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IN THE COURT OF APPEAL

CRIMINAL DIVISION

[2022] EWCA Crim 369



No. 202103970 A2

Royal Courts of Justice

Tuesday, 8 March 2022

Before:

LORD JUSTICE WILLIAM DAVIS
MR JUSTICE GRIFFITHS
HER HONOUR JUDGE WALDEN-SMITH

REGINA
V
BARRY GOODY

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Mr. B. Newton appeared on behalf of the applicant.
The Crown were not represented.

J U D G M E N T

MR JUSTICE GRIFFITHS:

- 1 This is a renewed application for permission to appeal against the sentence of 18 months' imprisonment for one count of causing serious injury by dangerous driving, contrary to section 1A of Road Traffic Act 1988, to which the applicant pleaded guilty. The sentence was passed in the Crown Court at Chelmsford on 18 November 2021 by his Honour Judge Morgan.
- 2 The facts in summary are that the applicant was responsible for an accident on the A12, London Road, past Langham and towards Colchester on 10 February 2021 at around 6.50 a.m. The applicant was driving a silver, Ford transit van. He overtook another driver at speed and hurtled towards a clearly visible tailback of other slowing or stationary traffic ahead of him without slowing down or reacting at all. He crashed at full speed into a slow moving vehicle at the back of the tailback, which was a Ford Fiesta driven by Harry Zizka. It was a dark morning but visibility was good, and there were also warnings on the gantries on that stretch of road of congestion and closure of the road ahead due to an overturned lorry. The impact caused Mr Zizka's car to crumple from behind, right up to Mr Zizka's driver's seat, and the transit van to rise into the air, hitting a stationary car. The impact also spun round the car in front of Mr Zizka, an Audi TT, driven by a Miss Hooper, who had her hazard warning lights on. It was also heard and felt by an HGV lorry in front of Miss Hooper.
- 3 The most serious injuries were caused to Mr Zizka, who was 22 years old. He was left slumped over the steering wheel, visibly injured, and had to be extracted by emergency services from the wreckage. He was flown to Addenbrooke's Hospital where he underwent surgery. He was partially paralysed and there was bleeding on the brain. There were numerous fractures to his bones and lacerations. On admission, he was found to have severe traumatic brain injury, as well as a lung contusion, spleen contusions and spinal injury. The injuries were life threatening, and Mr Zizka was admitted to a high dependency unit and an intensive care unit. He underwent temporary removal of part of his skull, and the insertion of a shunt to drain the build-up of fluid on his brain. Although his life was saved and his condition was improved by subsequent treatment and operations, it was unlikely that he would ever be able to live an independent life. The prognosis was permanent physical and cognitive limitation as a result of his injuries.
- 4 At the scene the applicant said to a witness, "I think I fell asleep. What should I say to the police?" The witness told him to tell the truth. The applicant told another witness that he had been travelling at 60 miles an hour. A body worn camera recorded the applicant telling police that he was slowing down and, "I do have a horrible feeling I fell asleep. I've been doing a lot of hours recently. I do air-conditioning. I remember pretty much nothing after slowing down."
- 5 However, the evidence of witnesses supported by the CCTV was that he had not slowed down at all, and the judge found no evidence that he was braking. The judge watched nearly 20 minutes of CCTV.
- 6 In a prepared statement the applicant said that he was driving to work. He was sleeping well at the time and the night before the collision. He was in good physical and mental health. He was not distracted during the journey. It seems that he was doing 60 miles an hour because he had set that speed on his cruise control and never applied his brakes to cancel it.
- 7 The applicant had no previous convictions but the judge noted as aggravating features the applicant's previous speeding offences. The DVLA record showed that his licence was

endorsed on 4 March 2020 with three points for speeding, and in March 2021 with four points for a further incident of speeding which occurred on 30 April 2020. This was an occasion when he was driving at 57 miles per hour in a 30 mile per hour area. We are told that this was due to a failure to adjust to a speed limit which changed in the course of that journey.

- 8 There is no challenge to the judge's sentence of 18 months' imprisonment after 25 per cent credit for plea. The sole ground of appeal is that it should have been suspended.
- 9 In his thorough written and oral submissions Mr Benjamin Newton of counsel has referred in support of the appeal to a number of motoring cases in which suspension was considered by this court. The sentencing judge's decision not to suspend was upheld in *R v Harding* [2016] EWCA Crim 769 and *R v Perera* [2017] EWCA Crim 2238. In *R v Sumaiya Neher* [2018] EWCA Crim 29 and *R v Dunt* [2021] Cr App R (S) 48 and *R v May* [2020] EWCA Crim 365 a suspended sentence was substituted. However, Mr Newton recognises that the cases are fact specific, and we have not found in them any point of principle to assist us in this appeal.
- 10 Mr Newton also refers to *R v Manning*, which said at paragraph 41 that the current conditions in prison during the COVID pandemic represent a factor which can properly be taken into account in deciding whether to suspend a sentence.
- 11 The sentencing judge in this case conducted an unusually detailed assessment of whether he should suspend the sentence or not (Remarks pages 33 to 35). He referred expressly to the guideline on the imposition of community and custodial sentences. He went through all the factors in that guideline, both for and against suspension. On whether the applicant represented a risk or danger to the public, the judge thought not, unless it was an offence on the road. On whether he had a history of poor compliance with court orders, he recognised that there were no previous convictions, but he was also concerned by the two previous speeding offences. He took account of a realistic prospect of rehabilitation suggested by the Pre-sentence Report. He gave full weight to the personal mitigation and set it out impeccably, finding it to be strong, although not exceptional. He recognised the harmful impact of a custodial sentence on the applicant's family but noted that he was not the sole carer and that this was not a case where an immediate custodial sentence would result in the break-up of the family. He could not say that the impact on others would be significant or that the circumstances of his mitigation were so exceptional that on the facts of this case an immediate term of imprisonment could be avoided.
- 12 The judge made it clear that the decisive factor was that in his judgment appropriate punishment could only be achieved on the facts of this case by immediate custody. This is a point straight out of the guideline and it was alone sufficient to justify his decision on the facts of this case. The judge had conducted a sentencing hearing which took well over two and a half hours, during which detailed evidence was presented of all the circumstances and the terrible impact of the offence, and the judge delivered a full judgment covering seven pages of transcript.
- 13 One sentence in particular is relied upon in support of this appeal, at paragraph 33G of the remarks where the judge said:

"I am urged to consider, and indeed, I am bound to consider in the circumstances, whether appropriate punishment can only be achieved by an immediate custodial sentence, and I refer myself to the guidelines."

14 Then, at page 34G to H:

"In my judgment, a person who falls asleep, even for a short period of time, on the A12 and causes an accident resulting in such significant injuries must go into custody."

15 However, it would be wrong to take that sentence alone and out of context. This was a careful and thorough sentencing exercise which identified and weighed in the balance all the relevant factors, including all the factors particularly relevant to the guideline on whether or not the sentence should be suspended. This was not a one-off incident of falling asleep at the wheel. There was a history of speeding. The applicant claims to have slowed down, which was contrary to the evidence. The outcome of the accident was catastrophic. There was limited remorse and it appears to have been somewhat slow to develop. The applicant's remarks at the scene were not focused on the consequences of what he had done, but more on what he should tell the police. His plea was late and we are not impressed by the submission made to us that the applicant can blame that on his lawyers. The guideline was, in our judgment, applied correctly and the decision not to suspend was open to the judge for the reasons he gave.

16 The application for permission to appeal is, therefore, refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.