APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 7
HCA/2020/000258/XC

Lord Justice Clerk
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in

CROWN APPEAL AGAINST SENTENCE

by

HER MAJESTY'S ADVOCATE

Appellant

against

SHAUN GATTI

Respondent

Appellant: Edwards, QC, AD; Crown Agent
Respondent: McElroy; McElroy McCusker

2 February 2021

Introduction

[1] The respondent pled guilty to charge 1 causing death by dangerous driving in that he drove at excessive speeds within a 30 mph limit, and on the wrong side of the road, having consumed alcohol, whereby his vehicle collided with a pedestrian on the roadway, Robyn Fryar, who died as a result. He also pled guilty to charges 2 and 3, failing to stop and

to provide, or to report, the necessary details as required following a collision; and a further charge (4), of attempting to pervert the course of justice by leaving the scene, concealing, cleaning, and removing the number plates from the vehicle in question to conceal his guilt, to avoid determination of his level of alcohol and to prevent investigation and prosecution for charge 1.

[2] On charge 1 he was sentenced to 4 years 6 months detention (reduced from 6 years), with concurrent sentences on charges 2 and 3 of 3 months (reduced from 4 months) and a consecutive sentence of 9 months (reduced from 12 months) on charge 4. The Crown takes no issue with the level of discount, but appeals the sentences on charges 1 and 4 as unduly lenient.

Circumstances of the offences

[3] The respondent was 20 at the time of the offences, living with his mother and siblings and employed by a lighting company. The fatal collision occurred at around 0200 hrs on 7 July 2019. The respondent had driven some friends to a public house in Paisley where the friends consumed alcohol but he did not. Thereafter they attended a 21st birthday party at the Gleniffer Hotel. The respondent and a friend left there at about 0040 and returned to the town centre by taxi where they went to a night club, at which they drank alcohol. Both drank from something called a "fishbowl", a large vessel containing a shot of vodka, a shot of Southern Comfort, two bottles of vodka based "alcopops" and orange juice. The respondent and his friend returned to the Gleniffer Hotel, where they were seen on cctv to get into the respondent's car and drive off into Glenburn Road.

[4] Meanwhile, a 15 year old girl, Robyn Fryar, who had been socialising with friends was walking with them towards Glenburn Road. They could hear the sound of vehicles

coming down Glenburn Road. At some point Robyn left her friends and began to run across the road. The respondent was driving westbound but was in the eastbound lane, and driving at an excessive speed. His car struck Robyn, carrying her some distance down the road before the brakes were applied and she was thrown from the vehicle onto the road. The respondent stopped his vehicle, got out, saw Robyn on the road, returned to the vehicle and drove off at speed. Robyn was taken to hospital, where she died.

[5] Collision investigators identified the vehicle as having been a black VW Polo which would be heavily accident damaged. Acting on a tip-off following a media appeal that same day, police went to the respondent's address where they found such a car concealed underneath a tarpaulin. The registration plates had been removed. There was significant front nearside damage with small amounts of blood in the cracked glass, although the car had been cleaned since the collision. The respondent was the registered keeper of the vehicle. When police called at his door the respondent answered, saying "It's me you're looking for, let's just go". In response to the s.172 requirement as to the identity of the driver at the time of the collision he responded "me". He was detained at about 1330 hrs, too late for any meaningful calculation of his alcohol consumption. Crash investigators estimate his speed, in a 30mph zone, to have been 42-47 mph.

The sentencing decision

[6] The sentencing judge was advised that the respondent was a first offender. A CJSWR records him as saying he thought he was fit to drive; that he hadn't seen Robyn until the last minute; and that after the accident he "panicked". He intended to hand himself in to the police but they arrived before he could do so. The report noted his remorse, and previous good character and confirmed that he had only recently passed his driving test.

[7] The sentencing judge was referred to the Definitive Guideline entitled "Causing Death by Driving" issued in July 2008 by the Sentencing Council in England and Wales, which he used as a useful cross check to the sentence which he selected (*Sutherland* v *HMA* 2016 SLT 93, LJC (Carloway) at para [20]), noting that under those guidelines the driving would have been likely to fall within category two, with a sentencing range of 4 - 7 years. An ill-advised submission that some blame attached to Robyn was robustly rejected. An equally ill-advised submission that the reference to driving after consuming alcohol should not be taken into account in the absence of allegations of impairment was rejected. The sentencing judge considered that having regard to the circumstances of the consumption of alcohol it was inevitable that driving ability would have been impaired.

Submissions for the appellant

[8] In using the English Guideline as a cross reference the sentencing judge had erred in categorising the offence as coming within level 2; it should have been classed as a level 1 offence with a sentencing range of 7-14 years. Even if it fell to be considered as a level 2 offence, it fell at the higher end of the relevant range. It was submitted that the sentences imposed for charges 1 and 4, separately or *in cumulo* failed to recognise the gravity of the actions of the respondent before, during and after the offence. The sentence failed to recognise the combination of: (i) a flagrant disregard for the rules of road, by driving at excessive speed in the dark on the wrong side of the road; following (ii) the consumption of alcohol, the extent and effect of which could not be determined by reason of his own actions in leaving the scene and in seeking to avoid detection. This conduct substantially diminished the mitigatory weight of the respondent's remorse. The submissions were supported by a detailed examination and analysis of the relevant English Guideline.

Submissions for the respondent

[9] The sentencing judge had applied his mind to all relevant factors. The Crown recognises this but submits that the sentencing judge did not give enough weight to some of these factors. In his report the sentencing judge clearly sets out the approach he took, which does not show any error, and does not justify the criticisms advanced in support of the appeal. The respondent was a young man who made wrong decisions over a relatively short period of time, drove when he should not have done, and over a short distance drove at excessive speed, with unfortunately tragic consequences.

Analysis and decision

[10] The test in an appeal such as this is whether the disposal in question was unduly lenient. What this means was explained in *HMA* v *Bell* 1995 SLT 350 at page 353 H-I:

> "It is clear that a person is not to be subjected to the risk of an increase in sentence just because the appeal court considers that it would have passed a more severe sentence than that which was passed at first instance. The sentence must be seen to be unduly lenient. This means that it must fall outside the range of sentences which the judge at first instance, applying his mind to all the relevant factors, could reasonably have considered appropriate."

[11] In our view there were two flaws in the submissions advanced in this case. The first was that they proceeded as if the Guideline used in England and Wales was actually applicable in Scotland rather than available for such help as it may provide by way of cross check. The Advocate Depute did recognise, formally, that the latter was the correct approach, but the extent to which the detail of the Guideline was dwelt upon tended towards the former approach. The second flaw in addressing the Guideline was to apply an overly analytical approach to its use. In *Geddes* v *HMA* 2015 SLT 415 the court noted (para [18]) that:

> "It is important to observe that, while the court has encouraged sentencing judges to 'have regard' to the English Guideline in death by dangerous driving cases, it has not said that it should 'be interpreted and applied in a mechanistic way' (*Neill* v *HM Advocate* [2014] HCJAC 67, Lady Clark of Calton at para [11]). In order to ensure a degree of consistency in this jurisdiction, albeit paying due regard to local circumstances, it may be equally important to have regard to existing precedent (eg *Neill v HM Advocate* (supra) or *Lynn and Logue* v *HM Advocate* [2008] HCJAC 72). The sentencing judge may wish to consider how a sentence for this type of offence dovetails with modern sentencing developments in relation to Scottish criminal offences generally, including those for, for example, culpable homicide.

[12] In *Milligan* v *HMA* [2015] HCJAC 84 the court stated, para [5]:

> "We caution against too rigid an application of the English sentencing guidelines. They are not to be applied even in England in mechanistic fashion and it must be borne in mind that those guidelines in England are to be understood in a different sentencing regime from the Scottish sentencing regime … But the Scottish approach to sentencing is rather less formulaic than the English sentencing guidelines."

[13] It is all too easy, as the submissions for the Crown in this case demonstrated, to focus so closely on the Guideline as to lose sight of the exercise at hand, and the purpose for which it is being referred to.

[14] In his report in the present case (para [20]), the sentencing judge explained how he approached his task:

> "In determining the appropriate sentences, I took account of the aggravating features namely, excessive speed, intoxication, driving in the wrong carriageway, failing to observe the road and take action to avoid a collision when there was an uninterrupted view and warning of the hazard ahead, his post collision conduct demonstrating the respondent's attitude to the collision and the devastating and incalculable effects of the consequences of his driving for the victim and her family. I also took account of the mitigatory features, namely the respondent's youth (aged 20), his lack of maturity, his remorse (confirmed in the CJSWR and his letter handed to me), his previous good character vouched for in the letters handed to me and the absence of a criminal record. I also took into account his early pleas of guilty which is reflected in the discount which I applied to the sentences. Taking all these factors into account and applying the sentencing principles as set out in the Scottish Sentencing Council's Principles and Purposes of Sentencing, I determined that a headline sentence of 6 years' imprisonment was appropriate for charge 1 and a headline sentence of 1 year's imprisonment was appropriate for charge 4. I also ordered that the sentence for charge 4 should run consecutively to the sentence for charge 1 to reflect the gravity of the offence, the effect his conduct had on the

investigation and the additional anguish that his conduct must have caused to the family of the deceased."

[15] He recognised that having reached his conclusion, on traditional grounds, of the appropriate level of sentence, the English Guideline could provide him with a cross-check. Having regard to the Guideline he was fully entitled to consider that the circumstances might reasonably reflect those of a level 2 offence, were the Guideline to apply. Having regard to the factors which characterise a level 1 offence, and the fact that the Guideline itself states that "Level 1 is that for which the increase in maximum penalty was aimed primarily", we cannot see how this case could ever reasonably be fitted into that category. The result is that the sentence cannot be described as unduly lenient and the appeal must fail.