Neutral Citation Number: [2023] EWCA Crim 5

Case No: 202200536 B3

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CENTRAL CRIMINAL COURT
HHJ Trowler KC
T20207393

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/01/2023

Before :

President of the King's Bench Division
Mr Justice Murray
and
Mrs Justice Farbey

- -

Between :

Kai Nathanial Holder	**Appellant**
- and -	
Rex	**Respondent**

- -
- -

Ms Nutan Fatania (instructed by **Berri's Law LLP**) for the **Appellant**
Mr. Hamish Common (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing dates : 8 November 2022

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Approved Judgment

Dame Victoria Sharp, P.

1. On 20 January 2022, the appellant, Kai Nathanial Holder (then aged 19) was convicted after a trial at the Central Criminal Court before Her Honour Judge Trowler KC and a jury, of causing death by dangerous driving (count 1). He had pleaded guilty at the

PTPH on 5 January 2022 to aggravated vehicle taking, causing death by driving whilst uninsured and causing death by driving whilst unlicensed (counts 2, 3 and 4 respectively). On 24 February 2022, he was sentenced to a total of 2 years' and 9 months' detention in a young offender institute: 2 years' and 9 months' detention on count 1, 12 months' detention concurrent on count 2, and 6 months' detention concurrent on each of counts 3 and 4. He was disqualified from driving for 4 years and 4 months and until an extended test is passed. Count 5, causing death by careless driving an alternative count to count 1, was ordered to lie on the file on the usual terms.

2. The appellant's application for leave to appeal against conviction was referred to the Full Court by the single judge. At the hearing of the application, we gave leave and dismissed the appeal. These are our reasons.

3. On 10 August 2019 at around 7pm, the appellant, who was then 17 years' old, was riding a stolen motor scooter, travelling east along Bedfont Lane in Feltham, West London. Bedfont Lane is a single carriageway road in a residential area with one lane in each direction and has a 20mph speed limit.

4. The appellant's friend, Bradlee O'Dell Alboni who was 14 years' old, was the pillion passenger. Neither Bradlee nor the appellant were wearing helmets. The appellant looked over his left shoulder and backwards for a period, while either he or Bradlee addressed some remarks to two young men who were walking past on the pavement. This, together with the speed at which the motor scooter was travelling, caused the appellant to lose control of the motor scooter which veered to the left and struck the kerb. The motor scooter overturned and both riders were propelled off the back.

5. The events immediately preceding the collision, and the collision itself were captured on CCTV footage. It was common ground at trial that the motor scooter was travelling at a speed of between 37 and 44 mph immediately before the collision. The appellant suffered relatively minor injuries and left the scene shortly after the collision. Bradlee however slid along the pavement and collided with two nearby poles and a telephone junction box. Tragically, he suffered fatal head and spinal injuries and he was pronounced dead at the scene half an hour later.

6. It was accepted on behalf of the appellant that his driving was careless and that his carelessness had caused Bradlee's death. A plea of guilty to causing death by careless driving was offered at the PTPH, but it was not acceptable to the prosecution. A count of causing death by careless driving was subsequently added to the indictment at trial.

7. The case for the prosecution on the charge of causing death by dangerous driving was that shortcomings in the appellant's standard of driving meant that it fell far below the standard expected from a careful and competent driver and there was an obvious danger of injury or serious damage to property due to the manner of the driving. By the time of the trial, the factors which the prosecution intended to rely on in support of this case were that the appellant was travelling at an excessive speed, that he looked over his shoulder and backwards rather than in the direction of travel, long enough to cause the scooter to drift and hit the kerb, that he drove the scooter with Bradlee as a pillion passenger when Bradlee was not wearing a helmet and that he took a pillion passenger when he was not legally permitted to do so because he did not have a driving license.

8. At the commencement of the trial, the defence objected to the prosecution's reliance on the fact that Bradlee was not wearing a helmet and the fact that the appellant did not have a driving license, on the ground that these facts were irrelevant to the standard of driving and prejudicial. The judge ruled out reliance on the latter factor and no issue is raised as to this aspect of her ruling in this appeal.

9. As to the former factor, the defence's main argument before the judge, in summary, was that the fact that Bradlee was not wearing a helmet was an aggravating feature of the offence for the purpose of sentence, but was irrelevant to the standard of driving. In addition, it was submitted that legislative exemption from the requirement to wear protective helmets for those who followed the Sikh religion, meant the absence of protective helmets could not be relevant to the standard of driving. The respondent submitted in response that the failure to wear a helmet was relevant to whether the defendant's driving was dangerous as this substantially increased the risk of injury, as shown in this case. In addition, there was no distinction in principle between a defect in a vehicle which affects its handling and a defect which means that its occupants are placed at a greater risk in the event of a collision. Further, the exemption for a particular class of individuals did not qualify the application of the law to everyone else. The substance of the parties' submissions made to the judge were repeated at the hearing of the appeal before us.

10. The judge rejected the defence's application. In a carefully considered written ruling she said:

> "In my view the exemption in …RTA is not determinative of this issue. The exemption is plainly intended to balance the public interest in protecting those travelling by scooter from harm with an individual's right to exercise his or her religion.
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> The real question is whether driving a scooter whilst carrying a pillion passenger under 16 without a helmet is properly to be considered part and parcel of the 'driving' for the purposes of s.1 RTA. In my view, the answer in this case is 'yes'. First, the fact that [Bradlee] was not wearing a helmet was plainly a contributory factor to the severity of the head injury which led to his death. Secondly, a jury would be entitled to expect a careful and competent driver to comply with the relevant rules placing a responsibility on the driver to ensure a young passenger is wearing a helmet and that a failure to do so created obvious danger of injury. The fact that driving with passenger without a helmet is not an aspect of the way in which the scooter was physically manoeuvred by [the appellant] on the road is no bar to it being part of the standard to be considered by the jury. Were that the case then a jury would not, in an appropriate case, be permitted to conclude that a vehicle was driven dangerously by reason of the fact that the condition of the vehicle made it obvious that driving the vehicle was dangerous [see s.2A(2)]."

Discussion

11. Section 1 of the Road Traffic Act 1988 (the RTA 1988) provides that "A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.**"**

12. The meaning of dangerous driving for the purposes of section 1 (and the section 2 offence of dangerous driving) is to be found in section 2A[1] of the RTA 1988. The relevant part of section 2A provides that:

> "(1)For the purposes of sections 1, 1A and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—
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> (a)the way he drives falls far below what would be expected of a competent and careful driver, and
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> (b)it would be obvious to a competent and careful driver that driving in that way would be dangerous.
>
> (2)A person is also to be regarded as driving dangerously for the purposes of sections 1, 1A and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.
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> (3)In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
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> (4)In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried"

13. The legislative exemption from the requirement to wear protective headgear is to be found in section 16(2) of the RTA 1988. The exemption applies to those who follow the Sikh religion, when they are wearing a turban. The existence of this exemption, as the judge said, is intended to balance the public interest in protecting those travelling by motor scooter from harm with an individual's right to exercise his or her religion. As she also said, correctly in our view, it is not therefore determinative of the matter in issue.

14. Apart from that exemption, it is compulsory to wear protective head gear that complies with specified standards, when driving or riding a motorcycle scooter or moped on the road and a failure to do so is a criminal offence: see section 16(4) of the RTA 1988; Schedule 2 of the Road Traffic Offenders Act 1988 and the Motor Cycle (Protective Helmets) Regulations 1998 (the 1998 Regulations) made under section 16. A person also commits an offence if they drive or ride on a motorcycle, scooter or moped with a person under the age of sixteen who is not wearing protective headgear: see section 16(4) of the RTA 1988 which provides that "no person other than the person actually committing the contravention is guilty of an offence by reason of the contravention,

[1] Sections 1, 2 and 2A were substituted for sections 1 and 2 of the RTA 1988 as originally enacted, by section 1 of the RTA 1991.

unless the person actually committing the contravention is a child under the age of sixteen years".

15. The compulsory nature of the requirement to wear protective headgear is reflected in rule 83 of the Highway Code which provides that: "On all journeys, the rider and pillion passenger on a motorcycle, scooter or moped **MUST** wear a protective helmet… Helmets **MUST** comply with the Regulations and they **MUST** be fastened securely." It is also material to note that a failure on the part of the driver to observe the Highway Code, does not give rise to criminal liability *per se*, but can be relied on "as tending to establish or negative any liability which is in question in those [criminal] proceedings". See section 38(7) of the RTA 1988.

16. The purpose of protective headgear, and the statutory requirement to wear it, is obviously to protect the wearer from head injuries in the event of an accident. Section 17 of the RTA 1988 read with regulation 4 of the 1998 regulations provides for example that the protective headgear that those riding on motorcycles must wear, must comply with the British Standards or be of a type which could reasonably be expected to afford the wearer a degree of protection from accidental injury greater than headgear conforming with those British Standards.

17. As the court pointed out in *R v Webster* [2006] EWCA Crim 415 at para 17, section 2A is "closely drafted" ; and Parliament has made plain that driving is dangerous "if…and only if" the conditions of the section are met. The answer to the question raised before the judge is to be found therefore only by reference to the definition of dangerous driving in section 2A(1) and in the subsections to which express reference is made in that section.

18. In this case, the appellant was driving at a high speed (about twice the speed limit) in a relatively narrow residential road, looking backwards instead of in the direction of travel; and neither he nor his young pillion passenger were wearing a helmet - something that in combination with his speed and, the fact that he was not looking ahead, greatly increased the risk of serious injury if an accident were to occur. In our judgment, on these facts, the judge was right to conclude it would be open to the jury to decide that the appellant's driving fell far below the standard to be expected of a competent and careful driver, and that it would be obvious to a competent and careful driver that driving in the way he did would create a risk of injury to the appellant and his passenger (or, to put it another way, this was a danger which would be "seen or realised at a glance": see *R v Strong* [1995] Crim LR and *R v Few* [2005] EWCA Crim 728 at para 8).

19. The test as to whether driving is dangerous is a purely objective one, and a finding of dangerous driving must be based on the manner in which a defendant drives (see *Webster* at para 17). However, the standard to be expected of a careful and competent driver is inextricably linked to and dependent upon the circumstances in which the driving takes place. Travelling at a certain speed may be appropriate and safe in one set of circumstances, having regard to the prevailing weather or road conditions for example, but very dangerous in another. Equally, such circumstances can be relevant to determining "whether there was a danger of serious injury or damage" (see *Webster* also at para 17).

20. That Parliament intended such circumstances to be taken into account in determining both limbs of section 2A(1) can be seen from the wording of section 2A(3). This provides that: "in determining …*what would be expected of, or obvious to,* a competent and careful driver …in a particular case, regard shall be had *not only to the circumstances* of which he could be expected to be aware but also to *any circumstances* shown to have been within the knowledge of the accused." (emphasis added) The emphasised words imply a broad approach and are apt to include evidence of the physical manoeuvres of the vehicle concerned, and the wider context of those manoeuvres. Such circumstances may be material (indeed highly material, in view of the words "particular regard" in section 2A(3)) to whether section 2A(1)(a) and/or section 2A(1) (b), has been satisfied.

21. One of the circumstances of which the appellant was aware, was that Bradlee, his young pillion passenger, was not wearing a helmet – the wearing of which is a basic but important safety measure imposed as we have said by the criminal law, and required under the Highway Code, to protect individuals riding motor scooters from head injuries in the event of an accident. It would not have been open to a jury to convict the appellant of dangerous driving on this ground alone; but such a scenario did not arise on the facts, nor did it form the basis of the judge's decision to leave the case to the jury. Instead, this factor was, as the judge put it, properly to be considered as part and parcel of the 'driving' for the purposes of section 1 of the RTA 1988.

22. We pause to observe that the jury might have been surprised to be told that the fact that Bradlee was not wearing a helmet was irrelevant to the objective danger of what the appellant was doing. But analysing the matter as one must by reference to the statutory requirements alone, in our judgment it was open to the jury to have regard to the fact that Bradlee was not wearing a helmet in two respects. First, in deciding whether and the extent to which his driving (speeding and looking backwards, instead of in the direction of travel) fell below what a competent and careful driver would be expected to do *in those particular circumstances*: see also *R v Taylor* [2004] EWCA 213 where it was said that the Highway Code was a guide to the standard to be expected of a careful and competent driver. To put it another way, the jury were entitled to conclude that a careful and competent driver who knew he had a young pillion passenger who was not wearing the required helmet to protect him, would not have driven in the manner he did; and that his driving in this manner regardless, fell far below the requisite standard. Secondly, in deciding whether it would have been obvious to a competent and careful driver that driving in that way would be dangerous because of the (obvious) risk of injury to his passenger.

23. Our reasoning differs to an extent from that of the judge, but we agree with her conclusions. No complaints were made about the judge's legal directions to the jury, which were impeccable. In the circumstances, this appeal was dismissed.