IN THE COURT OF APPEAL
CRIMINAL DIVISION

CASE NO 202201902/A3
NCN [2022] EWCA Crim 1351

Royal Courts of Justice
Strand
London
WC2A 2LL

Friday 7 October 2022

Before:

LORD JUSTICE DINGEMANS

MR JUSTICE GARNHAM

MR JUSTICE BOURNE

REGINA
V
DEREK CHRISTOPHER HALL

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MR S HANNS (Solicitor Advocate) appeared on behalf of the Appellant.

J U D G M E N T

MR JUSTICE BOURNE:

1. This is an appeal against sentence with permission granted by the single judge.
2. At 7.42 am on 29 January 2019 the appellant was driving his car on the A4041 Queslett Road, a dual carriageway with a 40 miles per hour speed limit. He approached the junction with Netherill Avenue where there is a pelican crossing controlled by traffic lights. The lights changed to amber and then to red. Another car stopped in the right-hand lane. The appellant did not stop but overtook that other car on its left side and passed through the light as it changed from amber to red. A cyclist, Sebastien Michalak, was crossing the junction on the pelican crossing. The appellant collided with him at a speed of at least 33 miles per hour.
3. Mr Michalak (then aged 34) suffered a catastrophic head injury. More than 3 years on, he has not returned home but is in a Rehabilitation Centre. He uses a wheelchair for mobility and a heavy duty Zimmer frame for the toilet. His speech is slurred, he has memory difficulties and he struggles to make choices. The Court received a very distressing victim personal statement from his wife, describing the effect on him, on her and on their young sons, as she put it "the family ceased to exist".
4. The appellant stopped at the scene. When interviewed by the police, he denied responsibility and said that the traffic light was amber and that he could not stop because he was committed to crossing the junction. Those assertions would be rejected by the judge. He pleaded not guilty at a PCMH. The trial was much delayed because of the Covid-19 pandemic. The appellant eventually pleaded guilty on the first day of the trial.
5. The appellant was aged 57 at the time of the offence, 60 when sentenced. He lived alone and worked as a delivery driver at the time of the offence but lost his employment as a result of it. There were some unrelated offences recorded against him in the 1980s but he fell to be treated as of previous good character.
6. The case came before HHJ Buckingham for sentence on 25 May 2022 in the Crown Court at Birmingham.
7. According to a pre-sentence report the appellant had shown "little but some remorse". He was critical of Mr Michalak for using a pedestrian crossing when cycling, possibly wearing headphones and not wearing high visibility clothing. As the judge said, the report showed the appellant in a poor light.
8. The judge had regard to the Sentencing Guideline for Causing Death by Dangerous Driving ("the Causing Death Guideline"). The statutory maximum sentence for that offence is 14 years, compared with 5 years for the offence with which we are concerned. The Guideline divides offences into three levels. Level 1, with a starting point of 8 years' custody and a range of 7 to 14 years is for: "The most serious offences encompassing driving that involved a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others". Level 2 with a starting point of 5 years and a range of 4 to 7 years is for "Driving that created a substantial risk of danger". Level 3 with a starting point of 3 years and a range of 2 to 5 years is for "Driving that created a significant risk of danger".
9. We observe that because the Causing Death Guideline only concerns fatal cases, it focuses entirely on the driver's culpability and not on the level of harm caused in individual cases. In a case of causing serious injury rather than death the court must, of course, assess both culpability and harm.
10. Judge Buckingham, having noted correctly the difference in the maximum penalty,

decided that the appellant's driving involved a "substantial risk of danger", corresponding to level 2 under the Causing Death Guideline. She also acknowledged that the offending did not include other commonly seen aggravating features such as the commission of further offences like driving uninsured or without a licence. The appellant had a clean driving record and no relevant previous convictions. That apart, she did not find significant mitigation, beyond the late plea which would attract credit of 10%. She decided that although the driving was not in the worst category, the catastrophic consequences took this case close to the maximum for this type of offence. She sentenced the appellant to 40 months' imprisonment with disqualification for 2 years plus an extension of 20 months under section 35 of the Road Traffic Offenders Act 1988 and a requirement for an extended driving test. She did not state what the sentence after a trial would have been, but her reference to 10% means that it would have been 44 or 45 months.

11. The appellant is represented by Mr Simon Hanns. He made very clear and realistic written and oral submissions for which we are grateful. He contends that although an immediate custodial sentence was justified, the term of 40 months was manifestly excessive, based on the following grounds of appeal:
    1. The judge was not made aware of a relevant factor, namely that when the appellant was 5 years old he was traumatised by witnessing an accident in which his brother was run over and killed by a car.
    2. Although the judge was entitled to have regard to the Causing Death Guideline, she "did not exercise sufficient caution" when making an adjustment to reflect the much lower maximum sentence for the index offence, and therefore took too high a starting point.
    3. The starting point of about 45 months was quite close to the maximum sentence of 5 years, despite this being an offence which was placed in category 2.
    4. The starting point was too high in light of the appellant's personal mitigation including remorse, which was not well communicated in the 15-minute telephone conference on which the pre-sentence report was based and in light of the effects of Covid-19 in delaying the hearing and in respect of conditions in custody.
12. We are not persuaded by the first ground of appeal. It was for the appellant to bring any relevant matters to the attention of his advisers and the court but, in any event, we do not consider that his tragic childhood episode could have persuaded the judge to pass a lower sentence, at least in the absence of any medical or other expert evidence to show that it reduced his culpability in some way. The suggestion that unresolved trauma from that episode could explain or excuse the appellant's minimising of his own guilt is, in our view, speculative.
13. The other grounds essentially merge into a submission that, all things considered, the judge took too high a starting point and imposed a manifestly excessive sentence.
14. Although there is no Sentencing Guideline specific to this offence there are judgments of this Court which give some guidance on how to proceed.
15. In R v Dewdney [2014] EWCA Crim 1722; [2015] 1 Cr App R(S) 5, an offender with relevant previous convictions, under the influence of alcohol and drugs, drove towards a hump back bridge far too fast, ignoring warnings from passengers. He caused injuries to several victims which were very severe although not catastrophic. He was severely injured himself. It seems that the Crown Court took a starting point of 54 months. It was

submitted on his behalf that this was not the most serious case of its kind, and that a starting point close to the maximum was wrong in principle. This Court had regard to the Causing Death Guideline. At paragraph 25 Treacy LJ said that the difference between the statutory maxima for the two offences meant that in a case of causing serious injury, "... there will of necessity be a degree of compression in the sentences available... to reflect different types of dangerous driving and its consequences... ". He continued:

> "26. It seems to us therefore that it is not a helpful exercise to indulge in considering the very worst imaginable type of case which would attract a sentence at the maximum. A more realistic approach is to identify a broader band of conduct which will represent the most serious offending within the ambit of the offence."

16. This Court ruled that the case fell within that band, even if it was a level 2 offence, because of the various aggravating factors. Culpability and harm were both very high and the "deservedly severe" sentence was upheld.
17. Whilst it is not appropriate to attempt a line by line comparison with the facts of other cases which are not guideline cases, we note that this Court has upheld similar or higher sentences in cases whose facts bear comparison with the present case. It imposed a notional sentence of 48 months before credit when allowing an appeal in R v Sandulache [2015] EWCA Crim 1502, where a dangerous overtaking manoeuvre on a twisty road caused the victim catastrophic injuries and there were no other aggravating features. It upheld the same notional sentence in R v Bridden [2016] EWCA Crim 2013, where a speeding driver applied the brakes too late to stop at a red traffic light, inflicting catastrophic injuries on a moped rider who was waiting at the lights.
18. Finally, we refer to R v Allen [2021] EWCA Crim 1405; [2022] 1 Cr App R(S) 45. The appellant there attempted a dangerous overtaking manoeuvre, disregarding warning signs. Another driver suffered catastrophic injuries. The appellant himself was seriously injured. The judge viewed the case as falling in level 1, but this Court would have placed it in level 2 or in level 3 with aggravating features. Carr LJ said:

> "26. However this may be a case where it is not particularly helpful to focus on the Guideline, given the legitimate debate as to where precisely the facts of this case fall within each of the levels there identified. Rather, it is better to consider the overall seriousness of the offending by reference to the appellant's culpability and harm set in the context of a maximum sentence of five years' custody. Against this background, we stand back and ask ourselves whether the overall resulting sentence of 38 months' custody was manifestly excessive.
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> 27. In our judgment, as indicated, a notional sentence of 40 months before credit for guilty plea, achieved by reference to the starting point for level 1 offending was manifestly excessive. In our judgment, taking into account culpability and harm and the relevant aggravating and mitigating factors, a notional sentence of around 30 months' custody after trial was appropriate."

19. That brief survey demonstrates the difficulty and the dangers of making comparisons with other cases, when every case of this kind turns on its own facts.

20. To the text that having regard to the Causing Death Guideline is and was helpful, we agree with the judge that this was a level 2 case. The appellant overtook the other car with the traffic light against him and when he could not see whether anyone was on the crossing, as Mr Michalak tragically was. That was highly culpable, clearly creating a substantial risk of danger.
21. Following the guidance given in Dewdney and Allen, we stand back and consider whether this case falls within a band representing the most serious cases, by reference to culpability and harm in the context of the maximum sentence of 5 years' custody. We have just referred to the appellant's level of culpability, and the harm, as we have said, was at the highest level.
22. The judge would have passed a sentence of up to 45 months after trial, compared with a statutory maximum of 60 months. She did not fail to "compress" the sentence downward from the levels in the Causing Death Guideline where the level 2 starting point would have been 5 years.
23. We must also emphasise that it was for the judge to assess personal mitigation, remorse and the justification of any complaint about the preparation of the pre-sentence report. In some cases a defendant has strong personal mitigation, as in Allen, where the defendant had himself suffered very serious injury. This was not such a case.
24. We recognise that the sentence was severe. It was at the upper end of the relevant range and only limited adjustment for mitigation was made. However, we are not persuaded that it was manifestly excessive and we consider that any adjustment we might have made would be in the nature of tinkering. The judge directed herself correctly on the law. She referred to the appellant's personal circumstances. She was aware of the delay and pointed out that it was caused primarily by his maintaining a not guilty plea until the last moment.
25. The appeal is therefore dismissed.