CA, CRIMINAL DIVISION

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2016/05532/A3

IN THE COURT OF APPEAL

CRIMINAL DIVISION

Royal Courts of Justice

The Strand

London

WC2A 2LL

Thursday 30th March 2017

B e f o r e:

LORD JUSTICE LLOYD JONES

MR JUSTICE GILBART

and

HIS HONOUR JUDGE COOKE QC

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

R E G I N A

- v -

ELLIOTT JAMES ALLEN

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(Official Shorthand Writers to the Court)

Miss J Martin appeared on behalf of the Appellant

Mr L Brembridge appeared on behalf of the Crown

J U D G M E N T

(Approved)

Thursday 30th March 2017

LORD JUSTICE LLOYD JONES: I shall ask Mr Justice Gilbart to give the judgment of the court.

MR JUSTICE GILBART:

1. On 4th November 2016, in the Crown Court at Truro before His Honour Judge Carr, the appellant was arraigned on an indictment containing two counts. He was charged with causing death by dangerous driving, contrary to section 1 of the Road Traffic Act 1988, and, as an alternative, with causing death by careless driving, contrary to section 2 of the 1988 Act. The appellant had always made it plain that he would be pleading guilty to causing death by careless driving, and an offer to that effect was made at the first hearing in the Crown Court. The prosecution took time to consider that plea and decided that they could not accept it. At the second hearing in the Crown Court, the appellant entered his guilty plea to the charge of causing death by dangerous driving. That was not the occasion when the case was listed for trial; it occurred at a hearing sometime before.

2. On 17th November 2016, he was sentenced by Judge Carr to two and a half years' imprisonment. He was also disqualified from driving for two years and until he had taken an extended driving test. He was also ordered to pay a victim surcharge.

3. As we will come to, the order made with regard to disqualification was defective in some respects. We shall correct it in due course.

4. The appellant appeals against sentence by leave of the single judge.

5. We turn to the facts. The appellant's driving caused the death of Matthew Smith, aged 27 at the date of his death. He lived with his foster parents and did voluntary work at a local garage. In the early part of 2015 he passed his motorcycle test and purchased a motorbike. He was described as a careful and sensible driver.

6. On the evening of 9th August 2015, he visited a number of public houses, where he only drank soft drinks, before setting off to drive the short distance home on his motorcycle along the A30 dual carriageway on Bodmin Moor.

7. The appellant, who was then aged 21, was driving his works Mitsubishi Jeep in the same direction, in the same nearside lane. His wife and 18 month old daughter were also in the vehicle, heading home to Cornwall from a religious convention in Exeter. The appellant had held a fullclean driving licence for two years since passing his test. His wife considered that he was fit and alert to drive that night.

8. On a straight stretch of road, the appellant approached the deceased from behind but failed to see him. His vehicle ran into the back of the deceased's motorcycle. The deceased was thrown forwards before becoming trapped beneath the Jeep. The appellant's wife, who had been sleeping, was woken by the appellant shouting that he had hit someone and that he had not seen them because they had had no lights. The appellant tried to help Mr Smith, but he was pronounced dead at the scene by paramedics.

9. The appellant told police at the scene that Mr Smith's motorcycle had appeared to be swerving in the wind and that when he attempted to overtake, it swerved in front of his Jeep.

10. Investigation revealed that the lights on Mr Smith's motorcycle had been on and that the weather conditions were such that he would have been visible to the appellant at a distance of 400 metres. While the expert collision investigation report ruled out excessive speed as an issue in the case, it is right to point out that the evidence refers to banks of mist, or what is known in Cornwall as "mizzle", which altered visibility on the road. But significantly, the collision investigation report found no sign of any change of course or positioning by either vehicle. The report also concluded that there was no sign of any physical reaction by the appellant to the presence of the motorcycle immediately before the collision.

11. There was evidence from other road users that approximately 20 minutes before the fatal accident – indeed as he was close to the border of Devon and Cornwall – the appellant's Jeep was seen to veer to the left onto the grass verge, before veering to the right and correcting itself into the nearside lane. Those who saw it were concerned by it.

12. In interview, the appellant said that he had been driving at 70mph when he saw the red light on the back of the motorbike, which was being pushed about in the wind. As he approached, he signalled to move into the outside lane, took his eyes off the motorcycle to check his mirrors, and had no time to react when the motorcycle was at his front bumper.

13. There were victim impact statements before the judge from Matthew Smith's father, his brother and his foster carer. It is plain that all who knew Matthew Smith feel keenly the loss of a very decent young man.

14. The judge also received letters from the family, friends and colleagues of the appellant. All spoke to his qualities. It is plain that he, too, is a very decent young man with a young family. He has no previous convictions of any kind.

15. The learned judge described the events of 9th August as a tragedy for all. He said that its effects upon the family and friends of both Matthew Smith and the appellant were clear to see. The judge set out the purpose of the sentencing exercise, which was to place the appellant's driving in the correct category. He took the view that Mr Smith was a "very special young man, loved by everyone around him who repeatedly assisted others in his kind and quiet way".

16. The judge set out the particular circumstances of the accident, which he said occurred on a typical Cornish night when the weather was a combination of rain and patchy fog, often described as "mizzle".

17. The appellant, who was not an experienced driver, was returning home with his family after a potentially tiring weekend. He was driving the works vehicle with which he was not fully familiar. It had also transpired since the accident that he had now been diagnosed with dyspraxia, which

affects his ability to co-ordinate his movements in driving and in other areas of his life. The judge was clear in his view that this was not a relevant feature in the accident, but it meant that the appellant knew that he was not a good driver.

18. The judge said that the evidence indicated that when the appellant struck the deceased from behind, at about 70mph, he took no steps at all to avoid the collision. That indicated that he had not seen Mr Smith, who was a vulnerable road user, until the point of impact. The judge said that the most likely explanation was that the appellant was tired and had "a momentary loss of concentration or even consciousness which anyone who has driven can on occasion experience".

19. The judge said that there were two significant aggravating features. First, there was clear evidence of poor driving in advance of the accident, which should have been a warning to him to stop, either because he was too tired or because he was too unfamiliar with the vehicle to control it in the particular conditions that evening. He should have pulled over as soon as it was safe so to do. Secondly, the judge said that the visibility tests indicated that the appellant would have been able to see Mr Smith's motorcycle at a distance of 400 metres. That meant that it was not a split-second moment of inattention, but that he failed to see someone who was there to be seen on a straight stretch of road for a period of time.

20. The judge referred to the extensive references produced on the appellant's behalf, which illustrated his positive good character. In his short life, he had spent a lot of time contributing towards others. In addition, he had shown the deepest possible remorse for what had happened. His comments to the police at the time were not an attempt to deflect blame away from himself, but simply an attempt to try to explain the inexplicable. He said that the incident had affected him, his family and those around him, and would stay with them for the rest of their lives. He noted that the appellant had voluntarily surrendered his driving licence following his diagnosis with dyspraxia. Although the plea of guilty to causing death by dangerous driving was not entered on the first occasion, it was as a result of entirely proper considerations by his legal representatives, and the judge acknowledged that he had always accepted responsibility.

21. The judge addressed the definitive guideline of the Sentencing Council. He said that this was a level 3 offence, due to the two aggravating features. The learned judge formed the view that it fell towards the upper end of that category. He had taken into account the powerful mitigation, the effect upon others of any immediate sense of custody, and the fact that the judge was sure that the appellant would never trouble the criminal justice system again. Nevertheless, in the light of the two aggravating features, he concluded that only a sentence of immediate imprisonment was appropriate.

22. Taking all matters into consideration, the least sentence that the judge considered he could impose was one of two and a half years' imprisonment. The judge stated that the appellant would be disqualified from driving for two years, but that the disqualification would commence only after his release from prison.

23. Following the sentence passed by the judge, the appellant's solicitors received an email, which this court has also seen, from the deceased's natural father, Mr Ian Smith. Mr Smith indicated that, having heard the full facts, including the mitigation presented in court, he had altered his view and now considered that the appellant ought not to serve a custodial sentence. The judge was asked to reconsider sentence under section 155 of the Powers of Criminal Courts (Sentencing) Act 2000, but, as he was entitled to do, indicated that he was not minded to do so.

24. We turn to the grounds of appeal. If we may say so, the appellant has been represented with skill by Miss Martin today, to whom we are grateful. Miss Martin advances two grounds of appeal. First, she says that this is a category 3 offence in the guideline; it is towards the bottom end of category 3, andit may well be on the cusp between that and causing death by careless driving. Secondly, she says that the judge indicated, impliedly, that there should be full credit for the guilty plea; that being so, this sentence is equivalent to one of four years' imprisonment; that is too high and is manifestly excessive. She refers to the fact that the aggravating feature referred to by the judge on visibility cannot be taken into account, because it is actually that which has made the offence dangerous rather than careless. She says that, taking all matters into account, the sentence would fall below one of two years' imprisonment, which would enable the sentence to be suspended. We trust we do no injustice to Miss Martin's submissions by expressing them in that succinct form.

25. So far as the Crown is concerned, Mr Bembridge, with complete frankness, has accepted, first, that full credit should be given for the guilty plea. Secondly, he accepts that therefore this sentence should be one of less than two years' imprisonment, and so it falls within the range where, were the court minded to do so, it could be suspended. Mr Bembridge also accepts Miss Martin's point that the visibility question cannot be brought into account twice.

26. We come now to our conclusions. This is one of those cases of causing death by dangerous driving which is especially tragic, even within the range of the tragedies that occur with such an offence. The death of Matthew Smith has been tragic above all for his family and friends. But tragic it has been too for the appellant, who will live with the consequences of his actions.

27. We have noted the email written by Mr Ian Smith. We recognise his great humanity in writing that email. But it cannot affect our decision for just the same reason that a letter from an aggrieved family member urging that the sentence be higher must also be disregarded by the court. But, we repeat, we recognise his decency and humanity in writing that email.

28. This court must start by addressing the definitive guideline. It sets out three categories for dangerous driving. The third category, which is the least serious, reads:

"Driving that created a *significant* risk of danger.

Where the driving is markedly less culpable than for this level, reference should be made to the starting point and range for the most serious level of causing death by careless driving."

The starting point for death by dangerous driving is one of three years' custody, with a sentencing range of between two and five years' custody. The guideline sets out additional aggravating factors and additional mitigating factors.

29. So far as causing death by careless driving is concerned, the most serious category of careless driving, which is described as "careless or inconsiderate driving falling not far short of dangerous driving", has a starting point of 15 months' custody and a sentencing range of between 36 weeks and three years' custody.

30. None of the additional aggravating factors apply. But we accept the aggravating factor found by the judge, which Miss Martin also accepts: that the appellant should have been on notice from what happened earlier, that he needed to be more aware of what was happening, or that his experience of driving was not sufficient for driving in the conditions that night. However, it must be noted also that the evidence of the collision report does not show anything unusual about the course followed by his vehicle or Mr Smith's motorcycle in terms of swerving or otherwise.

31. In our judgment, this is a case which falls at the bottom end of category 3 – perhaps at the cusp, with the most serious category for the offence of causing death by careless driving, but very much at the bottom end of category 3. That being so, we have borne in mind both the range in the causing death by dangerous driving guideline, and the range in the highest guideline in the range for causing death by careless driving. We have further taken into account the very powerful mitigation which exists in this case. The appellant was distressed by what occurred. He sought to help Mr Smith at the scene. He has given up driving. He has shown great remorse by the writing of the letter, which we have seen. Further, his life and conduct hitherto have shown him to lead a very honourable life.

32. The judge did not give an indication of the discount he gave for the plea of guilty, although, as we have indicated, there must be full discount, as was recognised by the Crown. In our judgment, the judge did approach the sentence from too high a starting point. This offence did not fall at the top of category 3. It would be near the bottom of category 3, as we have indicated, but we then have to take account of the appellant's particular mitigation.

33. In our judgment, the correct starting point, bearing in mind all that we have said, for a conviction after trial is one of 18 months' imprisonment. Allowing for the discount for the full remorse shown by the appellant, takes the sentence down to one of twelve months' imprisonment.

34. Before we pass to the submissions made about suspension of the sentence, we will deal shortly with the question of the period of disqualification. The sentence imposed by the judge was defective. It did not comply with section 35A of the Road Traffic Offenders Act 1988 and the guidance in R v Needham [2016] EWCA Crim 455, at paragraph 31. The judge ought to have imposed a period of discretionary disqualification and added an extension period equal to half the custodial term. By doing so, he could have achieved the same effect, namely, that the period of discretionary disqualification is served after the appellant's release from prison, if that is what occurs.

35. Accordingly, we impose a sentence of two years' disqualification, together with an extension period of six months; otherwise, the orders are left undisturbed.

36. We turn lastly to the question of whether or not the sentence should be suspended. Miss Martin has asked us to take into account the guideline which was published on 1st February 2017. We cannot do so in strict terms, because we are considering whether or not the sentence passed in the court below was manifestly excessive. However, what the guideline sets out is common good practice, that one considers the arguments for and against the imposition of an immediate custodial sentence, or of a suspended sentence.

37. We bear in mind that this is a sentence for a grave offence involving the death of a young man. We bear in mind that the level of sentencing that is imposed has to apply not merely so far as this case is concerned, but will be seen to fit into the context of sentencing for the causing of death by dangerous driving.

38. Bearing all those matters in mind, and the fact that the court has already allowed a very substantial reduction in the sentence because of the mitigation put forward, this court does not feel able to suspend the sentence.

39. The sentence we therefore substitute is one of twelve months' imprisonment, subject to the alterations of disqualification, which we have indicated. To that extent this appeal is allowed.

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