we do not think it was manifestly excessive. There may indeed be more serious cases of dangerous driving, but this was undoubtedly a very serious example indeed.

24. As to harm, the fact that nobody was injured is no more than a matter of good fortune. This dangerous driving took place over a prolonged period of time, most of it on a motorway. The appellant was clearly distracted by his fury at what had happened and his determination to do something about it. There was, in our judgment, a very high risk of death or serious injury. There was at least one collision, probably two, and on the appellant's own account three. There were passengers in the car and of course many other road users in the vicinity, at 1 pm on a weekday. Driving as slowly as 14 miles an hour on a busy motorway can be as dangerous as speeding.

25. Culpability was high. The appellant's behaviour was wildly disproportionate to the trivial incident that sparked it off. It was persisted in, despite official warnings. He showed a disturbing lack of self-control. He was fortunate, in our judgment, to be treated as a man of good character, but that cannot detract from the assessment of the author of the pre-sentence report that his conduct was reckless and impulsive.

26. In terms of mitigation, we do not think that any real weight can be placed on the lorry driver's behaviour in leaving the scene. He did so after a crash brought about by the appellant. In any event, it cannot begin to justify what followed. There was delay in the case, but this was largely if not entirely of the appellant's own doing, whether or not it was his fault, and there is no evidence before us to suggest that it bore harshly upon him or his loved ones. For virtually all of that period he was on bail.

27. We turn to ground 2. The guideline on the imposition of community and custodial sentences identifies factors which may support or point away from the suspension of such a sentence. There are three of each. Judges are required to weigh those factors in considering whether suspension is possible. In this case the judge's reasoning for imposing immediate custody was very brief and focused exclusively on a single reason for imposing it, rather than mentioning any countervailing factors. In an "ideal world", as this court recent observed in *R v Barraclough (David Selwyn)* [2022] EWCA Crim 1101 at [12], a sentencing judge will do more than this. He will refer to the relevant guidelines and to any factors pointing in the opposite direction in the particular case. It can be done very briefly.

28. A failure to provide reasons of this kind is not, however, of itself a ground of appeal. As *Barraclough* shows, this court will consider the substance of the matter. If the court concludes that the sentencing judge conducted the discretionary or balancing exercise required by the guideline, it will only interfere if there is some error of principle or the decision falls outside the ambit of reasonable evaluative conclusions.

29. In the instant case the judge expressly identified one of the three points against the suspension of a sentence. He was entitled to give that factor great weight. We are not persuaded that the brevity of the judge's observations on this issue is an indication that he failed to have any regard to countervailing factors, or to weigh them against the need to mark the seriousness of this offence with immediate custody. We have no doubt that he was ably pressed with these by counsel in mitigation. The judge's sentencing remarks as a whole indicate a careful approach to the appellant's circumstances. In our view, the judge's decision is not one with which we should interfere, and leave is refused.

30. We are not persuaded that the personal mitigation here was strong. There was nothing of any real weight so far as the appellant himself was concerned. The prospects of rehabilitation were uncertain. Where an offender relies on hardship to others, their rights must be factored in but are not a trump card. The issue has to be approached with some care. Absent agreement, a sentencing court – and this court – would normally expect supporting evidence. The medical information that counsel has presented to us today was evidently not provided to the author of the pre-sentence report. It is not accompanied by any medical report. What was before the sentencing judge, and is before us, is a printout of the partner's medication and letters from her and the appellant himself. At its high point, the relevant impact of the partner's condition appears to have been a need for someone to take her to medical appointments. We do not downplay that matter, but some replacement arrangements must have been put in place in the period that has passed since the sentence was imposed. The written materials presented to us made no attempt to explain what these are or were, or how they have worked. We are not convinced that the impact on third parties is so harsh as to outweigh the factor identified by the judge.

31. As for the Bail Act offence, however, we do see force in the contention that the sentence was excessive. A sentence of one month's imprisonment implies a notional sentence after a trial of six weeks. That is appropriate only where the offence involves a deliberate attempt to evade justice that leads to a substantial delay and/or interference with the administration of justice. The judge did not identify a basis for any such conclusions. Nor are we able to identify one in the papers before us. Accordingly, we accept that the case should have been treated as failure falling short of a reasonable excuse, with a starting point of a Band A fine.

32. In all the circumstances we will quash the sentence for the Bail Act offence and substitute a sentence of one week's imprisonment, which will run concurrently with the sentence of 18 months' imprisonment. The total sentence will thus be one of 18 months' imprisonment and not 19 months.

33. There must be a consequential alteration in the driving disqualification, which will now be a disqualification of three years, with an extension period of nine months, pursuant to section 35A of the Road Traffic Offenders Act 1988. The record will be amended accordingly.

34. To that limited extent only, this appeal against sentence succeeds.
