

WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Neutral Citation Number: [2024] EWCA Crim 414

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Case No: 2024/00607/A3



Royal Courts of Justice
The Strand
London
WC2A 2LL

Tuesday 16th April 2024

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE JAY

THE RECORDER OF NORTHAMPTON

(His Honour Judge Mayo)

(Sitting as a Judge of the Court of Appeal Criminal Division)

ATTORNEY GENERAL'S REFERENCE

UNDER SECTION 36 OF

THE CRIMINAL JUSTICE ACT 1988

R E X

- v -

SCOTT FITZGERALD

Computer Aided Transcription of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Miss C Pattison appeared on behalf of the Attorney General

Miss C Lloyd-Jacob appeared on behalf of the Offender

J U D G M E N T
(Approved)

Tuesday 16th March 2024

LORD JUSTICE SINGH:

Introduction

1. This case arises from the needless deaths of two men, Shane Fitzgerald and Daniel Witheridge, which were caused by the offender's dangerous driving. We offer our sympathies to their families.

2. This is an application on behalf of His Majesty's Solicitor General, under section 36 of the Criminal Justice Act 1988 ("the 1988 Act"), for leave to refer sentences to this court on the ground that they were unduly lenient.

3. The offender was born on 13th January 1987. He was aged 36 at the time of the offences and 37 at the date of sentence.

4. On 19th January 2024, in the Crown Court at Leicester, the offender was sentenced by His Honour Judge Evans to a total sentence of nine years and nine months' imprisonment.

5. Earlier, on 22nd November 2023, in the same Crown Court at the plea and trial preparation stage, the offender had pleaded guilty to counts 1 to 3 on the indictment. On 19th January 2024 he also pleaded guilty to a linked summary offence and was sentenced as follows: on count 1, Causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988, nine years and nine months' imprisonment; on count 2 (a count to similar effect), a concurrent term of nine years and nine months' imprisonment; on count 3, Assault on an Emergency Worker, contrary to section 1 of the Assaults on Emergency Workers Act 2018, a concurrent term of one month's imprisonment; and finally, for the offence of Failing to provide a specimen for analysis, contrary to section 7(6) of the Road Traffic Act 1988 and

Schedule 2 to the Road Traffic Offenders Act 1988, no separate penalty was imposed. Other appropriate orders were made. In particular, the offender was disqualified from driving for 14 years and two months. This was as a consequence of amendment under the slip rule on 26th January 2024. In addition, an extended retest has to be passed.

The Facts

6. For present purposes we take the facts from the summary set out in the Final Reference submitted on behalf of the Solicitor General.

7. On 3rd October 2023, at about 6.23 pm, the offender (then aged 36) was driving a Range Rover in the village of Woodhouse, Leicestershire, where a speed limit of 30 miles per hour applied. Earlier, in the minute or so leading up to the collision, the speed limit varied between 30 and 60 miles per hour. The offender's two brothers, Sean Fitzgerald and Shane Fitzgerald, and also a friend, Daniel Witheridge were passengers. None of the occupants was wearing a seatbelt. The offender lost control negotiating a bend, struck a wall, and rotated across the road into the opposite lane where he collided with an oncoming vehicle being driven by Luke Milligan.

8. The offender had driven his vehicle dangerously in the lead up to the collision. For part of the journey he had driven at excessive speeds, causing a vehicle to swerve; had driven closely behind a vehicle; sped off as soon as the traffic lights turned amber; and weaved in and out of traffic. In the four or five seconds before striking the wall, the offender accelerated up to speeds of 79 and 83 miles per hour. He applied the brakes on losing control of the vehicle. At the point of impact with the wall, the Range Rover was travelling at 47 miles per hour. In the opinion of a forensic collision investigator, the sole cause of the crash was that the Range Rover was travelling at excessive speed.

9. Shane Fitzgerald (who was aged 29) and Daniel Witheridge (who was aged 36) were pronounced dead at the scene. Luke Milligan sustained minor injuries.

10. Following his arrest, the offender became distressed and pushed a police officer causing the officer to stumble back towards a doorway.

11. Just after midnight the offender was breathalysed and produced a reading of 29 within the legal limit of 35. He was asked several times to provide a specimen of blood to enable a back calculation to be made, but declined to consent or to provide a specimen of blood.

The Sentencing Process

12. The offence of causing death by dangerous driving now carries a maximum penalty of life imprisonment. That has been applicable to offences of this type since 28th June 2022. The Sentencing Council has published a definitive guideline on causing death by dangerous driving which is applicable to all offenders aged 18 or over who are sentenced on or after 1st July 2023.

13. This offender has 31 convictions for 107 offences. They date between 2000 and 2020. They have included five for dangerous driving, the most recent of which was March 2011.

14. The judge was provided with a sentencing note by the prosecution and also one on behalf of the offender. In addition, he had a mitigation bundle filed on behalf of the offender and he had Victim Personal Statements. We have also had regard to those documents.

15. In his sentencing remarks, after setting out the facts, the judge noted that the offender had a large number of previous convictions, but also noted that the last of the driving related offences had been some 13 years earlier. He reminded himself of the letter which the

offender's wife had written to the court. It seemed to the judge that the offender had genuinely turned his life around. The judge considered the Victim Impact Statements and the offender's personal mitigation, including the testimonials which had been filed with the court.

16. The judge turned to the relevant sentencing guidelines. There was no dispute that this was a culpability A case. He said that the starting point for count 1 would have been one of 12 years' imprisonment, before consideration of the aggravating and mitigating factors. The judge noted that where there is more than one death, an upward adjustment must be made to reflect that fact. He also observed that he was bound to bear in mind the principle of totality.

17. The judge considered the statutory aggravating factors: the offender's antecedents, the fact that he had failed to remain at the scene, and there was a further lack of co-operation later on.

18. The judge also noted the statutory mitigating factors: the offender's remorse, which the judge had no hesitation in accepting was genuine, and the fact that the victims were his brother and close friend. The judge said that not all factors, aggravating and mitigating, are of equal weight. The previous driving record was a serious aggravating factor. On the other hand, the judge said, the loss of those close to the offender, and the impact of imprisonment upon his family, particularly children, were significant mitigating factors. The judge said that were he sentencing for count 1 alone, he would reduce the starting point by one year to 11 years' custody, but that there had to be an upward adjustment. He would keep that as short as he could, but it had to be two years. That therefore meant that the notional sentence after trial would have been 13 years' imprisonment. The offender was entitled to a discount of 25 per cent for his guilty plea, which reduced the sentence to 117 months' custody (nine years and nine months).

19. The judge said that on count 3 there would be a concurrent term of one month's custody. He imposed no separate penalty for the summary matter because he had already take it into account as an aggravating factor when considering counts 1 and 2.

20. The judge then imposed a period of disqualification from driving, although this was later corrected under the slip rule to 14 years and two months.

The Submissions on behalf of the Solicitor General

21. On behalf of the Solicitor General, Miss Pattison takes no issue with the notional sentence identified for count 3; with the judge's decision to order the sentences to run concurrently with the sentence imposed on count 1; or with his decision to order no separate penalty for the summary only matter. Further, she takes no issue as to the amount of credit given for the guilty pleas (25 per cent), which is appropriate for the stage at which the relevant guilty pleas were entered; nor for the downward adjustment to reflect the mitigating features.

22. What Miss Pattison does submit, however, is that the notional sentence on count 1 following a trial of 13 years' imprisonment was unduly lenient, given the presence of numerous aggravating factors, the fact that two deaths were caused, and the overall seriousness of the offending. In particular, she draws attention to the fact that there were, she submits, at least two category A factors and possibly a third, depending on the assessment made. The two she relies upon in particular are: first, a deliberate decision to ignore the rules of the road and disregard for the risk of danger to others; and secondly, a speed significantly in excess of the speed limit. She points out that in the seconds leading up to the collision, it was almost three times the speed limit.

23. Thirdly, Miss Pattison draws attention to the possible factor of a deliberate course of

dangerous driving in the lead up to the fatal collision, albeit she acknowledges that it is difficult to assess whether it was prolonged and persistent, depending on the court's assessment.

24. Further, she submits that there were the following factors which merited an upward adjustment to the starting point of 12 years: first, two deaths were caused; second, there were numerous aggravating factors – in particular, multiple previous convictions for motoring offences, although she acknowledges that the most recent conviction, apart from the imposition of some penalty points, was over 12 years earlier, in 2011; third, there were passengers in the vehicle; fourth, the offender failed to stop at the scene and did so in circumstances where he knew that one of his brothers and a close friend were seriously injured – he made no attempt to help them; fifth, he did not surrender to the police, but instead was located by them because he attended hospital for treatment for his injuries; and sixth, an additional offence was committed, namely failing to provide a specimen of blood. Although the judge was justified in imposing no separate penalty on that last matter, Miss Pattison submits that it had to be taken into account, along with other aggravating features, to increase the notional sentence for the lead offence under count 1.

25. Miss Pattison acknowledges that there were mitigating factors, which included: the offender's genuine and deep remorse; the positive character references, including those from the family of Daniel Witheridge, which demonstrated a close relationship between the families; the fact that one of the victims was the offender's own brother and the other a close friend, and the impact that that will have on the offender for the rest of his life.

26. Nevertheless, at the end of the day, Miss Pattison submits that the notional sentence of 13 years' imprisonment should have been significantly higher and that therefore the sentence after the guilty pleas of nine years and nine months' imprisonment was unduly lenient.

The Submissions on behalf of the Offender

27. On behalf of the offender, Miss Lloyd-Jacobs submits that the sentence was not unduly lenient; that the judge applied his mind to all of the relevant factors; and that he was entitled reasonably to impose the sentence which he did. Miss Lloyd-Jacobs submit that the offender's driving did not clearly fall into the category of "prolonged, persistent and deliberate". Further, it is not said on behalf of the Solicitor General that there was any additional breaking of the rules, beyond that which was already accounted for in the judge's reasoning.

28. Miss Lloyd-Jacobs submits that the judge correctly considered that the starting point had to be raised to take account of the second death, and correctly referred to other aggravating factors which would have increased the starting point by two years to 14 years, before reduction for mitigation.

29. Turning to the topic of mitigation, she submits that there was unusually powerful mitigation in this case. In particular, there was the highly unusual feature that the brother's wife and the friend's daughter both gave evidence before the judge asking for a lenient sentence, and describing the offender as a father to the whole family. There were also written statements from family members which reiterated that losing the offender to a prolonged period in custody would make their grief more, rather than less, intense. The victims were exceptionally close to the offender. The offender had had to bring up his brother in circumstances of family breakdown; and Mr Witheridge had been the best man at his wedding. Both men worked in the offender's business.

30. Further, Miss Lloyd-Jacobs submits that the judge was clearly influenced by the offender's genuine remorse. He correctly considered the issue of totality.

31. Finally, Miss Lloyd-Jacobs submits that even if this court did consider the sentence to be unduly lenient, it still retains a discretion as to whether to increase the sentence. She submits that the court should not exercise that discretion in the circumstances of this case, in particular given the pressure on prison capacity at the moment, the offender's desire to do what he can as soon as possible to provide for his extended family, and because of the anxiety which he will have felt because of the initial error made at the date of sentence when he was told by the judge that he would serve one half of his sentence before release on licence, which had to be corrected to two thirds at the slip rule hearing.

Our Assessment

32. The principles to be applied on an application under section 36 of the 1988 Act are well established and were summarised in *Attorney General's Reference (R v Azad)* [2021] EWCA Crim 1846; [2022] 2 Cr App R(S) 10, at [72], by the Chancellor of the High Court, as follows:

1. The judge at first instance is particularly well placed to assess the weight to be given to competing factors in considering sentence.
2. A sentence is only unduly lenient where it falls outside the range of sentences which the judge at first instance might reasonably consider appropriate.
3. Leave to refer a sentence should only be granted by this court in exceptional circumstances and not in borderline cases.
4. Section 36 of the 1988 Act is designed to deal with cases where judges have fallen into 'gross error'.

33. In giving the judgment of this court in the seminal case of *Attorney General's Reference (No 4 of 1989)* (1990) 90 Cr App R 366, at 371, Lord Lane CJ said that even where this court considers that a sentence was unduly lenient, it has a discretion as to whether to exercise its

powers. He also emphasised, as this court has done ever since, that its role is not simply to retake the sentencing decision as if it were the sentencing court. He stressed that mercy is a virtue and does not necessarily mean that a sentence was unduly lenient.

34. Applying those principles to the present case, we have reached the conclusion that while the total sentence passed could be described as lenient, it was not unduly lenient in the sense required by law. We remind ourselves that it is not the function of this court to re-sentence the offender again. The question is not what this court, or individual members of it, might have done had we been sentencing in the Crown Court, but whether the sentence in fact passed was outside the range reasonably open to the sentencing judge.

35. In our judgment, the judge carried out with care a difficult and sensitive sentencing exercise. He had regard to all relevant matters. He explained his reasoning as to the starting point, the upwards adjustment required for aggravating factors, and, importantly, the fact that there were two deaths caused. He then made an appropriate reduction for the exceptional mitigating features of this case.

36. We do not consider that the judge's conclusion was outside the range that was reasonably open to him. Accordingly, we refuse the application for leave under section 36 of the 1988 Act.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE

Tel No: 020 7404 1400

Email: rcj@epiqglobal.co.uk
