[2007–09 Gib LR 147]

OLIVARES v. R.

COURT OF APPEAL (Stuart-Smith, Ag. P., Aldous and Kennedy, JJ.A.): September 15th, 2007

Road traffic—dangerous driving—sentence—aggravation—includes driver's alcohol consumption, excessive speed, gravity of victims' injuries and previous driving convictions (as evidence of disregard of road safety)

Road traffic—dangerous driving—sentence—mitigation—driver's age not mitigating factor if not indicative of driving inexperience or contributing factor to incident

Sentencing—sentencing principles—starting points—12 months' starting point for dangerous driving adequate, when serious injury caused, taking mitigation into account

The appellant was charged in the Supreme Court with dangerous driving, contrary to s.47(1) of the Traffic Act 2005 and failing to give a specimen sample on arrest, contrary to s.65(5) of the same Act.

In 2005, the appellant was 21 years of age and had been driving too fast when he lost control of his car. In the accident, he hit two women and caused them injury. The first woman had one leg and the opposite foot amputated and the second woman sustained fractures to her nose and jaw. After the accident, the appellant fled but was later arrested; he was unsteady on his feet and smelt of alcohol but refused to give a breath, blood or urine sample.

The appellant had previous convictions for exceeding the speed limit and dangerous driving and the Supreme Court (Dudley, J.) convicted him (following a late guilty plea) of dangerous driving contrary to s.47(1) of the Traffic Act 2005 and of failing to give a specimen sample contrary to s.65(5) of the same Act. The court sentenced him to 9 months' imprisonment and disqualified him from holding or obtaining a driving licence for 2½ years.

When determining his sentence, the court considered the presence of alcohol and his previous driving offences to be aggravating features of his case. The starting point for sentencing of 12 months' imprisonment was reduced to 9 months in recognition of his guilty plea. He had not driven his car since the accident, 18 months prior to his appearance before the court, and for this, his period of disqualification from driving was reduced from 3 years to 2½ years.

On appeal, the appellant submitted that both his term of imprisonment and period of disqualification should be further reduced because (a) the starting point of 12 months' imprisonment was too high since it was only supported by English rather than Gibraltar authorities; (b) too much emphasis had been placed on the victims' injuries and the consequences of his dangerous driving; (c) the consumption of alcohol in a moderate amount should not have been an aggravating factor in his sentence; (d) insufficient weight had been given to other mitigating factors, such as his age, his remorse for the injuries caused and his good character in relation to matters other than driving; and (e) overall, the sentence was excessive.

Held, dismissing the appeal:

(1) The sentence passed by the Supreme Court had been correct. It was in line with the sentencing guidelines and therefore the appellant would be returned to prison to complete the remainder of his 9-month term of imprisonment. This was appropriate given the nature of the case and the aggravating features such as the presence of alcohol, his excessive speed, the gravity of the victims' injuries and his previous convictions which were evidence of a disregard for road safety (paras. 22–24; para. 30).

(2) In determining the appellant's sentence, the court had been sufficiently lenient in its consideration of the mitigating factors of the appellant's case such as his guilty plea (despite its being late). There was no need to consider the appellant's age as it did not signify a lack of driving experience or contribute to the accident. The starting point of 12 months' imprisonment was adequate (bearing in mind the mitigation) and could even legitimately have been higher (para. 19; para. 25; paras. 27–29).

Cases cited:

(1) *R.* v. *Cooksley*, [2003] EWCA Crim 996; [2003] 3 All E.R. 40; [2003] 2 Cr. App. R. 18; [2004] 1 Cr. App. R. (S.) 1; [2003] RTR 32, *dicta* of Lord Woolf, C.J. referred to.
(2) *R.* v. *Hicks*, [1999] 2 Cr. App. R. (S.) 228, referred to.
(3) *R.* v. *Martinez* (2001), unreported, not followed.
(4) *R.* v. *Steel*, [1993] 14 Crim. App. R. (S.) 218, referred to.

S. Triay for the appellant;
D. Conroy for the Crown.

1 **KENNEDY, J.A.,** delivering the judgment of the court: On February 5th, 2007, in the Supreme Court of Gibraltar before Dudley, J., the appellant, who is now 23 years of age, pleaded guilty on re-arraignment to dangerous driving contrary to s.47(1) of the Traffic Ordinance 2005, now the Traffic Act 2005.

2 That was Count 1 in a three-count indictment and the third count alleged that the appellant had failed to provide a specimen contrary to

s.65(5) of the 2005 Act. The appellant asked for that offence to be taken into consideration and the Crown apparently agreed to that course.

3 In our judgment, the more appropriate course would have been, in a case such as this, for him to have pleaded guilty and been sentenced in relation to that count in a normal way, or for that count to have been resolved by trial.

4 Count 2, to which the appellant had also pleaded not guilty on an earlier occasion, was ordered to lie on the file, and I need say no more about it.

5 On March 13th, 2007, before the same court, the appellant was sentenced to 9 months' imprisonment and disqualified from holding or obtaining a driving licence for a period of 2½ years. He now appeals both the custodial sentence and the period of disqualification. On April 17th, he obtained permission to appeal and on August 1st, he was granted bail.

6 The offence to which the appellant eventually pleaded guilty was committed at about 4.30 a.m. on September 10th, 2005 when the appellant, who was then 21 years of age, was driving along Devil's Tower Road towards the Sundial Roundabout at the junction with Winston Churchill Avenue.

7 He was driving far too fast. Subsequent enquiries indicated that he was travelling at a speed of at least 73 k.p.h. on a road subject to a 50 k.p.h. speed limit. He failed to negotiate the roundabout, drove onto the pavement and hit a boundary wall on which two women were sitting and both sustained serious injuries. The force of the impact was such that the appellant's vehicle turned over. The injuries to the first victim, Ms. Ballester, who was 40 years of age, were such that both her right lower leg and her left foot were amputated. The injuries to the second victim, Ms. Barratt, who was 35 years of age, were slightly less—she sustained a fractured hip and fractures of the nose and jaw.

8 After the accident, the appellant left the scene. He returned shortly afterwards, but he then told the police officer that although it was his vehicle, it had been stolen. That, of course, was untrue. He was arrested and taken to New Mole House Police Station. It was then noticed that he smelt of alcohol and he was unsteady on his feet, but he refused to give a specimen of breath, urine or blood, hence Count 3 in the indictment.

9 Evidence was called, or tendered, before the trial judge to the effect that, at that stage, he was suffering from shock. The trial judge accepted that he may in the circumstances have been suffering from shock but, as he said, the facts spoke for themselves.

10 Turning to the personal background of the appellant: It appears from the pre-sentencing report that the appellant lives with his mother and

younger sister and until the sentence he worked with a betting company. His employers spoke well of him. He expressed remorse to the probation officer for his behaviour and for its effect on the two women. But he noticeably underplayed his own previous offending, his criminality on this occasion, and its effect on the women.

11 He said that, first, he had one previous conviction for speeding, but for which he received a £40 fine. Secondly, that on this occasion he was driving at 50–60 k.p.h. and, thirdly, that one victim had had a single amputation, not two, and the other victim suffered, and I quote, "relatively minor injuries."

12 The probation officer suggested a suspended sentence, possibly coupled with a fiscal order but the trial judge concluded that the seriousness was such as to require immediate custody. Turning to his previous convictions: The appellant had two previous convictions for exceeding the speed limit and one for dangerous driving, for which he was fined £40, which of course would have been at the lower end of the scale and, on the face of it, this is surprisingly a small penalty.

13 As the judge said, the convictions are evidence of a disregard for road safety and that can certainly be seen when one looks at the totality. When sentencing, the trial judge explained his reasoning—he found two aggravating circumstances: First, the presence of alcohol and secondly, the driving record. Having looked at the authorities, he found the Gibraltar case of *R.* v. *Martinez* (3) which was decided in January 2001, to be out of line, and derived more assistance from two English authorities, *R.* v. *Steel* (4) and *R.* v. *Hicks* (2).

14 Having considered the authorities, the judge concluded that if the case had proceeded to trial and to conviction, the appropriate sentence would have been one of 12 months' imprisonment. Having pleaded guilty, albeit not at the first opportunity, the appellant was entitled to some discount, so the judge reduced the sentence to one of 9 months' imprisonment.

15 As to disqualification, he noted that the appellant had not driven since the accident, that is to say, for a period of about 18 months, so he limited the period of disqualification to 2½ years.

16 There are in effect five grounds of appeal. It is said by Mr. Triay on behalf of the appellant that (a) the judge took too much notice of the English authorities and too little notice of the Gibraltar authority of *R.* v. *Martinez* (3) when arriving at a starting point; (b) the judge attached too much weight to the consequences of the dangerous driving and in particular the injuries to the victims; (c) the judge was wrong to hold that the consumption of alcohol in a moderate amount was an aggravating

circumstance; (d) the judge failed to give sufficient weight to the mitigating circumstances and in particular, the appellant's age, his good character in relation to matters other than driving and his remorse; and (e) overall, the sentence was excessive.

17 When dealing with any statutory offence, the starting point must be the penalty prescribed by law. Section 47(1)(b) of the Traffic Act 2005 provides for a maximum sentence in cases of dangerous driving of two years. In this area of the law, the effect on victims is plainly relevant. Where the dangerous driving causes death, the maximum penalty is higher, namely five years (see s.45(1) of the Traffic Act). There is no separate offence of causing serious injury by dangerous driving but where serious injury is caused, a sentencing judge is bound to be looking towards the statutory maximum.

18 To put it another way, causing serious injury to one person is a serious aggravating circumstance and causing serious injuries to two persons is worse.

19 In *R.* v. *Cooksley* (1), the English Court of Appeal, Criminal Division gave guidance for sentencers in relation to causing death by dangerous driving and related offences. The Sentencing Advisory Panel had given advice to which Lord Woolf, C.J. referred, when he said ([2003] 3 All E.R. 40, at para. 10):

> "Where death is not a consequence of the dangerous driving, then the maximum penalty is two years' imprisonment. As that offence can still result in catastrophic injuries being caused by an accident we agree with the advice that—
>
> > 'Under the present structure there is an unduly large gap between the maximum of two years for dangerous driving . . . and 10 years [in England] for an offence in which the same standard of driving has, by chance, resulted in death.'
>
> Like the panel, we therefore welcome the proposed five-year maximum for the basic offence of dangerous driving."

20 That underlines the point that we have just made. In *R.* v. *Cooksley*, Lord Woolf, C.J. also said (*ibid.*, at para. 11):

> "[W]e would make the following points about sentencing for death by dangerous driving . . . (iv) A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving."

21 Driving home the message is just as important in this city as it is in

the United Kingdom. The English Court of Appeal accepted that culpability must be the dominant factor and that was a point made again this morning with Mr. Triay, with which we agree. And at para. 15, the court accepted, and we would adopt, the Sentencing Advisory Panel's analysis of aggravating and mitigating circumstances, noting that the analysis cannot be entirely comprehensive.

22 In the analysis, under the heading "highly culpable standard of driving at the time of the offence," we draw attention to two aggravating circumstances which are relevant to the present case, "(a) the consumption of . . . alcohol, ranging from a couple of drinks to a 'motorised pub-crawl'" and "(b) greatly excessive speed . . ."

23 Under the heading, "driving habitually below acceptable standard," we draw attention to "(k) previous convictions for motoring offences . . ." In the 12 months prior to this offence, this appellant had been before the court on seven occasions for motoring offences, including two offences of speeding, driving without insurance on two occasions, and dangerous driving. He had committed a number of other offences. That shows, as was accepted during the course of submissions this morning, a certain contempt for motoring laws.

24 Continuing with the aggravating circumstances, listed in *R.* v. *Cooksley* (1), under the heading "outcome of offence" para. (m) refers to "serious injury to one or more victims" and under the heading, "irresponsible behaviour at time of offence" para. (n) refers to "failing to stop." It might also have referred to a claim that the vehicle was stolen.

25 The present case, therefore, discloses a number of aggravating factors listed in *R.* v. *Cooksley*, and the only mitigating factors which can be relied upon are a belated plea of guilty which received ample recognition, and remorse. Age is said to be relevant where lack of driving experience has contributed to the commission of the offence. It did not apparently do so here. This appellant simply drove far too fast and thus allowed his vehicle to get out of control.

26 That deals with most of the grounds of appeal but leaves open the question of whether the judge was right to start with the figure of 12 months.

27 In our judgment, for the reasons we have given, the starting point could well have being higher, and certainly that starting point makes ample allowance for such mitigation as there was.

28 The judge was right not to follow *R.* v. *Martinez* (3), which was decided long before *R.* v. *Cooksley* (1), and should now no longer be regarded as being of any assistance in any future case.

29 *R.* v. *Steel* (4) and *R.* v. *Hicks* (2) were of assistance but we cannot, as

was submitted to us, regard them as being of such assistance as to indicate that the starting point in the present case was wrong.

30 Nothing in any authority which we have seen supports the proposition that this sentence was in any way excessive, either in terms of custody or in terms of disqualification, and the term of disqualification which was arrived at was entirely in line with the guidelines indicated in *R.* v. *Cooksley*. In our judgment, it was appropriate.

31 The appeal against the sentence must therefore be dismissed and the appellant must be returned to prison to serve the remainder of the sentence imposed by the court. He must surrender to custody at, subject to submission, the Gibraltar Central Police Station by 5 p.m. today, failing which, there will be a warrant (not backed for bail).

Appeal dismissed.