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IN THE COURT OF APPEAL

CRIMINAL DIVISION

Neutral Citation No:

[2021] EWCA Crim 1502

No. 202102413 A2

Royal Courts of Justice

Wednesday, 29 September 2021

Before:

LADY JUSTICE NICOLA DAVIES
MR JUSTICE DOVE
MRS JUSTICE LAMBERT

REGINA
V
THOMAS EDWARD REDDING

_____

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MS K. BROOME appeared on behalf of the Appellant.
MR R. TULLY QC appeared on behalf of the Respondent.

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J U D G M E N T

LADY JUSTICE NICOLA DAVIES:

1. This is an application by Her Majesty's Attorney General pursuant to s.36 of the Criminal Justice Act 1988 for leave to refer a sentence to this court upon the ground that she regards it as unduly lenient.

2. In 2021 in the Crown Court at Bristol, the offender pleaded guilty on re-arraignment to the offence of causing death by careless driving when over the specified limit contrary to s.3A(1)(ba) of the Road Traffic Act 1988 ("the 1988 Act"). On 9 July 2021 the offender was sentenced by the Recorder of Bristol, HHJ Blair QC ("the Recorder"), to a suspended sentence order of two years' imprisonment suspended for two years with an unpaid work requirement of one hundred and seventy-five hours and a rehabilitation activity requirement of fifteen days. The offender was disqualified from driving for two years and until an extended retest is passed.

The facts

3. At approximately 08.45 on 12 December 2018 the offender was driving his employer's Volkswagen transport van southeast on Wick Road near Bourton, Somerset. Kinga Glowacka, aged twenty-eight, was walking along the same road ahead of the offender's vehicle, wheeling her bicycle up the slight incline towards a bridge on the M5 motorway. Wick Road is a single carriageway roadway with a lane in each direction. It is approximately 6m wide bordered by a grass verge and hedges or trees. There are no central white lines to demarcate the lanes on the road. Approaching the scene of the collision in the direction from which the offender was driving and Ms Glowacka was walking, the road is straight for approximately 300m. It is flat for 130m before sloping uphill. The speed limit is 40mph.

4. At 08.40 on 12 December 2018 the sun was in direct alignment with Wick Road, 3.3 degrees above the horizon. The gradient of the slope was 3 degrees approximately 70m prior to the collision. The sun was directly aligned in front of the offender's view. A witness who attended the scene after the collision described the sun as "blindingly bright" such that he had to shield his eyes with his hand. Another witness who was driving ahead of the offender said that he had to shield his eyes from the sun by raising his hand. He said that there was a dark area just before the bridge, but as he drove into it visibility became clearer. He saw Ms Glowacka and was able to overtake her. Other witnesses also spoke of the brightness and adverse effect of the low sun. Ms Glowacka was wearing dark clothing and was not wearing a cycling helmet.

5. As the offender drove up the incline the front nearside of the van collided with Ms Glowacka. She was instantly rendered unconscious and died at the scene. The offender called the emergency services. He remained at the scene and was shocked and upset. When first spoken to by a police officer he said:

> "I was coming up the hill. It was quite bright. I couldn't see that well. When I came close to the top of the hill it was like that's where the sun peaked in my eyes and pretty much then there was just a bang and I then stopped and I saw her ... I didn't see her until it was too late you know ... I thought on the way I should go back and get my sunglasses but I didn't."

Examination of the vehicle following the collision demonstrated that the offender had lowered the sun visor above his head. No faults were found in the van.

6. The offender failed a drug test at the scene. The sample taken later showed that he had three and a half times the specified limit of a prohibited drug, namely Delta-9-tetrahydrocannabinol (THC), in his blood, the psychoactive constituent of cannabis. The specified limit is 2 micrograms per litre of blood. The offender's reading was 7 micrograms per litre.

7. Rule 237 of the Highway Code states, "If you are dazzled by bright sunlight, slow down and if necessary, stop." Rule 2 of the Highway Code provides, "If there is no pavement, keep to the right-hand side of the road so that you can see oncoming traffic." Ms Glowacka was walking in the carriageway on the left-hand side.

8. Experts instructed by the prosecution and the defence agreed upon the following matters:

   a. that the low and bright sun was directly aligned with the direction of travel for the offender and created a greatly reduced visibility on the approach to the scene. As a result, this provided an area which could not be seen into and most likely was the position of Ms Glowacka at the point of the collision;

   b. a realistic estimate of the offender's speed at the point of impact was approximately 30mph;

   c. the offender's van was driving at the edge of the carriageway or close to it;

   d. THC can impair a driver in a number of ways. However, if the stimulus to react and break was the collision itself, the offender reacted in a manner to be expected of a normal or unimpaired driver.

History of the proceedings

9. The collision occurred on 12 December 2018. It was not until 22 April 2020, 16 months later, that the offender was charged with the index offence. His first appearance at court was on 14 July 2020. At the PTPH on 10 August 2020 the offender pleaded not guilty. The case was listed for a further case management hearing on 2 November 2020.

10. On 20 October 2020 defence counsel emailed the senior CPS lawyer as to a possible resolution of the case designed to avoid what the offender's counsel described as the "unduly harsh" impact of the relevant Definitive Guideline. It has never been contended on behalf of the offender that the Definitive Guideline in respect of s.3A of the 1988 Act did not apply to the offence as charged. It was the anticipated application of this guideline which prompted the canvassing of an alternative resolution of the case. The lawyer replied and asked for a further opportunity to consider matters.

11. On 20 November 2020 the CPS lawyer indicated that the Crown would not accept a plea to the basic form of careless driving offence with a further plea to a separate offence of driving when over the prescribed limit for cannabis. Further emails were exchanged and the position was reached that the matter would be further reviewed following the service of the defence expert's reports. A five-day trial was listed for 14 June 2021. Reports were served on 10 March 2020. A joint experts' report was completed by 30 March 2021. The summary of its conclusions is set out at [8] above.

12. On 26 May 2021 a telephone hearing attended by solicitors for both parties took place at Bristol Crown Court before HHJ Picton. The hearing was part of the protocol adopted by

the court, namely to hold a pre-trial review hearing two weeks before a trial to ensure that the case was ready for trial and to identify any issues which required resolution. In our view, commendable proactive case management by the court. At the hearing, HHJ Picton raised the issue as to whether the case was capable of resolution without a trial. This appears to have been prompted by his understanding of the expert evidence served by the defence, not contested by the Crown, that cannabis did not impair the driving of the offender such as to have been causative of the collision. At the suggestion of the judge, the case was listed before the trial judge, the Recorder of Bristol, on 27 May 2021. Trial counsel were requested to attend. We regard this as a reflection of the proactive case management taking place at this Crown Court. In what was a busy time for the court and its judges, time was found in the Recorder's list for the hearing.

13. At the hearing on 27 May the Recorder explored the factual background of the case with counsel. He sought clarification of the question of whether there was a causal link between the level of cannabis found in the blood of the offender and the carelessness of his driving. Counsel on behalf of the Crown confirmed that there was not. It was the Crown's stated position that a lack of impairment might provide mitigation, but it did not provide a defence to s.3A(1)(ba) of the 1988 Act. The Crown reiterated its position that it would not accept a plea to "death by careless simpliciter". There was discussion between both counsel and the Recorder as to the circumstances on the day of the collision, in particular the blinding sun on the three-degree incline. It was accepted by the defence that the index offence was one of strict liability. The defence position was that the use of cannabis was not causative of the collision. The offender's speed was not in issue. The victim was pushing her bicycle on the wrong side of the road and that by reason of the colour of her clothing she was not particularly well illuminated.

14. Mr Tully QC, on behalf of the offender, raised the issue of the relevant Definitive Guideline. This was a reference to the s.3A Guideline which he acknowledged involved strict liability and a starting point of six years (for a high quantity of drugs). Discussions between the Crown and the defence had been on hold until the intervention of HHJ Picton. It was stated that the offender understood that if he was convicted the court would have to consider the application of the Definitive Guideline.

15. The Recorder, in referring to the Sentencing Guidelines, stated:

> "Sentencing guidelines are exactly that. Guidelines. The analysis and categorisation of the specific circumstances of this case are in my view at a level which if a custodial sentence had to be passed, there would be an argument for suspension of it. That question is affected by the case of *R v Manning*. It's affected by the imposition and the imposition guideline on custodial sentences and community sentences. Following a trial, if there were conviction, it might be harder to justify that course, but of course all options are open in that scenario.
>
> But I did want you, Mr Tully, and your client to be aware of that view that in my view that, that the very specific circumstances of this case and the lack of linkage between the level of cannabis and the driving and the conditions and so forth are ones that in my view would properly result in me going outside the strict interpretation of the way that guideline currently or, or, or might be interpreted as covering his level of, of cannabis in him. That's something I can express whether it has any outcome or not in terms of his view as to what plea he should be maintaining, and so it mustn't be regarded as some kind of arm twisted exercise. It isn't intended to be that, but it is intended to be an indication to all parties in the case that in terms of culpability levels my view would be that, worst case scenario, he wouldn't be receiving more than a 2 year sentence on a

> plea, which makes it difficult, probably even more difficult, I'm sorry to say, for him and you, but it's something that if it's of any value it's probably worth me expressing now rather than having quite the dramatic lip that there may currently be in his mind as to the difference between a conviction and an acquittal."

16. Following the hearing, the Crown was invited by the defence to agree that in the event that the offender pleaded guilty the Crown would not lodge an application to refer the sentence as being unduly lenient. On 27 May 2021 defence counsel was informed in an email by prosecuting counsel that the prosecution would not bind itself in this way.

17. On 9 June 2021 the offender was re-arraigned and entered a guilty plea.

18. On 9 July 2021 the sentencing hearing took place before the Recorder. The offender was aged thirty-one and had no previous convictions. It was conceded by the Crown that the road conditions at the time of the accident were challenging. It was accepted that the offender's reaction time was normal, but it was the Crown's contention that the presence of three and a half times the specified limit of cannabis was a potentially serious aggravating feature which would place the driving of the offender in a bracket not far short of dangerous. The Crown accepted that on the particular facts of the case that it could not prove to the requisite standard that there was a causal link between the levels of cannabis in the offender's system and the nature of his driving. It was also accepted that the lack of causal link would amount to a significant feature in respect of sentencing.

19. Victim personal statements were provided by Mr Branch, the partner of Ms Glowacka, and by her parents. Mr Branch read out a heartfelt and moving statement describing the character of Ms Glowacka, the inestimable loss of her life and the effect which it has had and continues to have upon him. The parents of Ms Glowacka stated that it was very difficult to put into words how they felt, but they described the loss of a much-loved daughter and the effect which her loss has had upon their family. The Recorder observed that the tragedy of the death of Kinga Glowacka cannot adequately be summarised in words. We agree. We are conscious, as was the Recorder, that whatever course is taken by this court it cannot begin to compensate her partner, her parents and wider family for the loss of a remarkable young woman who had so much to give to her family, friends and to life generally. To Mr Branch, and to Ms Glowacka's family, the court offers its deepest condolences.

20. In sentencing the offender, the Recorder identified his culpability as "being described within the charge which you have admitted. You drove carelessly". He noted that the sun was blindingly bright, shining in the offender's eyes as he drove up the incline of a straight single-carriageway country road towards the peak of an overbridge. In so doing the offender was in breach of Rule 237 of Highway Code ([7] above). In the Recorder's view, that was the measure of the offender's culpability and the cause of Ms Glowacka's death. The offender did not slow sufficiently so as to enable him to ensure that he could see what was on the left side of the road and if he could not see at all, to stop. It was that failure which led to the fatal collision. The Recorder noted that, unfortunately, Ms Glowacka was pushing her bicycle on the left side of the road with the bicycle to the left of her and was wearing clothing which would not have stood out particularly clearly against the background. Of the offender's driving, the Recorder observed that there was no prolonged, persistent or deliberate course of very bad driving. He was driving at 30mph at the point of the collision and his sun visor was down. His vehicle was sensibly positioned in the carriageway and he had a good driving record. The offender had stayed at the scene, called the emergency services, flagged others down and had behaved in a remorseful manner from the outset.

21. As to the concentration of the active chemicals of cannabis, the Recorder recognised that although there was no proven causal connection between that fact and the collision itself, it is

a factor which aggravates the sentence because the offender should not have been driving on the road in that condition. However, he stated that it would be completely wrong to say that the cannabis is connected to the death other than the fact that the offender was on the road at all. The Recorder identified one of the reasons that those instructed or involved in the case had arrived at this conclusion was because the offender reacted, braked and stopped in a manner expected of a normal and unimpaired driver.

22. In passing sentence, the Recorder bore in mind that the prosecution had been "… hanging over everyone's head for two and a half years." A positive Pre-Sentence Report detailed the fact that the offender had resigned from his employment following the collision. He has since gained alternative employment and before the court was a positive reference from his supportive employer. At the time of the accident he was living alone. He has since moved back into his father's home. His family have been supportive. Before the court were positive references from family and friends.

23. In the months before the crash the offender had consulted his GP and had been diagnosed with depression and recommended antidepressant medication. He had been resistant to the medication and had used cannabis as a means of moderating his persistent low moods and to help him relax and gain reliable sleep. It was in the context of assisting his sleep that he had smoked cannabis the night before the collision. Since the collision the offender has accepted antidepressant medication which is assisting. He has also attended a course of counselling. A psychiatric report detailed the exacerbation of the offender's depressive and anxiety symptoms following the accident.

24. In addressing the Sentencing Council Guidelines, the Recorder noted that s.59(1) of the Sentencing Act required him to follow any Sentencing Guidelines which were relevant to the offender's case. He noted that a judge is entitled in an appropriate case to depart from the guideline bracket if it would be unjust in the circumstances of a particular case, but reasons must be given for departing from them. The Recorder was of the view that the Guidelines were not able to provide him with direct assistance on the index offence because the legislature had created the offence under s.3A(1)(ba) after the drafting of the s.3A 2008 Guideline for causing death by careless driving when under the influence of drink or drugs. It is unfortunate that the authorities of *R v Mohamed* [2018] EWCA Crim 596; *R v Myers* [2018] EWCA Crim 1974 and *R v Adebisi* [2020] EWCA Crim 1446 were not provided to the court. The authorities are clear: the Guideline for s.3A of the 1988 Act applies to an offence under s.3A(1)(ba) notwithstanding the fact that the amendment was subsequently made.

25. The Recorder identified the appropriate sentence for the offender's level of culpability and harm before mitigation as being one of three years' imprisonment. Mitigation reduced the sentence to one of thirty months' imprisonment. He applied a twenty per cent discount to the sentence for the guilty plea, resulting in a sentence of twenty-four months. The Recorder considered the relevant Guideline on the imposition of custodial and community sentences and stated that he was firmly of the view that the offender did not present a risk or danger to the public. The offender had never before faced a criminal charge, in the Recorder's opinion there is a real prospect of his rehabilitation and he was not of the opinion that the appropriate punishment could only be achieved by an immediate sentence of imprisonment. Accordingly, he suspended the sentence for a period of two years. As to the conditions imposed, they were proposed in the Pre-Sentence Report.

26. A progress report from the National Probation Service dated 9 August 2021 states that the offender had engaged well with his supervising officer and demonstrated a positive attitude towards supervision. He presents as compliant and very remorseful. He sought support to further reduce his use of cannabis with the intention of stopping. The

antidepressant medication continues to be taken, the course of counselling has been completed and it is the hope of the supervising officer that by participating in the probation programme the offender will develop strategies to better manage periods of low mood and anxiety. Further, it is noted that should the offender be sentenced to a period in custody for this offence, the supervising officer would have significant concerns as to how he would cope in this environment and the ongoing impact on his mental health.

The submissions on behalf of the Attorney General

27. Three submissions are made:

    i) the Recorder fell into error when he considered that the court was not bound by the Sentencing Council Guideline for offences contrary to s.3A of the Road Traffic Act 1988;

    ii) he provided an indication for sentence when he had not been invited to do so by the offender. This was not in accordance with the principles in *R v Goodyear* [2005] EWCA Crim 888 and CPR Rule 3.31 and;

    iii) the Recorder imposed a custodial sentence which was not in accordance with the Sentencing Guideline and was too short to reflect the seriousness of the offence.

28. It is contended on behalf of the Attorney General, and not disputed on behalf of the offender, that the appropriate guideline is the s.3A Guideline, which identifies a maximum penalty of fourteen years' imprisonment together with a minimum disqualification of two years with a compulsory extended retest. As to the categorisations, in so far as they relate to drugs, a high quantity of drugs for the offence of careless driving results in a starting point of six years' custody with a sentencing range of five to ten years. A moderate quantity of drugs provides a starting point of four years' custody and a sentencing range of three to seven years. No definition is given as to what constitutes a high or moderate quantity.

29. Ms Broome, who was not trial counsel, in admirably succinct submissions, accepts that the quality of the offender's driving was of a careless/inconsiderate nature, arising from momentary inattention with no aggravating features. Ms Glowacka was a vulnerable road user, which is an aggravating feature. The appropriate starting point is contended to be one of four years' imprisonment with a sentencing range of three to seven years. It is necessary to adjust the starting point upwards to reflect the single aggravating feature. It is accepted that the Recorder's starting point of three years was within the sentencing range. However, the sentence passed did not reflect the amount of drugs present in the offender's system nor the aggravating feature. Further, the reduction for personal mitigation was too great. The delay in the case is accepted.

The submissions on behalf of the Offender

30. The court is grateful to Mr Tully QC for the detailed administrative history of this matter set out in his written submissions. This is of relevance to the issue of delay and to the events which preceded and took place at the hearing before the Recorder on 27 May 2021. Mr Tully places particular reliance on the concession made by counsel for the Crown following an amendment of the sentence note on 9 July 2021, namely that the Crown accepted that on the particular facts of the case that it could not prove to the requisite standard that there was a causal link between the levels of cannabis in the offender's system and the nature of his driving and that this would amount to a significant feature in respect of sentencing.

31. It is Mr Tully's contention that if the Crown had concerns about the process leading to the giving of the indication by the Recorder or to the substance of the indication given, that could and should have been made clear prior to the offender being re-arraigned and entering his plea. The essence of Mr Tully's admirably succinct submission is that the Crown played its own part in the process which led to the indication being given. They could have objected to such a course, but they did not do so. We agree.

32. In essence, the submission on behalf of the offender is that the Recorder was not in error when considering whether he had discretion to dis-apply the Sentencing Guidelines in circumstances where, after careful consideration, he concluded that to apply them would be unjust. He was entitled to take the course which he did on 27 May when indicating the maximum sentence which would apply in the event of the offender pleading guilty. Given the particular facts of the case, the Recorder was entitled to depart from the Sentencing Guidelines.

Discussion

33. This tragic case has a troubling administrative history. It took the Crown Prosecution Service sixteen months to make a decision to charge the offender. Thereafter, matters moved less than swiftly, no doubt in part due to the pandemic. On behalf of the offender it was always accepted that the offence with which he was charged was one of strict liability. From the outset his counsel raised a concern as to the application of the relevant s.3A Definitive Guideline and its starting point of six years' custody. The position became more acute when both prosecution and defence experts agreed that the cannabis caused no impairment in the driving of the offender and could not be deemed to have caused or contributed to the accident. Thus it was, the matter came before two experienced judges respectively on 26 and 27 May 2021.

34. We are satisfied that, in accordance with proactive case management, each judge was properly exploring whether the matter could be resolved without a trial. It is not suggested on behalf of the Attorney General that this was anything other than the appropriate course to take. Having read the transcript of the hearing before the Recorder on 27 May, it is clear that this experienced judge recognised and understood the problems in the case. It is also clear that although an indication had not been positively sought on behalf of the offender, it was the direction in which the hearing was going and if it was the Recorder who anticipated a request that was going to be raised, we are unable to find that in so doing he departed from the guidance in *Goodyear*. The Recorder was properly exploring with both counsel the factual and legal issues of the case and the difficulty identified by Mr Tully in respect of the application of the s.3A Guideline. There is nothing in the transcript which indicated that the Crown had concerns or was in any way unhappy with the manner in which the hearing progressed, either on the day or thereafter. It is clear that the Recorder and counsel were all seeking to explore whether this difficult and sensitive case could be resolved without a trial, a purpose of appropriate case management.

35. It is a matter of regret that the authorities cited at [24] above were not brought to the attention of the Recorder. It has always been the case on behalf of the offender that the appropriate Definitive Guideline is that of s.3A of the 1988 Act. Applying that Guideline, it is accepted on behalf of the Attorney General that the starting point would be four years' custody with a range of three to seven years. Notwithstanding the Recorder's departure from the Guideline, his starting point was in fact within that range. That said, there were a number of factors which in our judgment would have permitted a judge to sentence at the lowest end of this range or even depart from this Guideline. They are based upon the particular circumstances of the case and include the blinding sunlight which prevented the offender seeing

Ms Glowacka riding her bike, the fact that he was driving within the speed limit, Ms Glowacka was walking on the wrong side of the road, in dark clothing and would have been in a dark area by reason of the blinding sunlight. This was not a prolonged course of bad driving, it was a matter of seconds. The presence of cannabis did not impair the driving of the offender nor can it be shown to have been causative of the collision. The absence of impairment is but one factor which permits a sentence at the lower end of the range or possible departure from the Definitive Guideline. That said, nothing in this judgment should be read as asserting that the absence of impairment in itself provides a basis for departure from the relevant Definitive Guideline.

36. This was a difficult sentencing exercise which was required to reflect the challenging driving conditions on the morning, the driving of the offender and the tragic fact that by reason of his driving a young woman lost her life. We accept that no sentence can begin to reflect the loss suffered by Ms Glowacka's partner and her family, but it is for this court to consider the particular circumstances of the driving which led to the collision and those more generally of the offender. Having done so, we are unable conclude that the sentence passed by the Recorder was unduly lenient. In our judgment it properly reflected the facts and the circumstances of this tragic case. Accordingly, the application for leave to refer the sentence is refused.

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