APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 79
HCA/2019/000431/XC

Lord Glennie
Lord Turnbull

OPINION OF THE COURT

delivered by LORD TURNBULL

in

APPEAL AGAINST SENTENCE

by

KYLE STEWART

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Fyffe (sol adv); Paterson Bell for Bruce Short Solicitors, Dundee
Respondent: Bowie AD (sol adv); Crown Agent

29 October 2019

[1] The appellant Kyle Stewart is now aged 21. On 2 July 2019, he appeared for trial at the Sheriff Court in Dundee on an indictment containing five charges, each alleging contraventions of road traffic legislation.

[2] Charge one was a charge of causing serious injury by dangerous driving, contrary to section 1A of the Road Traffic Act 1988. The remaining four charges each concerned the

defective condition of the tyres on the vehicle which the appellant was driving. The appellant pled guilty to the offences concerning the tyres and was convicted after trial on the charge of causing serious injury by dangerous driving.

[3] The presiding sheriff imposed a sentence of two years' imprisonment on the principal charge, disqualified the appellant from driving for a period of five years and required that he must sit the extended test of competence to drive. He was admonished in respect of the remaining charges.

Circumstances of the offence

[4] The circumstances of the offence were described by the sheriff in his report to this court. It took place on 21 August 2017, on the Newtlye to Meigle road near Dundee. The road was described as a B listed single carriageway road which was difficult to manoeuver because of the twists and bends in it and the fact that there was shading caused by mature trees on either side. The speed limit was 60mph.

[5] The victims were a Mr Alan Cosgrove and his son Thomas, who were respectively the driver and front seat passenger in a vehicle heading south towards Dundee. As Mr Cosgrove proceeded around a blind bend in the area of Newbigging Wood he was aware of a solid line of traffic in the opposite carriageway heading towards him. He then noticed the vehicle driven by the appellant travelling towards him in the wrong carriageway at an excessive speed. The vehicle was unable to return to its correct side of the carriageway and despite the appellant's attempts to bring it to a halt it collided with Mr Cosgrove's vehicle.

[6] The appellant's driving had been observed by other road users in the vicinity shortly prior to the collision. He was described by one as driving at a speed far in excess of the limit and then overtaking at a bad bend in the road. He was described by others as driving at an

excessive speed and engaging in hazardous overtaking of vehicles at particularly dangerous stretches of the road.

[7] As a consequence of the collision both Mr Cosgrove and his son received injuries which required treatment at hospital. Alan Cosgrove had an open wound to his knee joint which required stitching and significant bruising to the area of his torso from the neck downwards. After being released from hospital he required to use crutches for a period of three months and thereafter a walking stick for a further eight months. The sheriff records that the incident has had a catastrophic effect on his independence.

[8] His son Thomas Cosgrove suffered fractures to his left wrist and his right ankle, along with soft tissue injury to his fingers. He described still suffering pain and discomfort from his injuries at the date of the trial nearly two years after the crash. He still walked with a prominent limp.

Submissions for the appellant

[9] On the appellant's behalf it was submitted that a custodial sentence was inappropriate, or, in the alternative, that the period selected was excessive.

[10] Although the appellant now fell to be dealt with as an adult, he was 19 years old when the offence was committed. His age at the time was a relevant factor to take account of in sentencing (*Greig* v *HM Advocate* 2012 SCCR 757 at para [11]). Accordingly, the sheriff should have given weight to the appellant's relative immaturity when the offence was committed.

[11] Similarly, it was relevant to take account of the significant period of time which had elapsed between the offence on 21 August 2017 and the date of sentence, 5 August 2019. Throughout that period the appellant had been in no further trouble with the authorities.

[12] Each of these two factors was relevant to the assessment of sentence but neither had been mentioned by the sheriff in his report. Neither appeared to have been given any weight by him when identifying the appropriate disposal.

[13] It was also said to be relevant to take account of the remorse which the appellant expressed to the author of the criminal justice social work report, to take account of the injury which he himself received in the collision and to take account of the psychological impact which the offence and the subsequent prosecution had on him, as noted by the author of the report. Little weight was said to have been attached to any of these factors in the assessment of sentence.

[14] The court was reminded that the appellant appeared before the sheriff as someone with a very limited record of previous convictions. He had two convictions, both road traffic offences, each of which had resulted in a fine. He had never before served a period of imprisonment. He had the protection of section 204(2) of the Criminal Procedure (Scotland) Act 1995 and he had been in regular employment since leaving school.

[15] The appellant was assessed as posing a low risk of reoffending and a community payback order with unpaid work was available as a direct alternative to custody.

Decision

[16] The offence of which the appellant was convicted is a relatively new one. It was brought into effect by section 143 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force in December of that year. The sentencing sheriff was not referred to any decisions which offered guidance on the correct approach to sentencing in relation to this offence. Nor were any such decisions brought to our attention on the appellant's behalf.

[17] Some guidance is available however. In giving the decision of the Court of Appeal for England and Wales in *R* v *Dewdney* [2014] EWCA Crim 1722 Lord Justice Treacy noted at paragraph 19 that:

> "This relatively new offence reflected a decision by Parliament to meet a gap identified both in judgments of this court and in public concern between the maximum sentence of two years for dangerous driving and the maximum sentence of 14 years for causing death by dangerous driving. It had been felt for many years that legislation failed to provide for circumstances in which not only had the driving been of a character likely to cause injury to life and limb, but had actually caused serious and significant injury to others. The result has been this new offence carrying a maximum of five years."

[18] In that case, and in others, the court in England has had regard to the Sentencing Guidelines Council guideline on causing death by dangerous driving in order to seek guidance from the levels of offending identified there.

[19] Level 2 in that guideline is described as driving that created a substantial risk of danger. Examples given are greatly excessive speed, gross avoidable distraction and driving whilst impaired as a result of alcohol or drugs.

[20] Level 1 is described as covering the most serious offences, encompassing driving that involves a deliberate decision to ignore (or a flagrant disregard for) the rules of the road and an apparent disregard for the great danger being caused to others. Examples given include a prolonged, persistent and deliberate course of very bad driving.

[21] In our opinion, the driving which the appellant engaged in, and which resulted in the collision causing serious injury, falls into the upper ranges of Level 2. This provides a guide in determining the question of whether the sentence selected was excessive.

[22] It is of course also relevant to take account of the fact that two individuals were seriously injured, with continuing consequences for each. The previous convictions which

the appellant has, whilst not serious offences, are in relation to road traffic matters, one being a conviction for careless driving which resulted in a significant financial penalty.

[23] In our opinion, the offence which the appellant committed was a serious one of its type. Given our assessment of the level of culpability involved and the level of harm which resulted, the sheriff was correct to conclude that a custodial sentence was the only appropriate method of dealing with the appellant. That was the appropriate conclusion to reach despite the application of 204(2) of the 1995 Act.

[24] In considering whether the sentence selected can be described as excessive we have taken account of the decisions of the Court of Appeal in England and Wales in the cases of *R* v *Ellis* [2014] EWCA Crim 593 and *R* v *Smart* [2015] EWCA Crim 1756, in addition to the case of *Dewdney* referred to above. Each of these three cases involved contraventions of the same section of the Road Traffic Act as the sentencing sheriff was dealing with in the present case. Broadly, the decisions arrived at in these cases might be seen as supporting the proposition that the sentence selected was within the correct range. Were it not for the submission concerning the appellant's age at the time when the offence committed we would be inclined towards the view that the sentence could not be described as excessive.

[25] However, we accept the submission advanced on the appellant's behalf that account ought to have been taken of the fact that he was a young man and was relatively immature at the time. What was said by Lord Carloway in giving the decision of the court in the case of *Greig*, to which Mr Fyfe referred, provides support for that proposition. At no stage in his report, or in his sentencing remarks, did the sheriff mention the appellant's age at the time of the commission of the offence, nor the passage of time which had elapsed. We accordingly conclude that this was not a matter which he gave weight to in selecting the appropriate length of sentence.

[26] In these circumstances we shall quash the custodial element of the sentence imposed and in its place we shall impose a sentence of 18 months' imprisonment, to date from the same date as identified by the sentencing sheriff.