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Case No: 202102801/A2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

ON APPEAL FROM THE CROWN COURT AT BASILDON

HER HONOUR JUDGE COHEN

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 8 June 2022

Before:

LORD JUSTICE STUART-SMITH
MR JUSTICE JEREMY BAKER
HIS HONOUR JUDGE ANDREW LEES
(Sitting as a Judge of the CACD)

REGINA
V
THOMAS WILSON

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Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London EC4A 1JS

Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

MR D CLAXTON appeared on behalf of the Appellant
MR M MULLINS appeared on behalf of the Crown

J U D G M E N T

1. LORD JUSTICE STUART-SMITH: On 13 August 2021 before Her Honour Judge Cohen at the Crown Court at Basildon, the appellant, who was then aged 28, was sentenced for two offences as follows. On count 6 of an indictment, which was an offence of aggravated vehicle taking involving a fatal accident, allowing himself to be carried, contrary to section 12A of the Theft Act 1968, having been convicted after a trial the appellant was sentenced to three years' imprisonment consecutive. On count 7, a count of possessing a controlled drug of class A with intent to supply, contrary to section 5(3) of the Misuse of Drugs Act 1971, upon his plea of guilty he was sentenced to three years and four months' imprisonment. There was also imposed an order of 98 months of disqualification. Ancillary orders for the forfeiture and destruction of cocaine and a mobile telephone were also made. As will appear later, the judge also imposed a requirement that the appellant should take an extended driving test before he could drive lawfully on the roads again.

2. There was a co-accused, Mr Madel, who pleaded guilty to causing death by dangerous driving which had been count 1 on the indictment. He was sentenced to nine years' imprisonment after full allowance had been made for his plea of guilty.

3. The appellant appeals with the leave of the single judge against the sentence imposed on count 6. He submits that the sentence of three years is manifestly excessive when viewed in isolation. He also submits that there should in any event have been a reduction in the overall sentence on grounds of totality and that there should have been a Manning reduction. An application for permission to appeal against the sentence imposed on count 7 was refused by the single judge and is not renewed before this court.

4. On the morning of 18 September 2020 the appellant attended the Stock Brook Country Club in Billericay where he was a member, with Mr Madel as his guest. The appellant had driven there with Mr Madel as his passenger. Due to the pandemic there was a one-way system in operation in the changing room and by the pool which meant that the lockers could not be used and bags and possessions were left unattended. The defendants were observed by a cleaner at the club to be going in the wrong direction along the pool side and the cleaner formed the view that they had left something in the changing room. The cleaner therefore went into the changing room and retrieved a bag which he handed over. The bag in fact belonged to another member of the country club and the keys to that person's Ford Kuga car were inside. Within a short time Mr Madel had left the club and driven off in that other member's Ford Kuga. The appellant left a few minutes later in his own vehicle.

5. Telephone download evidence showed that Mr Madel then sent messages to the appellant telling him where he was. Cell site data suggested that the two were together later in the afternoon and during the evening. They consumed a large amount of alcohol, as well as cocaine and Ketamine.

6. On 19 September, the following day, Mr Madel and the appellant were together shortly after 2 pm in the Ford Kuga that had been taken the previous day. Mr Madel, a

disqualified driver who did not have insurance, was driving and the appellant was the front seat passenger. They were driving on Hartswood Road near Brentwood. The Kuga was travelling at between 64 and 68 mph on a 30 mph section as it approach temporary traffic lights. Mr Madel drove through the red light and struck the front corner of an oncoming Mercedes vehicle. The Kuga overturned and skidded along the pavement on its roof. It collided with James Esah, a 17-year-old A-level student who was walking home from his part-time job. Mr Esah was projected into the air and found a short time later by members of the public. He subsequently died in hospital from his injuries. A group of three workmen managed to leap out of the way of the Kuga. One of them, a Mr Clark, felt the bonnet momentarily press his legs into the pavement, so narrow was his escape.

7. Both defendants emerged from the wreckage of the Kuga and attempted to leave the scene. They were pursued by members of the public. Mr Madel succeeded in getting some distance away before being stopped and arrested. The appellant had been injured quite seriously in the crash and so was unable to get away. Those at the scene observed a white powder around the noses of both defendants. After getting out of the Kuga, Mr Madel had handed a small bag to the appellant which was the same bag that the appellant had had with him at the country club the day before. On examination it was found to contain just over 43 grams of cocaine at a purity of around 85 per cent and around one gram of Ketamine. Messages on the appellant's mobile phone showed that he was engaged in selling drugs for money. That formed the basis of count 7, the charge of possessing class A drugs with intent to supply.

8. The appellant was 28-years-old at the time of sentencing. He had relevant previous convictions. He had previous convictions for using a vehicle whilst uninsured in 2011 and 2017 and a previous conviction for supplying class A drugs in 2012 for which he had received a suspended sentence. Just a month before the events giving rise to the present case, on 17 August 2020 he had failed to stop after an accident when he had been driving while unfit through drink or drugs and had failed to surrender to custody as soon as practicable after the appointed time for which he received a relatively short custodial sentence on 26 September 2020. At the time of the present offences he was on bail.

9. The sentencing judge had victim statements both from the family of the deceased and from the three workmen who narrowly avoided being killed or severely injured in the accident. We have read them. The family spoke eloquently of the near impossible grief suffered by those left behind and the devastation caused by the senseless ending of Mr Esah's life when he was on the threshold of adulthood.

10. The judge had a number of character references and certificates which we have also read. They spoke of the appellant as someone far removed from the reckless idiot high on cocaine or Ketamine, speaking of his qualities as a devoted father and honest man for whom nothing would be too much trouble.

11. The prosecution's note for sentence identified aggravating features which included that the appellant (a) had a poor driving record and would have known of Mr Madel's worse record; (b) did nothing to stop Mr Madel from driving dangerously; (c) did nothing to

stop Mr Madel from driving when he knew he was under the influence of class A drugs which they had taken together; (d) had tried to flee from the scene of the accident.

12. In sentencing the appellant, the judge referred to the circumstances leading to and immediately following the accident, stating that both Mr Madel and the appellant were intoxicated by cocaine and Ketamine. She regarded the appellant's previous convictions as "highly aggravating". Turning to the aggravated taking charge, she said:

> "There are no sentencing guidelines for aggravated vehicle taking; the maximum sentence is 14 years. Those cases, which do touch upon it, are mainly concerning instances where the driver is the defendant. I have to look therefore at your culpability, as well of course as the harm that was caused. You helped to steal the car, you took drugs with the driver on the day of the accident and you have bad antecedents relating to driving, which demonstrate to me that you have a reckless disregard for any rules relating to the driving of cars. Weighing against that, I have to bear in mind that you were not the driver and I must also bear in mind, and do, the principle of totality. The sentence on that count will be three years' custody, which will be consecutive to the drugs matter, so the total sentence in your case will therefore be six years and four months."

13. In submitting that the sentence on count 6 was manifestly excessive, Mr Claxton, who also appeared in the court below, submits that the offence under section 12A of the Theft Act 1968 may be committed by someone either as driver or as passenger and that where committed by a passenger there is a distinction to be drawn between passengers who bear some responsibility for the driving and those who do not. The appellant he submits was in the latter category. He submits that the appellant's offence was of a lesser order of seriousness than was the case in the authorities to which the court below was referred and to which we refer below. He submits that the appellant's individual culpability was not significantly greater than it would have been for the simple form of the offence under section 12.

14. Mr Claxton summarises his submissions by saying that there was no reduction in the sentence on count 7 to reflect totality, nor was there any apparent reduction in the sentence under count 7 (that being the count of possession with intent to supply) to reflect the personal mitigation that was available to the appellant or to reflect prison conditions during the pandemic. Therefore it is submitted any reduction must have been in relation to the sentence imposed on count 6, so that the sentence of three years was not in truth the judge's starting point but the end point. Viewed in this way, he submits that the sentence is too high. He is entitled to draw support from his submission from the fact that the judge said that the sentence of three years was after adjusting for totality, but there was no express mention in the judge's sentencing remarks of any reduction for personal mitigation or Manning.

15. In response, Mr Mullins, who appeared before us and before the court below for the Crown, submits that the judge was entitled to find that the appellant exhibited a reckless

disregard for any rules relating to the driving of cars and that disregard goes directly to culpability.

16. Section 12A was introduced by the Aggravated Vehicle Taking Act 1992 to deal with problems that may arise after the unlawful taking of a vehicle either by a group or where it is not clear who has been driving or who has inflicted damage on or with the stolen car. It builds upon section 12 of the Act which creates the basic offence of taking a mechanically propelled vehicle as follows:

> "(1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if—
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> (a) he commits an offence under section 12(1) above (in this section referred to as a 'basic offence') in relation to a mechanically propelled vehicle; and
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> (b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.
>
> (2) The circumstances referred to in subsection (1)(b) above are—
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> (a) that the vehicle was driven dangerously on a road or other public place;
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> (b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;
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> (c) that, owing to the driving of the vehicle, an accident occurred by which damage was caused to any property, other than the vehicle;
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> (d) that damage was caused to the vehicle.
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> ...
>
> (4) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, fourteen years ... "

17. The maximum sentence where the accident causes the death of a person was increased from 2 to 14 years by the Criminal Justice Act 2003 at the same time as the maximum sentence for causing death by dangerous driving was increased also to 14 years. This led

at least on occasion to cases involving fatalities being charged under section 12A rather than as an offence of causing death by dangerous driving, even if the evidence would support such a charge. In Roberts [2013] EWCA Crim 785 this approach was deprecated by the Lord Chief Justice, Lord Judge who said:

> "Causing death by dangerous driving is, in sentencing terms, generally regarded as the more serious offence and it should be the norm for that [rather than an offence under section 12A] to be charged where the evidence is there to support it."

18. Of the four sets of circumstances set out in section 12A(2) only (a) refers to the manner or quality of the driving. Neither (b) nor (c) requires proof on its face that the quality of the driving was deficient. However, in Taylor [2016] UKSC 5, the Supreme Court affirmed its earlier decision in Hughes [2013] UKSC 56 in holding that the driving referred to in (b) and (c) must have some causative effect beyond merely being the occasion for the presence of the vehicle. It was held that:

> "22. ... The phrase 'caused the death of another person by driving a motor vehicle on a road' (section 3ZB of the Road Traffic Act 1988) and the phrase 'owing to the driving of the vehicle, an accident occurred by which injury was caused to any person' (section 12A(2)(b) of the Theft Act 1968) both posit a direct causal connection between the driving and the injury."

19. In its consideration of section 12A and its impact upon a person who is not the driver of the stolen vehicle, Lord Sumption with whom the other members of the Supreme Court agreed, said:

> "27. The first point to be made about section 12A of the Theft Act is that it is in no sense a regulatory or 'quasi-criminal' enactment. Aggravated vehicle-taking is a serious crime. Driving offences causing serious injury or damage are a source of growing public concern. The aggravating factors which differentiate the section 12A offence from the basic offence expose the defendant to a maximum sentence of 14 years imprisonment, the same as for causing death by dangerous driving. Although the death of the victim is not strictly speaking an element of the offence, the increased maximum sentence for cases where someone has been killed reflects the real stigma associated with it. Even where the only damage is to property, the maximum sentence is two years.
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> 28. The one respect in which section 12A imposes strict liability is that the offence may be committed not only by the driver but by anyone else who was party to the basic offence under section 12(1) and is in or in the immediate vicinity of the vehicle at the time of the dangerous driving, injury or damage. That emerges unequivocally from the statutory language. But it is important to

> note that it is also a rational response to the mischief of the enactment, which has close analogies to the principle underlying cases of strict liability identified by Lord Diplock in Sweet v Parsley. The Act treats someone who has been party to the taking of a vehicle without authority as having control over it thereafter. He is in a position to take positive steps to ensure that it is driven safely and not in a manner which causes personal injury or damage to property. That is the rationale of the proviso that he must have been in or in the immediate vicinity of the vehicle at the time when the dangerous driving, injury or damage occurred. His responsibility continues to be engaged while he is present.
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> 29. However, it is one thing for the legislature to make a person who has taken a car without authority responsible for the fault of another person who drives it in his presence. It is another thing altogether to make him responsible for personal injury or damage which could not have been prevented, because it occurred without fault or was entirely the fault of the victim. That would be a sufficiently remarkable extension of the scope of the strict liability to require clear language, such as the draftsman has actually employed to impose liability on a taker who is not the driver. There is no such language in section 12A. Of the four aggravating circumstances identified in subsection (2), (a) expressly imports a requirement of fault (the car must have been driven dangerously), while (b), (c) and (d) contain nothing which expressly excludes such a requirement. As Lord Reid explained in Sweet v Parsley, at p 149D-E, this difference cannot itself be enough to make (b), (c) and (d) operate independent of fault. On the contrary, in the case of (b) and (c), it is implicit in the requirement that the accident must have occurred 'owing to the driving of the vehicle', that there will have been something wrong with the driving. As this court pointed out in Hughes, the driving cannot be said to have caused the accident if it merely explained how the vehicle came to be in the place where the accident occurred."

20. There is no sentencing guideline for offences under section 12A. Equally there is no guideline case and the present case is not set up to become one. We are therefore reticent about making general statements of principle. However, as the passage from Taylor that we have cited above makes clear, the need for the prosecution to prove causation in a case falling under (b) or (c) implies that there will be something wrong with the driving of the vehicle. As the passage also makes clear, where that requirement is proved both the driver themselves and the passenger may be caught by the draconian provisions of section 12A. Those provisions are the considered legislative response to a serious social problem and public concern. That considered response places responsibility upon a non-driver for the consequences that flow from the use of a stolen vehicle - see Taylor at paragraph 28. We therefore reject the submission that a person in the position of the

appellant is to be regarded as no more culpable than a person who only commits the "basic offence" under section 12 of the Act.

21. We were referred to Woolley [2005] EWCA Crim 2853, [2006] 1 Cr.App.R (S) 123 and Wheatley [2007] EWCA Crim 835, [2007] 2 Cr.App.R (S) 77 as examples of previous decisions of this court. In Woolley a 19-year-old caused the death of his friend when driving a stolen car. It was accepted that he had not been driving dangerously at the time. The court accepted that there could be gradations of culpability for both drivers and passengers, a proposition which seems to us to be self-evidently correct. From the perspective of the driver the presence or absence of dangerous or negligent driving obviously goes to culpability. In the case of a passenger, the quality of the driving may also go to culpability, particularly in a case such as the present where the driver and passenger had both become intoxicated by cocaine and Ketamine before the driving in question. For the passenger culpability could also be affected by whether the passenger actively encouraged the drive to drive or to drive as he did, or whether the passenger was either neutral or tried to discourage the driver from driving as he did. That said, for the reasons set out at paragraph 28 of Taylor, the mere absence of evidence of positive encouragement over and above mere presence does not mean that the passenger avoids responsibility or culpability for the driving or its consequences. Beyond this we do not consider that it is likely to be helpful for us to attempt to categorise all the possible factual permutations of such cases or to place them in order of gravity.

22. In Wheatley sentences of four years' detention, which were equivalent to sentences of six years before reduction for guilty pleas, imposed upon passengers aged 18 and 19 were reduced to three years, i.e. equivalent to four-and-a-half years. There was no evidence that the passengers had encouraged the dangerous driving that led to the death of a child other than by their presence, though they were clearly aware that dangerous driving was likely before they got into the car as the driver was showing off, performing stunts and driving dangerously before an audience of youths which had included the appellants before they got into the car. The court referred back to Woolley and the observation of Rose LJ at paragraph 16 of that case that the most significant feature in relation to sentence for a driver was likely to be the degree of culpability of the driving of the offender. The court accepted the submission that culpability is also the most significant factor for those who are passengers in the vehicle being driven dangerously by another and that in general the culpability of a passenger is likely to be less than that of the actual driver. We respectfully endorse that observation while cautioning that even so there could be cases where the actions of the passenger, for example in egging on the driver, could mean that the passenger's culpability either matched or virtually matched that of the driver.

23. We respectfully agree that culpability is likely to be the most significant factor for those who are passengers, though it must be recognised that the occurrence of a fatality causes a step-change in the level of sentence that is available to the court and likely to be imposed and that the culpability of the passenger must be seen in the light of the observations in Taylor.

24. In the present case the judge expressly looked at the appellant's culpability while also

taking into account the harm that had been caused. She was right to do so. It may be said that assisting in stealing the car is a prerequisite to an offence under section 12A because section 12A does not come into operation unless the defendant has committed the "basic offence" under section 12 either on their own or jointly with someone else. However, the facts relating to the unlawful taking are infinitely variable and there is no reason why the level of a defendant's culpability in relation to the original taking may not be taken into account when considering the overall seriousness of the aggravated offence.

25. The judge also identified as aggravating features the fact that the appellant took drugs with Mr Madel on the day of the fatal accident, as he had done the day before, and his previous driving convictions. On this material the judge was entirely justified in concluding that the appellant had shown a "reckless disregard for any rules relating to the driving of cars". The judge did not go so far as to treat the joint drug taking as active encouragement to Mr Madel to drive dangerously, but the disinhibiting effect of their joint intoxication may readily be accepted as a factor that contributed to what happened later and to the appellant's culpability. As against that, the judge expressly and rightly took into account the fact that the appellant was not the driver and the principle of totality.

26. The judge did not state what reduction she had made for totality, nor did she mention the appellant's personal mitigation or any reduction following Manning when gathering the strands of her ruling together. That said, the only question for us to answer is whether the sentence on count 6 was manifestly excessive given that it was to be made consecutive to the sentence on count 7.

27. We deal with the Manning point first. Numerous authorities since that decision have emphasised that the longer the aggregate sentence the less potent are Manning arguments. In our judgment unless a very significant reduction is to be made for other reasons, the aggregate sentence passed on the appellant was in the region where the potency of a Manning submission is greatly reduced.

28. If count 6 had stood alone we are confident that a sentence significantly in excess of three years could and would properly have been passed. While accepting that the appellant was not the driver and giving due weight to the personal mitigation to which we have referred, this was a serious case of aggravated vehicle taking in which the appellant played his full part. He could readily have terminated his involvement with the car and Mr Madel after it had been stolen the day before. Instead, not content with playing his full part in the theft of the car the day before, he stoked up with cocaine and Ketamine and set off again. Seen in this light the absence of evidence that he said anything that expressly encouraged Mr Madel to drive dangerously loses whatever force it might otherwise have had. It may also be noted that the appellant was not, as so often happens, a teenager whose culpability could be said to be reduced because of his youth. He was in his late twenties and should have known much better.

29. The previous decided cases do not establish any sort of tariff, not least because the culpability of offenders in such cases is highly fact-sensitive. This was, as we have said, a serious case of aggravated vehicle taking involving a fatality caused by sustained

dangerous driving. Although he was the passenger, the sentencing judge would have been entitled to pass a sentence of four-and-a-half years on the appellant if count 6 had stood on its own, for the reasons we have outlined.

30. The question then is whether the judge was obliged to reduce the sentence by more than she did to allow for personal mitigation, totality and Manning. Despite Mr Claxton's best efforts we are far from being persuaded that she was. In our judgment the sentence passed was comfortably within the range that she was entitled to pass, even after taking full account of totality, personal mitigation and Manning.

31. A further point has been raised because it appears from the transcript of a discussion with counsel and the court record below that the judge imposed as an additional requirement that the appellant should take an extended test before he can drive again. It is accepted that the judge had a discretion to impose such an order. The only question is whether such an order should have been made in the present case given that the appellant was not the driver.

32. In Bradshaw [2001] RTR 41 the same question arose in relation to two appellants who were passengers in a car that was being driven dangerously and who said that they had only been passengers for a few minutes before the accident. At paragraph 14, Keene J, giving the judgment of the court, said:

> "In the circumstances where one is dealing with passengers on offences of this kind, it does not seem to us that an order to take an extended driving test at the end of the period of disqualification is an order to make. Certainly in the circumstances of the present case such an order does not seem to us to be a right order to make and we would propose to quash that order and to make no substitute order..."

33. As is clear from the second sentence of this citation, there was a degree of qualification and the decision was ultimately based upon the particular facts of the case before the court on that occasion.

34. Subsequent cases have made clear that there is no universally applicable principle that passengers should not be required to take an extended test. In Beech [2016] EWCA Crim 1746, [2016] 4 WLR 182 the appellant had been a passenger during a high speed chase. The trial judge's imposition of an extended test requirement was upheld by this court. The Lord Chief Justice giving the judgment of the court said at paragraphs 23 to 26:

> "23. It is accepted that, under the legislation, the judge had power to impose a disqualification until an extended test is taken. However, in the submissions that have been advanced on behalf of the appellants, both in writing and orally this morning, it is argued that the court should have taken into account the decision of this court in R v Wiggins [2001] RTR 3 and the earlier decision of R v Bradshaw [2000] RTR 41. On the particular facts of both those

> cases, which we do not propose to set out, the court indicated that it was not appropriate to pass disqualification until an extended driving test had been taken on persons who were purely passengers.
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> 24. The question for this court is whether the indications given in those cases are such that the court would invariably exercise its discretion never to disqualify someone who is simply a passenger. We are firmly persuaded that those cases turned on their particular facts and were properly decided on those facts. We must examine the facts of this case to see if the imposition of the requirement for an extended test was necessary for the proper protection of the public.
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> 25. We have set out the egregious nature of the driving in this case and the fact that those in the car were speeding away from a jointly-planned serious professional criminal attempt on a cash machine. The speeds at which they were driving and the manner of their driving plainly put the public at risk. Although they may not have quite the level of culpability of the actual driver, nonetheless the level of their culpability was extremely high. There is every reason to believe that they fully participated in the escape at speeds that self-evidently would put the public at significant risk of serious injury, if not loss of life.
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> 26. In those circumstances we consider that the learned judge was correct in the view that he took, and that it was right to order disqualification until an extended driving test is taken. The purpose of an extended driving test is for the authorities to be satisfied that those who have been disqualified from driving are fully competent to be allowed to drive again ... "

35. As appears from paragraph 24 of Beech the guiding principle is whether the imposition of an extended test requirement is necessary for the protection of the public. In the present case the level of the appellant's participation fully justified the judge's conclusion that the appellant had shown a reckless disregard for any rules relating to the driving of cars. On these facts she was fully entitled to exercise her discretion as she did for the protection the public.

36. For these reasons this appeal must therefore be dismissed.