APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 8
HCA/2020/000303/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, then LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

STEPHEN JONES

Respondent

Appellant: A Edwards, QC, AD; Crown Agent
Respondent: McCall, QC; Adams Whyte, Solicitors, Edinburgh

2 February 2021

[1] By section 76 letter, the respondent pled guilty to a combined charge of causing death and serious injury by dangerous driving on the B792 south of a farm access road, on 8 January 2019. The respondent was driving a single decker bus. The charge alleged that he repeatedly drove onto the opposing carriageway, drove at a speed excessive for the road layout, failed to negotiate a left hand bend, and drove onto the opposing carriageway directly into the path of an oncoming car. The driver and passenger of the car, Ian McKay

and his wife Helen, were so severely injured that they died. All four passengers on the bus, Gladys Heggie, Hugh Dean, Greg Moodie and Agnes Marshall were injured, the latter more severely than the others.

[2] The preliminary hearing judge imposed a sentence of 3 years imprisonment, reduced from 4 years and 6 months on account of the plea. The Crown appeals that sentence as being unduly lenient.

Circumstances of the offence

[3] It was a sunny day and road conditions were good. The respondent crossed the centre line on at least two occasions in the approach to the bend at which the accident took place, and made no attempt to brake before the bus collided with the deceased's car. The four passengers suffered a range of injuries, mainly bruising and pain, although one suffered from a hairline fracture to her jaw. CCTV from the bus shows the incident as it happened.

[4] The manner of driving was to some extent spoken to by the passengers, all of whom expressed concerns at the driving in the lead up to the collision. One was sufficiently concerned that just before the collision he put his phone away and grabbed onto the seats in front of him with both hands.

[5] Cameras on the bus showed the following:

- 12:49:18 - The bus appears to encroach on the opposing carriageway across the centre white lines.
- 12:49:34 - The bus appears to encroach on the opposing carriageway across the centre white lines.

- 12:49:38 - The bus approaches the corner of the road, appears to go in a straight line not following the bend of the road and encroaches onto the opposing carriageway, where the car is.
- 12:49:42 - the bus encroached further onto the opposing carriageway, and takes no corrective action. The car, clearly visible on the footage, does take evasive action but the collision occurs one second later.

[6] The average speed of the bus was calculated as 43mph, from a point 0.205 miles from the collision, to the point of the collision itself. There was no evidence to suggest that the bus exceeded the applicable speed limit of 50mph.

[7] Interviewed by police the respondent said:

> "I got blinded temporarily by the sun upon going round the corner. It affected me for a few seconds. By the time I regained my vision I realised there was a car directly in front of me and gave me no chance to apply an emergency brake."

When cautioned and charged he said: "All that I can say is sorry."

[8] The respondent has four relevant previous convictions, two for speeding some time ago, and two for careless driving, the latter in 2014 and 2016. His wife suffers from fibromyalgia, with chronic symptoms of pain and extreme fatigue. She is very reliant on his care.

The sentencing decision

[9] In sentencing the respondent the judge accepted that the sun, which was dazzling as seen on cctv, may well have briefly impaired to some extent a clear view of the road ahead immediately before the collision. However, whilst that may have been a contributory factor it was plain that there were other more substantial causes for which the respondent was wholly responsible. He was driving too fast for the road layout and for the weather

conditions. It must have been plain that there was a risk of being dazzled but he did not moderate his speed as he should have done. On a number of occasions in the lead up to the collision he failed to keep to his own carriageway. His conduct in the lead up to the collision gave rise to a significant risk of danger. It caused two deaths and the serious injury of a third person. Weight fell to be attached to the recent convictions for careless driving. The respondent's genuine remorse, and his role as a carer for his wife, who would suffer by being deprived of his care and support whilst in prison were taken into account as mitigating factors.

[10] The sentencing judge considered the Definitive Guideline on "Causing death by dangerous driving" issued by the Sentencing Council for England and Wales and concluded that the whole circumstances put the offence at the high end of level 3 of the Definitive Guideline.

Submissions for appellant

[11] It was submitted that the sentence imposed was unduly lenient in that it failed to recognise the level of seriousness of the danger presented in this case, which involved: (i) a public service vehicle with passengers; (ii) excessive speed; (iii) conditions of much reduced visibility, namely direct sunlight; and (iv) the accident occurring when the accused made no attempt to properly negotiate a bend, continuing in the wrong carriageway. The following aggravating factors were present: (i) the accused had relevant previous convictions; and (ii) two people died and four were injured. Having regard to the particular combination of factors present in this case, the sentence imposed failed to satisfy the need for retribution and deterrence.

[12] The sentencing judge erred in stating that under the Guideline which would apply in England and Wales the offence would be a level three offence (with a range of 2-5 years) rather than a level two offence (with a range of 4-7 years). Level three involves driving which created a significant risk of danger whereas level two is driving which created a substantial risk of danger, as in this case. The respondent drove a public service vehicle at excessive speed having regard to the conditions and drove onto the opposite carriageway at a time when he could not see oncoming traffic by reason of the dazzling effect of the sun. By reference to a detailed examination of the Guideline it was submitted that the offence fell within level 2.

Submissions for respondent

[13] The test in appeals of this kind (*HMA* v *Bell* 1995 SLT 350) is that the court must consider the sentence to be outside the range which any judge could reasonably have considered appropriate. That could not be said in the present case. The driver did not exceed the speed limit, and although he failed to reduce his speed to allow for the weather, he had taken the precaution of lowering his visor and wearing sun glasses. This was not a sustained period of bad driving but driving where the bus encroached twice onto the wrong carriageway, and where the speed, although within the permitted limit was nevertheless excessive for the locus and the conditions of low sun. The judge correctly identified the aggravating factors, and the personal mitigation.

Analysis and decision

[14] The sentence selected by the sentencing judge is a lenient one for the circumstances of the offence. The question for the court, however, is not whether it may be classed as

lenient but whether it is "unduly lenient". That is a high test, as explained in *HMA* v *Bell* (at page 353 H-I):

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate."

[15] In the case of *HMA* v *Gatti*, heard on the same day as the present case, we observed that:

> "It is all too easy… to focus so closely on the Guideline as to lose sight of the exercise at hand, and the purpose for which they are being referred to."

[16] That was a reference to the fact that the Guideline, whilst it may usefully provide a check against the sentence imposed, is not applicable in Scotland and should neither be treated as though it was nor followed with slavish adherence. In *Milligan* v *HMA* [2015] HCJAC 84 the court stated, para [5]:

> "We caution against too rigid an application of the English sentencing guidelines. They are not to be applied even in England in mechanistic fashion and it must be borne in mind that those guidelines in England are to be understood in a different sentencing regime from the Scottish sentencing regime … But the Scottish approach to sentencing is rather less formulaic than the English sentencing guidelines."

[17] There is a slight hint, perhaps, in his report that the sentencing judge did not retain this point firmly in the forefront of his mind. In the appeal, the Crown submissions, whilst referring to Scottish precedent in cases of this kind, focused to a significant extent and in great detail on the Guideline. We shall return to the content of the Guideline in a moment.

[18] Before doing so it is helpful to identify what was the nature of the driving in question which made it dangerous. As the sentencing judge put it, the essence was that at times the respondent drove too fast for the road conditions and encroached over the centre line of the road, although at no stage did he exceed the speed limit. The judge recognised

that two deaths were caused and one passenger was seriously injured. He properly took these into account as aggravating factors. He also recognised the significance of the convictions, in particular the two most recent ones, which he identified as aggravating factors. We do not think that he failed to identify the relevant factors to be taken into account.

[19] It was submitted that a cross check using the Guideline would necessarily have resulted in a higher sentence, and that the speed of the vehicle, taken with the aggravations, and the fact that it was a public service vehicle, would clearly have placed the offence within level 2 of the guidelines. It was submitted that it would fall into that category because of the combination of the speed, and other determinants of seriousness, namely a prolonged, persistent and deliberate course of very bad driving and that the vehicle was a PSV. We cannot accept that submission. The level of speed which might attract consideration of level 2 is "Greatly excessive speed, racing or competitive driving against another driver". That is not the situation here: rather the speed may be characterised, *per* level 3, as "Driving above the speed limit/at a speed that is inappropriate for the prevailing conditions". It was not, on the libel and the cctv, a "prolonged, persistent and deliberate course of very bad driving" as is referred to in the relevant determinant of seriousness within the Guideline. No other determinant of seriousness applies, unless one were to count speed twice, which would be impermissible. It is not irrelevant that the vehicle was a PSV, and it is of course relevant that passengers were injured. However, it was not the nature of the vehicle or its load which made the speed an issue but the weather and the nature of the locus. The Guideline itself states that "The greater obligation on those responsible for driving other people is not an element essential to the quality of the driving and so has not been included amongst the determinants of seriousness that affect the choice of sentencing range".

Accordingly we do not accept the fundamental basis upon which the Crown submission rests. We do not think it can be said that the sentence falls "outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate". The appeal must therefore be refused.