APPEAL COURT, HIGH COURT OF JUSTICIARY

[2017] HCJAC 90
HCA/2007/000500/XC

Lord Justice Clerk
Lord Menzies
Lord Drummond Young

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

APPEAL AGAINST CONVICTION FOLLOWING A REFERENCE FROM THE SCCRC

by

DUNCAN STEWART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: F Macintosh; Latta & Co, Glasgow
Respondent: I McSporran, QC, Sol Adv, AD

6 December 2017

[1] On 19 December 2012, the appellant tendered a plea of guilty to a charge under section 3ZB of the Road Traffic Act 1988 that on 8 May 2012 he did, by driving a mechanically propelled vehicle, cause the death of a motor cyclist, the circumstances being that the appellant was disqualified and uninsured.

[2] Section 3ZB of the RTA 1988 provides that:

> "A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under–
>
> (a) section 87(1) of this Act (driving otherwise than in accordance with a licence), or
>
> [..]
>
> (c) section 143 of this Act (using motor vehicle while uninsured or unsecured against third party risks)."

[2] The appellant had been disqualified for 15 months in March 2011. At the time of the incident he had applied for return of his licence and would have been entitled to drive from 3 June 2012. He had approached insurers specialising in disqualified drivers and had obtained cover at an enhanced premium. The cover was vitiated by the fact that he had not been entitled to drive at the time.

[3] There was never any doubt that in the traditional understanding of the word the accident, and thus the death, had been caused by the motor cyclist himself, who had pulled out to overtake a van, straight into the path of the appellant's vehicle. This was the conclusion of the police investigation. The actual driving of the appellant had not in any way contributed to the death, and indeed it was recognised that he had done all he could to prevent the accident. It is clear from the transcript of the hearing at which the plea was tendered, from the terms of the plea in mitigation and from the sheriff's sentencing remarks, that the basis upon which the plea had been tendered was that had the appellant not been driving when he should not, the accident could not have happened. His solicitor had advised him that in these circumstances he was "deemed" to have caused the death and should plead guilty: the charge was effectively a strict liability one.

[4] The sheriff in sentencing stated:

> "the circumstances of the accident have been fully explained to the court and I do accept that there was nothing that could be said to be at fault with your driving as such but, of course, you were disqualified, and indeed, because of that also lacking in insurance and, as has been pointed out, you had no right to be on the road at all, and in that sense, your presence was the cause of the death of the motor cyclist.."

[5] The appellant's case has been referred to the court by the Scottish Criminal Cases Review Commission on the basis that, contrary to the advice tendered to the appellant, and contrary to the basis upon which all had proceeded at the time of the plea, section 3ZB imports the concept of causation, and it was not the case that an individual was deemed to be guilty under the section whenever his vehicle was involved in a fatal accident. The law had been clarified by the United Kingdom Supreme Court in *R* v *Hughes* [2013] UKSC 56, some months after the plea had been tendered. The Commission considered that, whilst a plea of guilty could be withdrawn only in exceptional circumstances (*Healy* v *HMA* 1990 SCCR 110; *Reedie* v *HMA* 2005 SCCR 4007), such circumstances existed in the present case. In *R* v *Hughes* there had been a clear change in the interpretation of the law, with the result that the basis upon which the plea had been tendered was wrong in law.

[6] In *R* v *Williams* [2011) 1 WLR 588 the judge's direction to the jury that fault in the manner of driving was not an element in the offence was upheld on appeal. In an offence under section 3ZB, fault was not required and it was the mere act of driving which was important. If that made a contribution to the result which was more than negligible or minute, it constituted a "cause". The court recognised that there had been considerable criticism of the offence, on the basis, for example, that an individual who was stationery at traffic lights would nevertheless be guilty of causing the death of a driver who ran into the back of him and died. The Commission considered that a similar approach to that taken in *Williams* was adopted in *Rai* v *HMA* 2012 SCCR 591 where the court noted:

> "The offence created by section 3ZB of the 1988 Act has been the subject of some formidable criticism – compare *R* v *Williams* at paragraphs 15-17, since it is sufficient for its commission that there is a factual causal link between the driver being unlawfully on the road and the fatality, the nature and quality of the driving being irrelevant."

[7] In Hughes, the UKSC addressed the question whether Parliament had used language which had the far-reaching effects suggested in *Williams*, and concluded that it had not. The Supreme Court concluded (para 28) that

> ".. in order to give effect to the expression 'causes … death … by driving' a defendant charged with the offence under section 3ZB must be shown to have done something other than simply putting his vehicle on the road so that it is there to be struck. It must be proved that there was something which he did or omitted to do by way of driving it which contributed in a more than minimal way to the death."

[8] The Commission referred to *McLean* v *HMA* 2011 SCCR 507 in which, following the decision in *Cadder* v HMA [2010] UKSC 43, an appellant sought to withdraw a plea of guilty tendered on the basis that an incriminating statement made by him had been made without benefit of legal advice. His appeal was refused on the basis (para 5) that:

> "there is no practice in this jurisdiction under which an accused person, having tendered a plea of guilty following a judicial ruling, can have his conviction set aside if that ruling is subsequently overturned"

[9] The Commission considered that the present case can be distinguished from *McLean*: *R* v *Hughes* did not change the law, it merely clarified what the law had always been.

Submissions for the appellant

[10] Counsel for the appellant adopted the Commission's reasoning. In England & Wales a number of appeals had succeeded on the same basis, including *R* v *McGuffog* [2015] RTR 34 and *R* v *Uthayakumar & Clayton* [2014] EWCA Crim 123. In the latter case, the court noted that:

> "The judgment of the Supreme Court in Hughes is clear. The use of the phrase 'causing death by driving' in section 3ZB, taken in context, means the Crown must

> prove 'something open to proper criticism in the driving of the defendant, beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way to the death' (see paragraph 33). Section 3ZB requires "at least some act or omission in the control of the car, which involves some element of fault, whether amounting to careless/inconsiderate driving or not, and which contributes in some more than minimal way to the death. It is not necessary that such act or omission be the principal cause of death.' (see paragraph 36)."

[11] In *Rai* the issue of whether *Williams* had been correctly decided was not before the court. The issue there was whether the driving had in fact caused death. The court did not require to deliberate on the meaning of the relevant section.

[12] There is no good reason for the law to be interpreted differently on either side of the border. The observations in *McLean* do not present a bar to the appeal, since in the present case the effect of the plea was that there was no judicial ruling on the issue. The case of *Hughes* involved a relatively straightforward exercise in statutory interpretation, whereas *Cadder* had involved reconsideration of long-standing constitutional principles.

Submissions for the Crown

[13] The Advocate Depute advised that the Crown did not resist the appeal. The Crown accepted that there required to be exceptional circumstances before a conviction proceeding on a plea of guilty could be set aside, but concede that such circumstances existed. The appellant's driving had been blameless and he had incorrectly been advised that the offence was one of strict liability. At the time the appellant tendered his plea, the law was in a state of flux. In the appeal to the Court of Appeal in *Hughes*, the court had noted further, robust criticism of the decision in *Williams.*

[14] In deciding whether to prosecute cases under section 3ZB, the Crown will have regard to the decision of the UKSC in *Hughes.* Had the appellant's case arisen after that decision he would not have been prosecuted, and the Crown view was that the appellant

should not in fact have been prosecuted. The Crown had investigated cases in which a prosecution had already taken place and were satisfied that only seven cases might be affected by the decision in *Hughes.*

[15] The Advocate Depute agreed that *Rai* was not exactly in point. The only issue there was whether the appellant had caused a death. Further, the factual situation in both *Williams* and *Rai* could be distinguished from the present case. In those cases, the vehicle driven by the appellant collided with and killed the deceased, in *Williams* by striking the vehicle, and in *Rai* by hitting a pedestrian. If the issue is whether the driving caused death, a conclusion that it did so would be difficult to argue with. The position here was entirely different, where the deceased had driven onto the wrong side of the road, and collided with the appellant's vehicle.

Analysis and decision

[16] We are satisfied that this is an exceptional case in which the conviction should be set aside as constituting a miscarriage of justice, notwithstanding that it proceeded on the basis of a plea tendered on legal advice. We agree with the Commission and counsel for the appellant that on the face of it the case of *McLean* is quite different and can be distinguished. In that case, when the appellant tendered his plea of guilty he was under no misapprehension as to the substantive law which applied, or whether the facts as admitted by him would constitute the offence to which his plea related. The intervening decision in *Cadder* altered neither of these things: it merely changed one aspect of the law of evidence. The situation in the present case, where the appellant's solicitor, the procurator fiscal and the sheriff all proceeded upon an erroneous understanding of the substantive law is very different indeed.

[17] This court is not bound by the decision in *Hughes*, even though it relates to a UK statute. However, it is a decision to which high regard should be paid. It seems clear from para 22 of the judgment that the case did not turn in any way on that aspect of causation in criminal law upon which the law in the two jurisdictions is somewhat divergent (*R* v *Kennedy (No 2)* 2007 2 WLR 612; *McAngus* v *HMA* 2009 SCCR 238). On the resulting question which was addressed by the court, namely whether the appellant's driving was a cause of the death, we see no reason why a different approach should be taken in this jurisdiction.

[18] In *Rai* the question whether *Williams* constituted a correct statement of the law was not a live one for the court to answer. It seems to have been conceded, at least implicitly, that it did, but no submissions were made on the matter and the court did not require to make a decision thereanent. The only arguments in the case were:

(i) that the sheriff failed to make it clear that the jury had to be satisfied that the deceased had been alive when struck (it being suggested that death might have occurred when he was run over by a truck after being knocked down by the appellant's vehicle);

(ii) whether his directions might have led the jury to think that the mere fact of driving illegally was sufficient for proof of guilt, without a requirement for a causal connection of any kind, even a factual one; and

(iii) re-iterating these grounds, that no reasonable jury could have convicted.

[19] It is true that the court expressed the view that the Court of Appeal's decision in *Williams* had been correct, but this (para 7) was in connection with a matter other than the issues raised as grounds of appeal, and, as noted above, in circumstances where there was no dispute about the matter. The passage is therefore *obiter*, and in our view *Rai* does not

amount to a decision of the court (a) that *Williams* was indeed correct; or (b) which is binding on us. The passage referred to above, in which the court referred to the criticisms of section 3ZB referred to in *Williams,* related to the sentence appeal in *Rai* and is equally of no import for present purposes.

[20] Furthermore, the case can be distinguished on its facts. It is quite clear that the circumstances of the driving in the present case would not constitute an offence under section 3ZB on the law as explained in *Hughes.* However, it is by no means clear that the circumstances of *Rai* would not have been sufficient for commission of the offence: much would turn on the extent to which the appellant might have been expected to be aware of the presence of a pedestrian on the road, and other factors which, for understandable reasons, are not made clear in the report.

[21] At the time when the present appellant tendered his plea (19 December 2012), and indeed even at the time of the decision in *Rai* (26 October 2011) the law was in fact in a state of flux. The Court of Appeal had issued its decision in *Hughes* in November 2010, in which it had set out at considerable length detail of the academic criticism of *Williams*, which it nevertheless considered itself bound by, and had stated:

> "47 We add only this. It could be said that if Parliament intended that a person would be invariably guilty of the offence against section 3ZB even though the person killed was 100% responsible for his death, then Parliament should have made that clear by using express language. Whether it is in the public interest to prosecute in these circumstances is a matter for the Director of public Prosecutions."

[22] On 6 October 2011 the following question was certified for consideration by the UKSC:

> "Is an offence contrary to section 3ZB of the Road Traffic Act 1988, as amended by section 21(1) of the Road Safety Act 2006, committed by an unlicensed, disqualified or uninsured driver when the circumstances are that the manner of his or her driving is faultless and the deceased was (in terms of civil law) 100% responsible for causing the fatal accident or collision?"

The appellant was not made aware of this, nor was the sheriff. We are satisfied that this was a case in which the plea was tendered under substantial error or misconception for which the appellant was not responsible, and that the appeal must succeed.