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IN THE COURT OF APPEAL

CRIMINAL DIVISION

NCN: [2023] EWCA Crim 1097



No. 202300915 A5

Royal Courts of Justice

Friday, 8 September 2023

Before:

LORD JUSTICE POPPLEWELL
MR JUSTICE LAVENDER
MR JUSTICE BRYAN

REGINA
V
KENNETH SMITH

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MR S. J. CONNOLLY appeared on behalf of the Appellant.

J U D G M E N T

MR JUSTICE LAVENDER:

- 1 The applicant renews his application for leave to appeal against the sentence of 44 months' imprisonment imposed on him by HHJ Mann KC in the Crown Court at Woolwich on 8 March 2023 for one count of causing death by dangerous driving, to which he had pleaded guilty in the same court on 30 November 2022.
- 2 The offence was committed on 6 August 2019 at about 6.50pm when the applicant was driving northbound along North Cray Road, the A223, which is a dual carriageway between Ruxley and Bexley in South-East London. The applicant was driving a BMW335i which he had acquired only two weeks before. The speed limit was 40mph. The applicant had been exceeding that limit, driving at about 80mph, but he slowed down to 40mph as he passed a speed camera. He then accelerated quickly to 81mph. At that speed he was unable to avoid colliding with a car driven by Derek Harmer, who was properly executing a right turn across the northbound carriageway. The applicant braked when he saw Mr Harmer's car, but he was still travelling at 66mph when he hit the nearside of Mr Harmer's car. The collision occurred only about 430m after the speed camera.
- 3 Mr Harmer died in hospital two days later. The victim impact statements from Mr Harmer's widow and four children eloquently express the profound loss caused to them and the other members of their family, including Mr Harmer's grandchildren. No sentence imposed by any court can make up for that loss.
- 4 The applicant, who was 40 years old at the time of the offence, had no previous convictions. He told the police at the scene that he had been driving at 40mph, which was untrue, and that he saw the other vehicle and he believed that it had stopped or was going to stop. This amounted to putting the blame for the accident on Mr Harmer, since the collision would not have occurred either if the applicant had been driving at the speed limit or if Mr Harmer had stopped.
- 5 The applicant gave no comment interview in September 2019. He did not correct the inaccurate account which he had given on the day. That is something which has significantly exacerbated the harm caused to Mr Harmer's family.
- 6 A substantial investigation was required in order to establish the true facts, which were very different from the account given by the applicant to the police. The applicant gave a further no comment interview in November 2021. He pleaded not guilty on 4 August 2022. He pleaded guilty on 9 November 2022, but he provided a basis of plea which included saying that Mr Harmer's driving was a contributory cause of his death. This was not accepted by the prosecution and the applicant did not require a Newton Hearing.
- 7 At the time of the offence, the applicant lived with his wife and their newborn daughter. They have since had twins. He was employed as a sales and procurement manager and had worked for the same employer for 20 years. He told the probation officer that his wife would have to go back to work if he was sent to prison. As a result of the offence, he was diagnosed with depression and anxiety, for which he was prescribed medication. When he spoke to the probation officer, he expressed considerable remorse, but he also appeared to place some blame for the collision on Mr Harmer. There were several character references before the judge and a letter from the applicant expressing his remorse.
- 8 It was agreed that the offence fell within level 2 in the offence-specific sentencing guideline, for which the starting point was five years' custody, with a range from four to seven years, on the basis that the applicant's driving had created a substantial risk of danger. Of the

factors listed in the guideline which were indicative of such driving, the relevant factor was greatly excessive speed.

9 In his sentencing remarks, the judge said that he would give the applicant full credit for his guilty plea because there had been a complicated issue as to what caused Mr Harmer's death, such that, in effect, paragraph F1 in the guideline on Reduction of Sentence for Guilty Plea applied. The judge said that he treated as an aggravating factor the fact that the applicant had been deliberately speeding excessively by accelerating from 40mph to 81mph in less than 400m after passing the speed camera. He said that he regarded 81mph as a "grossly excessive speed".

10 The judge also said that he accepted that the applicant would have been shocked on the day, but he added that the account which he gave to the police was an attempt to divert their attentions from him. The judge accepted that there had been a delay in bringing the proceedings which was not of the defendant's making. The judge accepted that the defendant was remorseful and that his offence had had a real effect on his own family and would cause him to lose his job. However, the judge also noted that the applicant's driving licence had been endorsed for speeding on the motorway in 2021.

11 The judge referred to what he called the applicant's "grossly excessive speed" which he distinguished from "greatly excessive speed" and found that it was an aggravating factor that that grossly excessive speed was, as the judge put it, "contrived" by the applicant's accelerating after going through a speed camera. The judge then said as follows:

"Having considered the submissions in this case, both by the prosecution and the defence and having taken into account everything that I know about you, it seems to me that the appropriate starting point in this case, had there been a trial, would be six years' imprisonment."

12 He then reduced that to five and half years by reason of the delay. He said that the sentencing guidelines assumed good character, so he did not make any reduction on that account. He reduced the five and a half years, or 66 months, by one-third by reason of the applicant's guilty plea and that is how he arrived at the sentence of 44 months' imprisonment.

13 The proposed grounds of appeal are that the sentence was manifestly excessive because:

(a) the judge was wrong to treat deliberate speeding as an aggravating feature;

(b) the judge was wrong to treat that deliberate speeding as justifying an increase of 12 months above the starting point; and

(c) the judge took insufficient account of:

(i) the applicant's remorse;

(ii) the personal effect on the applicant's mental health and loss of employment and career; and

(iii) the impact of a custodial sentence on the applicant's family.

14 The single judge's reasons for refusing permission to appeal were as follows:

"1. I do not accept that it is arguable that the Judge was wrong to regard the circumstances in which you came to be driving a powerful car at 81mph on a 40mph road as an

aggravating feature (Ground (a)). The evidence was that there was a 40mph speed limit on the dual carriageway because there were turning points to allow vehicles to cross. There was a speed camera positioned 430 metres away from the turning point where the collision occurred, again to encourage drivers to slow down. You did slow down so as not to activate the speed camera but you then immediately and rapidly accelerated to 81mph. You therefore deliberately and flagrantly flouted the speed limit and bypassed attempts to enforce it.

2. I also consider that your Grounds (b) and (c) are based on a misreading of the Judge's sentencing remarks. He expressly took into account your remorse, which he accepted. He also expressly took into account the effect of the offence on you in terms of your career and your mental health as well as the effect on your family. This is plain from his sentencing remarks. He was fully entitled to conclude that, having regard to these considerations and the other mitigating features of the case, (as he put it 'having taken into account everything that I know about you'), his sentence after a trial would have been 6 years' imprisonment. The fact that he expressly made a further reduction of six months in respect of delay is not an indication that he failed to take into account your mitigation. It merely reflects the fact that this was an additional consideration."

- 15 We have each considered the matter afresh for ourselves, but we have concluded that we agree entirely with what the single judge said. This was not merely a case of driving at greatly excessive speed. The judge was entitled to find that it was an aggravating factor that the applicant had accelerated so quickly after passing the speed camera to what the judge was entitled to view as a grossly excessive speed. Moreover, it is clear from the sentencing remarks that the judge did take account of the mitigating factors in arriving at the notional sentence of six years' imprisonment. We do not consider that he was required by those factors to impose a lower sentence than was in fact imposed.
- 16 We add that the judge would also have been entitled to place more reliance on one matter which he did not specifically identify as an aggravating factor, but which he was entitled to regard as such, "namely blame wrongly placed on another." This is not a factor which was listed in the offence-specific sentencing guideline, but it is listed in the General Guideline: Over-arching Principles, which it expressed to be for use in conjunction with offence-specific sentencing guidelines.
- 17 Standing back and looking at all of the circumstances in this case, including the aggravating and mitigating factors, we do not consider that it is arguable that the sentence imposed was manifestly excessive.
- 18 Finally, we mention a matter concerning the applicant's disqualification which has been drawn to our attention by the Registrar. The judge initially said that the applicant would be disqualified for four years plus one half of his sentence, i.e. 22 months, making a total of 70 months' disqualification. Counsel then pointed out that the applicant's disqualification had begun on his conviction in November 22, which led the judge to reduce the period of disqualification by 4 months to 66 months.
- 19 It appears that counsel and the judge overlooked section 26(12) of the Road Traffic Offenders Act 1988, which states that any period of disqualification imposed under section 34 or 35 of that Act shall be treated as reduced by any period during which he was disqualified by an interim order. The period of interim disqualification will be deducted automatically and administratively and should not be deducted by the sentencing judge: see *R v Cooper* [2018] EWCA Crim 1958 and *R v Cole* [2021] EWCA Crim 3025.

20 We have no power to increase the period of disqualification and so we merely draw attention to this point for future reference.

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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