IN THE COURT OF APPEAL
CRIMINAL DIVISION

Neutral Citation Number: [2020] EWCA Crim 1446
CASE NO 202001395/A4

Royal Courts of Justice
Strand
London
WC2A 2LL

Wednesday 28 October 2020

LORD JUSTICE HOLROYDE

MR JUSTICE PICKEN

HIS HONOUR JUDGE THOMAS QC
(Sitting as a Judge of the CACD)

REGINA
V
ADEFEMI ADEBISI

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MR M MAGARIAN QC appeared on behalf of the Appellant.

MS L OAKLEY appeared on behalf of the Crown.

J U D G M E N T
(Approved)

1. LORD JUSTICE HOLROYDE: On 21 December 2018, at the conclusion of a trial in the Crown Court at Woolwich before HHJ Raynor and a jury, this appellant was convicted of an offence contrary to section 3A(1)(ba) of causing the death of Joshua Hayes by driving without due care and attention when he had in his body a specified controlled drug, namely cannabis, and the proportion of it in his blood exceeded the specified limit. On 7 February 2019 he was sentenced to 4 years 6 months' imprisonment. He was disqualified from driving for a period of 7 years 3 months, comprising a discretionary period of 5 years and an extension period, under section 34 of the Road Traffic Offenders Act 1988, of 2 years 3 months and until he takes and passes an extended driving test.
2. He now appeals against his sentence by leave of the Full Court.
3. It is sufficient for present purposes to summarise quite briefly the sad facts of the case. In the early hours of 1 October 2016 Mr Hayes, then aged 27 and a popular and valued college lecturer, was walking in Romborough Way, London SE13. CCTV footage showed him to be unsteady on his feet, and the judge found that he was to some degree affected by alcohol. Whether for that or some other reason, it appears that he fell into the carriageway at a point about 7 metres from the junction of Romborough Way with the major road. He had been lying in the carriageway for just over a minute when the appellant, then aged 34 and working as an Uber taxi-driver, turned left from the main road into Romborough Way. The appellant failed to see Mr Hayes and ran over him. He then drove backwards and forwards in an attempt to clear what he thought was an obstruction from under the car. It was not until he and his passenger got out to investigate the problem that he realised that Mr Hayes was trapped under the car. Distraught at this discovery, the appellant rang the emergency services. Very sadly, Mr Hayes' life could not be saved and he was pronounced dead about an hour later.
4. The impact of Mr Hayes' death was powerfully conveyed in victim personal statements from his parents, which were before the judge and which the members of this court have also read. We offer our condolences to the bereaved family, who have lost a much-loved son and brother.
5. An initial cannabis test provided by the appellant to the police was negative. However, the appellant admitted that he had smoked cannabis some 26 hours earlier, and a further test was carried out which was positive. Later analysis of the specimen of blood showed the presence of more than 7 micrograms of tetrahydrocannabinol ("THC") in 1 litre of blood. The legal limit is 2 micrograms of THC in 1 litre of blood.
6. The offence of which the appellant was convicted does not require proof that his standard of driving was impaired by the presence of a prohibited quantity of cannabis in his blood. Expert evidence was given at trial to the effect that the 2 microgram limit, which is in effect the lowest proportion of THC in the blood which can reliably be measured, was set by Parliament as part of a zero-tolerance approach, and not as a level indicating impairment. However, there was also expert evidence that for average members of the population, 5 micrograms of THC in 1 litre of blood would have an impairment effect broadly equivalent to a blood alcohol level at the legal limit for driving after drinking.
7. The appellant gave evidence that he began using cannabis around the time he obtained a

driving licence in 2008 and that at the time of the offence he regularly smoked cannabis four or five times a week. He had been working as an Uber driver since 2016 and had not disclosed his cannabis use when obtaining his taxi licence. He did not believe he was affected by cannabis at the time of the offence.

8. His passenger, on whose evidence reliance is placed on behalf of the appellant, gave a favourable account of the manner in which the appellant had driven up to that point of the journey.
9. The appellant had no previous convictions and no endorsements or penalty points on his driving licence. He lived with his wife and two children. A pre-sentence report recorded that he had stopped using cannabis and that he had suffered nightmares and flashbacks since the offence. He had not of course been able to continue working as a driver.
10. There were supportive testimonial letters which, amongst other things, described the appellant as always having been a careful driver. The appellant himself had written a letter expressing his remorse.
11. The judge in his sentencing remarks noted that at the time of the offence the weather was good, the area was reasonably well lit, the appellant had his headlights illuminated and there was nothing to obstruct his line of vision as he approached the junction with Romborough Way or as he turned into that side street.
12. We interject to note that each member of this Court has seen photographs of the scene which confirm the clear view of the side road which was available to the appellant as he approached it and began his left turn. The evidence at trial was that the appellant was not driving in the bus lane on the nearside of the carriageway of the main road but more towards the centre of that carriageway. Thus, his road position afforded him the optimum view of the mouth of the junction as he approached it and prepared to make his turn.
13. Returning to the sentencing remarks, the judge said that Mr Hayes was lying in the carriageway, not standing or walking, and therefore would not be as obvious a figure as a pedestrian would usually be. However, in failing to see Mr Hayes the appellant had fallen below the standard of care required of a driver.
14. The judge considered the guideline produced by the Sentencing Guidelines Council in 2008. That guideline predates the statutory amendment which added subsection (1)(ba) to section 13A of the 1988 Act. The judge was however correct to consider it - see R v Mohammed [2018] EWCA Crim 596, followed in R v Myers [2018] EWCA Crim 1974.
15. The judge referred to the pre-sentence report and the testimonial letters. He accepted that the appellant had not smelled of cannabis when spoken to by the police soon after the offence, and that it was the appellant himself who had volunteered his recent use of cannabis. He noted the impact, including the financial impact, of the offence on the appellant and his family. He accepted that the appellant was no longer using cannabis.
16. At page 8A of the transcript of his sentencing remarks the judge expressed his conclusion as follows:

    i. "... I take the view that the appropriate starting point is four years nine months. That becomes aggravated by the fact that you are providing a public service and takes the provisional sentence before giving any credit for mitigating factors, or allowance I

> should say for mitigating factors, to a sentence of five years. I then have regard to mitigating factors that have been put forward to me and I am acutely aware of the impact this will have on you and your family. I reduce therefore, the five-year sentence to a final sentence in this case of four and a half years. "

17. Mr Magarian QC submits on behalf of the appellant that both the prison sentence and the period of disqualification are manifestly excessive in length. The judge, he submits, took too high a starting point. He should have placed the offence in the lowest category of the relevant guideline. He wrongly cited the cases of Mohamed and Myers, both of which involved significantly more serious offending of this type, and he failed to give sufficient weight to the appellant's good character or good driving record.
18. So far as the quantity of cannabis in the appellant's body is concerned, Mr Magarian points out that the judge did not specifically identify which of the categories in the guideline he found to be applicable. There was, he submits, no clear basis on which it could fairly be said that the case fell into the middle category of the guideline, which refers to "moderate quantities of drugs". In view of the expert evidence, which equated the effect of 5 micrograms of THC to the effect of the maximum permitted level of alcohol, he submits that the amount of cannabis should have been regarded as falling in the lowest category namely "minimum quantity of drugs".
19. As to the quality of the driving, Mr Magarian submits that this was quite plainly a case which fell into the lowest category referred to as "monetary inattention". He particularly relies on the evidence of the appellant's passenger. She was looking out for the side road, for it was she who advised the appellant to take that turning rather than the route shown on his satellite navigation device. Her evidence, and indeed other evidence in the case, was that the appellant was travelling at quite a slow speed when he turned into the side road. Mr Magarian submits that the passenger was, in reality, in as good a position as was the appellant to see whether there was anything obstructing the road ahead of them. Since she did not, he argues that the level of carelessness on the part of the appellant should have been placed into the lowest category.
20. Mr Magarian further submits that the judge failed to recognise or to give any weight to the important mitigating factor referred to in the guideline, of the actions of the victim contributing to the likelihood of a collision occurring. Mr Magarian argues his point on the footing that, however it came about that Mr Hayes was lying in the carriageway, it was his presence there which created an obvious risk of a collision occurring and so should have been taken into account.
21. Ms Oakley, representing the respondent in this Court as she did below, submits that the judge correctly applied the guideline. He had presided over a trial which lasted several days and was in the best position to judge the facts of the case. The quantity of THC in the appellant's body was more than three times the legal limit. The expert evidence which drew a comparison with the permitted alcohol limited related to the effects of the consumption not to the quantity consumed. She submits that the level of carelessness cannot be said to fall in the lowest category, bearing in mind that the appellant had chosen to drive a vehicle, and to carry passengers for reward, when he had more than the permitted level of cannabis in his body. The appellant, she argues, should have seen Mr Hayes lying in the carriageway. There was no evidence at the trial as to whether he

fell because he was intoxicated or for some other reason and, in any event, Ms Oakley submits, the fact of his falling into the carriageway provided little mitigation for a driver who had consumed an excessive quantity of cannabis, and who should and would have seen Mr Hayes if he had been keeping a proper lookout.

22. We are grateful to both counsel for the assistance we have received from them.
23. It is, in our view, clear that the judge took considerable care to follow the guideline as he was required to do. The guideline, though not in the more familiar format of the guidelines more recently published by the Sentencing Council, sets out different levels and descriptions of the quantity of drugs and the quality of the careless driving. It directs the sentencer to "identify the level or description that most nearly matches the particular facts of the offence for which sentence is being imposed". That provides the sentencer with a starting point which can then be adjusted upwards or downwards to reflect aggravating and mitigating factors. The judge did not state in terms which level he identified. With respect, he should have done. Nonetheless, we agree with counsel that it seems clear from the sentencing remarks read as a whole that the judge was focusing on two of the levels identified in the guideline: that which is described as "moderate quantity of drugs" and "other cases of careless driving" for which the starting point is 5 years' custody and the range from 4 - 8 years; and that which is described as "moderate quantity of drugs" and "careless driving arising from momentary inattention with no aggravating factors", for which the starting point is 4 years' custody and the range from 3 to 7 years. We also think it clear that the judge regarded the circumstances of the case as falling within the first of those categories but justifying a modest downward movement from the starting point, to reflect the fact that the level of carelessness was not much more serious than "momentary inattention". That, in our view, is clearly why the judge took what may be described as an adjusted starting point of 4 years 9 months' custody before assessing the aggravating and mitigating factors.
24. In our judgment, the judge was entitled to categorise the offence as he did. As we have indicated, the offence does not require proof of impairment and the appellant had well over three times the permitted level of cannabis in his body. Although impairment is not a necessary element of the offence, it is plainly relevant to the seriousness of it. The level in the appellant's body was significantly in excess of the level at which impairment would be expected. In those circumstances, we cannot accept a submission that the quantity of drugs fell below the "moderate" level in the guideline.
25. As to the quality of the appellant's driving, although he is no doubt generally a careful driver, and although, of course, the sight of a person lying in the carriageway is unexpected, the inescapable fact here is that Mr Hayes could and should have been seen. We do not agree with Mr Magarian that the fact the passenger in the rear seat of the taxi did not see Mr Hayes is of any real assistance to the appellant. The appellant was the driver. He was turning into a comparatively narrow minor road, the mouth of which was plainly visible to him before he began to turn, and he should have been looking at what lay head. If he had exercised reasonable care in doing so, he would have seen Mr Hayes.
26. The judge, in our view, correctly identified the aggravating and mitigating factors, though we agree that he did not spell them out as fully as he might have done. We also agree that, on the face of the papers, the judge might have given rather more weight than he did to the matters of mitigation. However, he had presided over a trial lasting 8 days and he was in the best position to make that jeudgment. He was entitled to conclude that

although the mitigating factors outweighed the aggravating factors, the overall reduction on that ground should not take the final sentence below 4 years and 6 months' imprisonment. In particular, the mitigation relating to the appellant's loss of employment and income had to be viewed in the context of his failure to disclose his regular cannabis use when obtaining his licence to work as a taxi-driver.

27. As to the length of the period of disqualification, the judge was, again, entitled to reach the conclusion he did. The fact that the appellant had been working as a taxi-driver with an undisclosed cannabis habit was an important factor in this regard.
28. We have given careful thought both to Mr Magarian's particular submissions and also to his more general submission, powerfully made, that - stepping back - the sentence is simply too long. We accept that the sentence was a stiff one but notwithstanding Mr Magarian's efforts on the appellant's behalf, we are not persuaded that it was manifestly excessive or outside the range properly open to the judge. This appeal accordingly fails and is dismissed.