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No: 201203901/C3

IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 29 November 2012

B e f o r e:

LORD JUSTICE McCOMBE

MR JUSTICE FOSKETT

MR JUSTICE EDER

R E G I N A

v

RAYMOND JENKINS

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Mr D Callan appeared on behalf of the **Appellant**

Mr J Smith appeared on behalf of the **Crown**

J U D G M E N T
(As approved by the Court)

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1. LORD JUSTICE McCOMBE: We have to give a judgment on the points that have been addressed to us. It should be said immediately that it is not forgotten by this court that the facts of this case reflect a human tragedy of immense proportions and that are not be ignored while we deal with more mundane points that arise as matters of law on this appeal.
2. On 28 May 2012 in the Crown Court at Newcastle upon Tyne after a trial before His Honour Judge Sloan QC and a jury, the appellant was convicted of causing death by careless driving contrary to section 2B of the Road Traffic Act 1988 as amended. On 29 June 2012 he was sentenced by the learned judge to two years' imprisonment and disqualified for two years until he had passed add extended driving test.
3. He now appeals against conviction and sentence by leave of the single judge.
4. The fact facts of the case were these. The appellant was working as a delivery driver for a builders merchants firm, TJ Dove Limited. On 6 December 2010 he was making a delivery to another concern known as British Metalcraft based at Fell House Cottage, Hexham, County Durham. The company premises were situated on the A68 road at a point where it was a single track carriageway, i.e traffic moving in two directions but one carriageway in each, with the road separated by double white lines. The driveway of the premises was inaccessible, partly because of vehicles already parked there and partly because of snow on the sides of the carriageway.
5. The accident occurred at a period of particularly inclement weather. The climate conditions were in general poor. It was a cold day. Snow had been cleared from the roads but it was banked high on the verges bordering the road. Perhaps the most significant feature was that the skies were clear but the sun was very low in the sky and several witnesses, who had driven towards the appellant, stated that visibility was seriously impaired.
6. The appellant, wishing to make a delivery, had been unable to park in the driveway of Fell House Cottage and so parked his lorry on the road adjacent to it, thus blocking most of that side of the road. The location where he stopped was at, or just a short distance before, a right-hand bend in the road on a stretch of carriageway marked with double white lines. He left his headlights and hazard warning lights on and the engine running. He had been away from his vehicle attending to matters relating to his delivery for some ten minutes when a Leyland DAF insulated van, driven by Mr Peter Kemp, approached in the same discretion as the appellant had been driving and collided with his vehicle. Sadly, Mr Kemp suffered catastrophic injuries in the collision and died at the scene.
7. The case for the Crown was that the appellant's driving fell below what would reasonably be expected of a competent and careful driver when he brought the lorry to a halt on a road marked with double white lines. He brought it to a halt on a bend when the visibility of drivers approaching the lorry from behind was adversely affected by the sun in the manner that we have described. He created, said the Crown, an unnecessary obstruction and a hazard on the carriageway. The outcome could have been anticipated

by an ordinary, sensible person, and, as Mr Smith submitted, it was an accident waiting to happen.

8. The defence case was the appellant's actions had not, in fact, been careless in parking where he did. His visibility had not been impaired by the sun as he approached Fell House Cottage. He checked the front and rear when he alighted and a vehicle could have overtaken his lorry safely having first checked there was no on-coming traffic. The manner of the deceased's driving, it was submitted, at some 50 to 60 miles per hour in poor conditions had, it was argued, broken the chain of causation in the offence of causing death by careless driving, the sole cause being (as a matter of law) that of the deceased.
9. A number of witness with some experience of using this road, who were travelling on it at about the time of the accident, gave evidence at the trial as to the unusual conditions that day. Some of the witnesses said that they had to drive at unusually slow speeds. One had to execute an emergency stop to avoid hitting the appellant's vehicle. Each was faced by the situation, created by the parked vehicle, with the dilemma of either being hit by other traffic approaching from the rear in poor visibility, on the one hand, and overtaking the parked vehicle on a blind bend and the risk of being hit by on-coming traffic on the other. Two witnesses driving in the opposite direction to that of the appellant passed the deceased's vehicle shortly before the collision. They estimated his speed at about 60 miles per hour.
10. The expert evidence for the Crown and for the defence respectively can be summarised in this way. PC Luther, an experienced police accident investigator, attended the scene at 11.00 am and conducted a detailed examination. He recorded the temperature as minus 6 degrees centigrade and the road surface as damp. There was snow banked on the verge. The sun was very low. The overall width of the carriageway was some 6.8 metres and some 430 metres prior to Fell House Cottage the road markings separating the north and southbound traffic were marked with double solid lines. The maximum speed was 60 miles per hour. The maximum speed for the Leyland DAF van, loaded as it was driven by the deceased, over 7.5 tonnes, should have been 40 miles an hour. The driveway leading to Fell House Cottage had been partly cleared of snow. There was no physical evidence on the road surface of any pre-collision braking by the deceased. The tachograph data indicated the appellant's vehicle had been stationary for ten minutes prior to the collision. In Mr Luther's opinion the deceased vehicle was travelling at "quite a speed" at the moment of the impact, but various factors meant he was unable to calculate with precision the speed involved. He estimated the deceased's vehicle would have been travelling at about 50 miles per hour but was not comfortable in giving that estimate as a matter of precision.
11. For the defence a Professor Graham Greatrix, a professor of physics, gave evidence. He concluded that the sun would have been very low at the time of the collision and its direct glare, as well as the reflective glare from the road, could have caused the deceased's visibility problems. The sun would have been in a different position when the collision occurred compared to when the appellant parked his vehicle but not significantly so. He estimated that the deceased had had been travelling at between 50 and 60 miles per hour at the moment of impact. There was no evidence of impact. Had

the sun not been directly in front of the deceased, he may have seen the vehicle for some 100 to 120 metres away. He stated that the deceased would have been aware of the hazard posed by the sun for several miles before the collision, and, in all probability, would have been blinded by it. He had been driving at a speed inappropriate for the conditions, said the professor, and slowing down would have been sensible.

12. At the close of the Crown's case counsel for the appellant, Mr Callan, who appeared then as he appeared before us, submitted that on those facts there was no case to answer. In the submissions recorded in the transcript before us that application was based primarily upon the judgment of this court in the case of R v L [2010] EWCA Crim 1249, given by Toulson LJ, sitting with Beatson and Swift JJ. It appears that it was Judge Sloan who had drawn counsel's attention to that case when the matter was in the Crown Court.

13. In paragraph 9 of that reported decision the court said this:

"Those authorities [R v Henningan (1971) 55 Cr App R 262, R v Skelton [1995] Crim LR 635 and R v Barnes [2008] EWCA Crim 2726] establish or recognise these principles: First, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, ie causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury."

14. Counsel also drew the judge's attention, during the course of his submissions, helpful as no doubt they were to the judge as they were to us, between driving which creates the circumstances of the fatal collision and driving which is the actual cause of death, alluded to by Hallett LJ in the case of Barnes, to which we have already referred and quoted by Toulson LJ at paragraph 14 of the judgment in L.
15. Following the initial submission, the argument continued at page 1 starting at line 30. Mr Callan submitted:

"Your Honour, as far as remoteness is concerned, in this case the following circumstances are relied upon. The defendant had parked his vehicle, had essentially completed his journey, had applied his hazards, had exited the cab. The drop-side of the vehicle had been lowered. He returned ...

Judge Sloan: Mr Callan, is this not really confusing two different matters? It is clear he drove the vehicle to a halt.

Mr Callan: Yes.

Judge Sloan: There is no issue about that. If there is evidence that in driving the vehicle to a halt at that location he was driving without due

care and attention, then that suffices so far as this particular element is concerned.

Mr Callan: As far as carelessness is concerned, yes.

Judge Sloan: Yes. And here you are not suggesting that there is not evidence to go before the jury?

Mr Callan: On carelessness, no.

Judge Sloan: Driving to a halt at that location. That is the end of the driving point.

Mr Callan: Yes.

Judge Sloan: Then one moves to the causation argument. And so all the points you are making at the moment fall away because they are to do with driving and he clearly was driving -- even on the most basic test he was driving when he brought that vehicle to a halt, and if there is sufficient evidence he was driving without due care and attention, then it is simply a causation point.

Mr Callan: I find it difficult, with respect, to find that consistent with the third principle set out in L at paragraph 19. If the driver is so remote from the later event as to not be a cause of it."

16. Our quotation from L indicates what Mr Callan was there referring to.
17. The argument went on to allude to cases concerning the definition of "driving" arising in some of the cases in other contexts and the passage from the well-known textbook Wilkinson on Road Traffic Offences. To one of those cases we have been briefly referred this morning, McDonagh 59 Cr App R 55 where the offence concerned was driving while disqualified. The relevant appellant there had been pushing a vehicle, rather than driving in the usual sense, and the argument on the appeal was whether that was "driving" for the purpose of the relevant section.
18. Counsel's conclusion before the learned judge was to submit that all the relevant driving for the purposes of offence had been ended by the time of the impact and it therefore played no part in this fatality which was too remote from the driving that had occurred.
19. In short, the learned judge rejected the submissions and directed there was evidence to go before the jury. The defence evidence was given and the judge dealt with the elements of the offence to be proved by the jury in a lengthy passage in the summing-up between page 4 line 5 and page 10 line 9. We have, of course, read that extract in full and refer only to certain parts of it for the purposes of this appeal.
20. He divided the direction into five elements two of which cause no problem in the debate in the present appeal. We quote page 4 lines 7 to 14.

"1. The prosecution must prove so that you are sure of it that he was driving. Here it is not disputed by the defence that when he brought the lorry to a halt adjacent to Fell Cottage, when he parked up at that location he was driving. He was in the driver's seat, controlling the movement and direction of the lorry when he brought it to a halt at that location. That is the first element the prosecution must prove so that you are sure of it, that he was driving.

2. The second element to be proved by the prosecution so you are sure of it that he was driving a mechanically propelled vehicle [no problem there].

3. The third element the prosecution must prove so that you are sure of it that he was driving on a road. [there is no problem about that.]

4. The fourth element the prosecution must prove so that you are sure of it that when the defendant brought the lorry to a halt and parked up adjacent to Fell House Cottage that when he was driving in that way he was driving without due care and attention."

No problem arises about that.

21. Although the judge summed up in some detail about what the standard of care expected of a driver was, there is no dispute about that in the present appeal.

22. The judge went on:

"I move now to the fifth element to be proved by the prosecution. The prosecution must prove so that you are sure of it that by driving without due care and attention the defendant caused the death of Mr Peter Kemp."

23. In the next four pages of the transcript the learned judge deals with that fifth element, namely causation. After referring to the evidence of the defence expert, he continued by stating that it was for the Crown to establish the causal link and he pointed out the distinction made in Barnett's case -- not in terms in reference to that case so as not to confuse the jury, but, nonetheless, the distinction between creating the circumstances of a fatal condition and driving which is the actual cause of death.

24. At page 8 between lines 2 and 6 he said this:

"In other words, it is not sufficient simply to establish that but for the presence of the lorry the accident would not have happened, the prosecution must prove more than that. The prosecution must prove that the defendant's driving brought about the death."

25. At lines 12 to 18 on the same page the judge said:

"The prosecution must sure so that you are sure of it that what actually, that the particular outcome could have been anticipated as being possible

by an ordinary sensible person ... In other words, the prosecution must prove that the particular outcome was reasonably foreseeable. You are not concerned with what the defendant foresaw. The test is an objective one."

26. We explored with counsel during argument whether there was any contest about that direction. It seems that there was not.

27. At page 9 the learned judge picks the matter up at line 14 in the following way:

"It suffices for these purposes if you are sure that the careless driving, if proved, was a cause of death which was more than trivial or minimum, the defence contend that the only cause of death, the sole cause of death, was Mr Kemp's own driving because he was driving too fast for the conditions. If that is corrected, or may be correct, then the prosecution will not have proved that this defendant's driving was the real cause of death and he must be acquitted."

28. In those circumstances Mr Callan submits in support of the present appeal that the learned judge was wrong to reject the submission of no case. He adds to that submission that the judge erroneously failed to deal in the summing-up with whether the appellant was driving at point of impact. It is argued he should have left to the jury the question of whether the appellant was driving at that point.

29. He makes three submissions orally this morning. First, that the appellant was not in fact driving at the relevant moment. Secondly, it was one of those cases, like L, where the circumstances had been caused by the driving rather than the accident itself. Thirdly, if the driving had not stopped at the relevant time, then there was a break in the causation and the resultant events were too remote.

30. It is as well to begin our consideration of the points that have been made with a quotation of the section which imposes the offence. That is section 2B of the 1988 Act which is the following terms:

"A person who causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, is guilty of an offence."

31. It is to be noted that it is no part of the statutory definition that the driving must be coterminous with the impact resulting in the death. The offence is "causing the death ... by driving". It is not "causing the death while driving".

32. That is the point made in the earlier decision of this court in R v Skelton [1995] Crim LR 635. In that case the prosecution was based upon a lorry driver's failure to take a required rest period and then taking out onto the road a vehicle with defective air pressure to operate the brakes when the pressure gauges were, to his knowledge, not working. The vehicle had to be stopped by the use of the handbrake and was left in a position blocking the nearside lane of a motorway. Several vehicles avoided the parked

lorry but some 12 minutes afterwards one of such vehicles collided with the lorry and the driver was unfortunately killed. The driver of the parked lorry was convicted of causing death by dangerous driving. It was submitted on the appeal that the dangerous driving in taking the defective vehicle on to the road was spent by the time of the fatal crash. The appeal was dismissed. The short summary of the judgment appearing in the Crim LR is as follows:

"... the issue in the case was not driving but the consequences of driving if that driving was dangerous. The consequences are capable of outlasting the time the driver spends at the wheel. The dangerous driving must have played a part, not simply in creating the occasion of the fatal accident but in bringing it about. There is no particular degree of contribution to the death required, beyond a negligible one.

There was evidence fit to go to the jury. It could not be said that the consequences of the appellant's driving were on any view spent and the accident either the sole fault of [the deceased] in failing to see the obstruction or a pure accident. There may come an evidential point at which the judge's obligation is to hold that the dangerous driving although established was too remote from the supervening death to have been the cause of it but that point had not been reached in the appellant's case."

33. This morning Mr Callan submitted that that was a case dealing with the second limb of the offence in that concern in that case, concerning the taking of a defective vehicle on to the road, and, secondly, he emphasised the fact that the judge stated there would be cases that could be shown where the driving had become too remote from the supervening events to constitute the offence. No doubt, as in any case, one has to take care to account for cases that one cannot immediately envisage.
34. It was accepted, as can be seen from the summing-up and indeed from the submissions made by Mr Callan this morning, that the appellant had been driving at least up to the point when he parked the lorry and alighted. That could not be disputed. It was not, in our judgment, a requirement of the section or the authorities that the Crown must show that the defendant was still driving at the point of impact. The questions are whether the driving played a part in causing the death, not simply in creating the occasion of the fatality. That is the point that is drawn out in all the cases.
35. Of course, if there is a real dispute as to the fact of the accused having driven at all, that is a matter for the jury. In our judgment, on the accepted facts, it was for the jury to decide whether the admitted driving in this case was careless (which was left to the jury) and whether it had caused the death rather than merely the circumstances for the accident to occur which was also left to the jury.
36. The issue arising on paragraph 9 of the judgment in L is an issue as to causation and not as to driving. The judge left that issue to the jury, and, in our judgment, rightly so. There was ample evidence upon which the jury could find the defendant's admitted driving in positioning his vehicle as he did was careless and that it caused Mr Kemp's death, in the sense of being more than a trivial or minimal one and not merely creating

the occasion for the accident. Whether these matters were established were for the jury. For these reasons we consider that the learned judge was correct to reject submission of no case and was correct in directing the jury in the manner he did.

37. Accordingly the appeal against conviction is dismissed.
38. We turn to the appeal against sentence. These are always very difficult matters, because, as is recognised by the section, it is a sentence for causing death by careless driving obviously where no harm had ever been intended.
39. The appellant is now 62 years of age and was of good character. He had held a HGV licence since 1974. He had an excellent work record and was well thought of by his employers, and, notwithstanding the extensive driving which he must have practised in his job, he had only one traffic conviction some years ago for exceeding a speed limit.
40. The pre-sentence report stated he was fully remorseful and still shaken by these events. He had found it impossible, said the report writer, to put into words his feelings for the deceased and his family. The report made a recommendation for a suspended sentence with an unpaid work requirement.
41. In passing sentence the learned judge noted the denial of the offence in interview, the maintenance of that denial and that he tried to put blame onto the victim. The judge said that the appellant had been convicted on overwhelming evidence. The offence had not been one of momentary inattention. The sun had been shining in his face for about one and a half miles before the stop and it must have been obvious to him that it was unsafe to park as he did. Further, he had left the vehicle in the position for ten minutes until, as the judge put it, the inevitable happened. The judge found that the offence fell not far short of dangerous driving, although he recognised the deceased's own contribution to the collision by the speed at which he was driving. He noted all the personal mitigation factors. He held that the offence fell into the upper half of the sentencing range identified in the guidelines.
42. On the present sentence appeal it is submitted the judge was wrong to place this offence into that highest category of the offence:

"Careless or inconsiderate driving falling not far short of dangerous driving."

for which the sentencing starting point is 15 months' custody with a sentencing range of 36 weeks to three years. It is argued by Mr Callan that it more properly fell within the category of "other careless or inconsiderate driving", where the starting point is 36 weeks' custody with a sentencing range of a high community order up to two years. Mr Callan made that submission this morning, although not advanced in his written grounds of appeal. Therefore, that ground is not advanced with leave. We do give him leave to raise that point, although it has arisen late, and we consider it on its merits.

43. In our judgment we cannot fault the judge's placing of this case into the highest category of offence. Indeed, in our judgment, it was little short of dangerous driving to park on that bend in that sunlight, in that visibility and other conditions which the

appellant must have been well aware of. Equally, we cannot fault the conclusion that the offence fell towards the upper end of the range of seriousness.

44. Our only question is whether appropriate allowance was made for the age of the appellant, his virtually unblemished record, driving for many years, and the other personal mitigation. We mention in addition his service with the military for some time.
45. In the end, we consider the judge did on reflection pay insufficient regard to those features and that the custodial sentence that was passed should have been one of 15 months rather than the two years' imposed. We would accordingly allow the sentence appeal so as to substitute that sentence for the sentence of two years imposed in the Crown Court. We are, however, unpersuaded that the disqualification imposed was manifestly excessive. It is not, in our judgment, necessary to say any more about that.