[2017 Gib LR 34]

AULD v. R.

COURT OF APPEAL (Goldring and Moore-Bick, JJ.A. and Dudley, C.J.): March 22nd, 2017

Sentencing—grievous bodily harm—dangerous driving—2 years' imprisonment for causing grievous bodily harm by dangerous driving not manifestly excessive

The appellant was charged with dangerous driving and causing grievous bodily harm.

The appellant had driven his car at excessive speed and in a dangerous manner, racing another vehicle. He had lost control of the car and crashed. Both he and his passenger (the victim) suffered serious injuries. The victim suffered a serious brain injury and would never be able to live a completely independent life.

The appellant pleaded guilty to causing grievous bodily harm and dangerous driving. He was sentenced by Ramagge Prescott, J. to 2 years' imprisonment for causing grievous bodily harm and to 12 months' imprisonment, concurrent, for dangerous driving, and was disqualified from driving for 18 months. In sentencing, the judge had regard *inter alia* to the Sentencing Council of England and Wales's Definitive Guideline for Assault. She considered that it was not improper to charge grievous bodily harm and that the court must determine the appropriate sentence for that offence according to the guidelines and not according to the maximum sentence for dangerous driving. She found it difficult to categorize the offence within the guidelines, which appeared not to have been drafted with road traffic accidents in mind, probably because in the United Kingdom there was a separate offence of causing serious injury by dangerous driving. She considered the appropriate sentence to be 3 years' imprisonment, which was reduced to 2 years on account of the appellant's guilty plea.

The appellant appealed against the 2-year sentence for grievous bodily harm, claiming that it was manifestly excessive. He submitted *inter alia* that at the time of sentencing the maximum sentence for causing death by

dangerous or reckless driving was 5 years' imprisonment, as was the maximum sentence for grievous bodily harm. Causing death by dangerous or reckless driving was markedly more serious than causing really serious injury when driving. In a motoring context, the maximum sentence that could properly be imposed for causing grievous bodily harm should be no more than half that for causing death by dangerous or reckless driving, namely 2½ years after a trial or 20 months after a guilty plea.

Held, dismissing the appeal:

(1) The appellant's sentence of 2 years' imprisonment for causing grievous bodily harm was not manifestly excessive. The court was bound to consider the fact that for causing death by reckless or dangerous driving at the relevant time, the appellant could only have been sentenced in Gibraltar to 5 years' imprisonment. The English Sentencing Council's Guidelines had to be considered in that context. That did not, however, require the maximum possible sentence to be reduced to a given figure, *e.g.* 2½ years. The judge had a significant degree of discretion. The court would only interfere in the exercise of that discretion if, having regard to the relevant context, the resulting sentence was manifestly excessive. The present case appeared to be the first in Gibraltar in which a defendant had been sentenced for unlawfully causing grievous bodily harm by the manner of his driving. It had been difficult for the judge to fit the case into the Definitive Guideline for Assault. The court doubted whether it was in the interests of justice to seek to shoehorn particular offending into a guideline that had not been contemplated as applying to such offending. In this case, the court would stand back and take less account of the Guideline than would normally be the case, and consider whether the sentence of 2 years' imprisonment after a guilty plea was manifestly excessive in all the circumstances, having regard to the fact that the maximum sentence for causing death by reckless or dangerous driving was 5 years. As the judge rightly pointed out, this was very serious offending. Although no doubt severe with regard to the statutory framework at the time, the sentence was not manifestly excessive and the appeal would therefore be dismissed (paras. 38–42).

(2) The court observed that the issues raised in the present case were unlikely to be repeated as the maximum sentence for causing death by reckless or dangerous driving was now 14 years' imprisonment (para. 43).

Cases cited:

(1) *Olivares* v. *R.*, 2007–09 Gib LR 147, considered.

(2) *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; [2003] Crim. L.R. 564, *dicta* of Lord Woolf, C.J. referred to.

Legislation construed:

Criminal Procedure and Evidence Act 2011, s.484(4): The relevant terms of this sub-section are set out at para. 28.

A.M.J. Cordona for the appellant.

1 **GOLDRING, J.A.:** On November 15th, 2016, having previously pleaded guilty to the offence of causing grievous bodily harm, contrary to s.167 of the Crimes Act, the appellant was sentenced by Ramagge Prescott, J. to 2 years' imprisonment. That was Count 2 on the indictment. For dangerous driving, he was sentenced to a concurrent term of 12 months and disqualified for 18 months. That was Count 1 on the indictment. The appellant appeals solely in respect of the 2-year sentence of imprisonment.

The facts

2 On Sunday, November 23rd, 2014, very shortly after 3.00 p.m., the appellant was driving in an easterly direction along Devil's Tower Road, which has an indicated 50 km.p.h. speed limit. As his front-seat passenger he had a friend called John Paul Suetta. The vehicle he was driving was a Honda Civic. Behind that vehicle was a black Mercedes being driven by a man called Manuel Hernandez. Both vehicles continued to drive down Sir Herbert Miles Road towards Europa Point. On CCTV, they appeared to be driving normally at a location called Both Worlds. A short time later, the Honda can then be seen driving back, past Both Worlds and Eastern Beach. Approximately 20 seconds later, the Mercedes also drove back down Sir Herbert Miles Road.

3 Someone called David Hayes, who was washing his car, watched the Mercedes drive past. Its exhaust was spitting out smoke. He described the driver as "throttling it." It overtook other vehicles as it approached a blind bend. Both vehicles then re-appeared, travelling in a westerly direction down Devil's Tower Road. The Mercedes "undertook" the Honda, accelerating and gaining distance on it. Both vehicles can be seen on CCTV travelling at high speed. They overtook a Volkswagen Polo. The noise made by the vehicles overtaking was described in terms of an aircraft taking off. The vehicle "shuddered." The front seat passenger in the Polo rightly formed the view that the vehicles were racing each other. They were driving very fast and in a dangerous manner.

4 The two overtaking vehicles then moved to the nearside lane. They "undertook" another vehicle. The Mercedes successfully negotiated a roundabout. The Honda sought to conduct the same manoeuvre. As it attempted to enter lane 2 from lane 1, control of the vehicle was lost. It slid to the left before losing traction, slid to the right and turned 180 degrees on its axis. It was then facing the wrong direction up the carriageway. It mounted the pavement, struck a wall and immediately rebounded into the lamp post on the pavement. The impact was such as to cause the vehicle almost immediately to stop.

5 One witness, who had heard the vehicles, described the noise as indicating a very fast speed. He said immediately before the collision the Honda braked extremely hard, smoke coming from its tyres. It skidded left and, almost at once, right. He described the vehicle colliding with the lamp post in these terms: "It almost cut through it like a knife through butter."

6 Mr. Suetta was ejected out of the rear offside window before hitting the pavement. Neither of the two occupants of the Honda was wearing a seatbelt. Each sustained serious injuries. Both were unconscious.

7 Mr. Hernandez drove round and parked his car on the opposite carriageway to observe the scene.

8 The appellant was in an induced coma for approximately two days. He suffered multiple injuries. Mr. Suetta was in a life-threatening condition for some time. He had bleeding to his brain. Its structure had shifted out of place. At the time, his survival rate was assessed as very poor. Ultimately he was allowed home for Christmas in 2014. He required 24-hour care. He was finally released on December 23rd, 2014, with serious injuries and swelling still present on the brain.

9 The appellant was interviewed on November 27th, 2014. He did not want a legal representative present. He described his injuries in terms of two fractured ribs, a broken collar bone, three other fractures, seven or eight stitches to his head and to his foot, and some forty stitches elsewhere. As to his relationship to the injured man, he said "I love him with all my heart." He described having had a full licence for three or four months. He described being overtaken by a Mercedes at high speed and going to catch him up.

10 The Traffic Accident Investigator assessed the Honda's minimum speed as 117 km.p.h. prior to the accident. The Mercedes was being driven at an average speed of 162 km.p.h.

11 The appellant was tested both for alcohol and drugs. There was some cannabis in his system. It was said there was the possibility of a significant impairment whilst driving.

12 The effect of the injuries on Mr. Suetta was serious. We have been read a psychiatric report dated December 27th, 2016 which speaks of Mr. Suetta "[lacking] mental capacity to make relevant decisions in relation to [conducting] litigation." He lacks mental capacity because of an impairment in the functioning of his mind due to the injury to his brain. We have been told that he now is able to do some work, however, as we are told, of a limited nature.

13 We turn to the judge's sentencing remarks. She said that she had regard to the Definitive Guideline for Assault and the Sentencing Council's guidelines for dangerous driving.

14 She said, as far as the appellant was concerned: "[It is to] your credit two days after you came out of the coma you were frank with the police and admitted your culpability without restraint." She referred to the absence of relevant previous convictions. She referred to the appellant's remorse and regret which, she said, she believed were genuine.

15 As to the injuries suffered by Mr. Suetta, she said that she had carefully read the medical report and observed that his brain injury was serious. She said that he would never be able to live a totally independent life.

16 Having had her attention drawn to the case of *Olivares* v. *R*. (1), the judge endorsed the remarks of Kennedy, J.A., sitting in this court, in which he said (2007–09 Gib LR 147, at paras. 20–21):

"20 . . .

> '. . . [I]t 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 . . ."

17 The judge then said:

"I would respectfully endorse what the learned judge has said and further say that in a city such as Gibraltar where space is tight, where roads are saturated with cars and mopeds and where pedestrians are plentiful, driving that message home is vital."

18 As to the driving, the judge said this:

"This was, to use the adjectives in the Sentencing Guidelines for Reckless Driving, aggressive driving, racing, inappropriate attempts to overtake, undertake and driving at excessively high speeds in populated areas. The driving was due to gross irresponsibility as opposed to the inexperience of the driver. There are various pelican crossings in the area, it put other road users at obvious risk. In addition the driving took place from Both Worlds, Sir Herbert Miles Road, along Devil's Tower Road.

Culpability is high it is true that it is mitigated by the factors I have highlighted but it is nevertheless high and I am satisfied that the custody threshold has been crossed. It is difficult to imagine a more

serious example of dangerous driving. But for the Defendant's cooperation and remorse which as I have said I consider to be genuine, the entry point held [would] be higher. In the circumstances the appropriate sentence for the dangerous driving is one of eighteen months which I reduce by one third to take account of the guilty plea resulting in a sentence of twelve months."

19 The judge went on to consider the grievous bodily harm charge. She said:

"There is in my view nothing improper about charging grievous bodily harm as the more serious offence for this type of offence and having such a charge before it, the court must assess that offence according to the guidelines and not according to the maximum sentence permitted for dangerous driving. This is not a grievous bodily harm with intent and I accept that the mens rea is recklessness. I agree with counsel that the mens rea in this case reduces the level of culpability when compared to intentional assault. It has not been an easy case to categorise this offence of GBH within the guidelines. The guidelines appear not to be drafted with road traffic accidents in mind and that is probably because in the UK there is a separate offence of causing serious injury . . . [by] dangerous driving. There is no doubt in my mind that greater harm is present but it is difficult to assess in terms of culpability."

20 Having regard to the guidelines, the judge then said this:

"I am persuaded to place this offence in Category 2 which has a starting point of eighteen months. Thereafter I turn to consider factors increasing seriousness and reducing seriousness. Factors which reduce seriousness I have already highlighted and I adopt those considerations in assessing this offence. Factors which indicate the increased seriousness I have similarly already highlighted and discussed at some length and I similarly adopt and apply those to the consideration of this case. This was not a momentary loss of focus or the execution of an isolated dangerous movement. It was an acute example of dangerous driving which as I have said put members of the public as well as the passenger at grave risk of danger and which unfortunately resulted in very serious injury. Within Category 2 of simple GBH this is the most serious.

I am of the view having considered the features that the appropriate sentence in this case is one of three years. To that I apply the prescribed reduction of one third for the early guilty plea resulting in a custodial sentence of two years. I have been urged to suspend these sentences. I have noted the Defendant's cooperation with police, his lack of previous convictions, his remorse and his employment history and I note and attach significance to the assessment of the Probation

> Officer that he poses a low risk of reoffending. That has all been factored into my assessment of sentence."

21 We turn to the Definitive Guideline for inflicting grievous bodily harm. The maximum sentence for inflicting grievous bodily harm, both in England and Wales and Gibraltar, is 5 years. As the judge observed, the provisions in the Guideline were not devised with a conviction such as the present in mind. The Guideline indicates that at step one, the court should determine from the three possible offence categories, the appropriate one. It states (at 4):

> "**Category 1**—Greater harm (serious injury must normally be present) **and** higher culpability
>
> **Category 2**—Greater harm (serious injury must normally be present) **and** lower culpability; **or** lesser harm **and** higher culpability
>
> **Category 3**—Lesser harm **and** lower culpability."

The Guideline then goes on to state:

> "The court should determine the offender's culpability and the harm caused, or intended, by reference **only** to the factors below (as demonstrated by the presence of one or more). These factors comprise the principal factual elements of the offence and should determine the category."

22 Under "Factors indicating greater harm," it is said, injury which is serious in the context of the offence must normally be present. It goes on to deal with factors particularly relevant to the more conventional allegation of GBH/wounding under s.20. As to factors indicating lesser harm, it indicates injury which is less serious in the context of the offence.

23 As to culpability, higher culpability is set out in terms of an "offence motivated by, or demonstrating, hostility to the victim" (at 5). Other aggravating factors are said to be "a significant degree of premeditation." There is then reference to the use of a weapon, the question of intention and the infliction of harm and various other aspects relevant to the more conventional allegation under s.20. As to factors indicating lower culpability, it refers to such matters as including a subordinate role in a group or gang.

24 The Guideline goes on to state, at step two, under the heading "Starting point and category range," that the court, having determined the category, should use the corresponding starting points to reach a sentence within the category range below. As we have observed, the judge determined this case fell within Category 2. The starting point is said to be of 1 year 6 months' custody with a range of 1–3 years.

25 Step two does contain these words (at 5): "A case of particular gravity, reflected by multiple features of culpability in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below." There are then set out aggravating features, including the location of the offence, its ongoing effect on the victim, the commission of the offence whilst under the influence of alcohol or drugs, and mitigating factors such as the absence of previous convictions, remorse and good character. Again, the factors that are there referred to are more appropriate to the conventional allegation. Finally, step four (as presently relevant) indicates that there should be a reduction for a plea of guilty.

The submissions on appeal

26 The central submission which Mr. Cardona made is that the sentence imposed was manifestly excessive in all the circumstances. The essential point can be stated quite shortly. At the time the appellant was sentenced, the maximum sentence for causing death by dangerous or reckless driving in Gibraltar was 5 years' imprisonment (since increased to 14 years). The maximum sentence for causing grievous bodily harm was 5 years' imprisonment. Causing death by dangerous or reckless driving is markedly more serious than causing really serious injury when driving. The court in Gibraltar must recognize that difference. In a motoring context, the maximum sentence a court can properly impose in Gibraltar for causing grievous bodily harm should be no more than half that for causing death by dangerous or reckless driving, namely, 2½ years after a trial, 20 months after a plea of guilty.

27 In support of the submission, Mr. Cardona has drawn our attention to what was said in *Olivares* (1). The court referred (2007–09 Gib LR 147, at para. 19) to the English Court of Appeal decision of *R.* v. *Cooksley* (2). Lord Woolf, C.J. said this ([2003] 3 All E.R. 40, at para. 10):

> "'Under the present structure there is an unduly large gap between the maximum of two years for dangerous driving . . . and ten years [in England] for an offence in which the same standard of driving has, by chance, resulted in death.'
>
> . . . [W]e therefore welcome the proposed five-year maximum for the basic offence of dangerous driving."

28 Mr. Cardona submitted that he can derive from that an indication that a difference of 50% between dangerous driving (including causing really serious injury) and causing death by dangerous driving is appropriate. He also drew our attention to what is said in s.484(4) of the Criminal Procedure and Evidence Act:

> ". . . [A] court may, except where the circumstances of Gibraltar are such that it would not be appropriate to do so, have regard to the Sentencing Guidelines Council Guidelines for England and Wales published in December 2004 (as amended or replaced from time to time)."

Mr. Cardona emphasized the words "except where the circumstances of Gibraltar are such that it would not be appropriate to do so." This, he submits, is such a case.

29 Mr. Cardona also drew our attention to previous decisions in Gibraltar. He did not, he said, rely upon them for principle but to illustrate that the sentence imposed in this case was too high given the sentencing practice in Gibraltar. This sentence, he submitted, was out of line. It is unnecessary for us specifically to refer to those authorities. Each was dependent upon its own facts. In none of those cases was the allegation the same as the Count 2 allegation in this case.

30 Mr. Cardona made what he described as a number of ancillary points. He was critical of the judge's approach to the Guideline. It is not necessary for us to go into the detail of that criticism, for reasons which will shortly become apparent.

31 He also submitted that the judge failed to take into account, or give sufficient weight, to some mitigating features. He relied upon the following: the ongoing effect upon the appellant, the close relationship between the appellant and Mr. Suetta, the lapse of time since the offence, which was not the fault of the appellant, his exceptional cooperation with the police, his remorse and regret, the absence of previous convictions, his difficult childhood, his care and financial maintenance for three dependants. We should mention that we have read a most moving letter from his partner in which the problems that she and the family faces are starkly set out; not uncommon, we fear, in a situation such as this. Mr. Cardona referred to the low risk of re-offending as assessed by the probation officer. He submitted that those elements should have reduced the seriousness of the offence to such a degree that a starting point of 3 years as taken by the judge was manifestly excessive.

32 He also made the point that there was some element of double counting in the sentence imposed by the judge. She took into account aggravating features in setting the category of offence and took them into account again as aggravating factors when deciding upon the appropriate sentence.

33 Mr. Cardona was critical of the judge's taking into account the presence of cannabis as an aggravating feature when previously she had indicated that she was unable in terms to find that the appellant's driving was impaired due to the consumption of cannabis.

34 Mr. Cardona submitted that the judge overstated the duration of the dangerous driving. Whether or not she did seems to us to be beside the point. It was perfectly clear that this was significant dangerous driving for a measurable period of time.

35 Mr. Cardona submitted that the judge misunderstood the extent of the impact upon the victim. It seems to us this takes the matter no further. It is perfectly clear that Mr. Suetta suffered very significant injury, albeit there now does seem to be at least some improvement.

Our view

36 We start by pointing out that the plea to unlawfully causing really serious injury amounted to an acceptance by the appellant that he foresaw a risk of causing some injury to other people by the manner of his driving. Dangerous driving, whether or not causing death, involves no such foresight. Reckless driving, again whether or not causing death, requires foresight of the risk of an accident. Here, therefore, the appellant fell to be sentenced on the basis that he appreciated that in driving as he did he might cause injury, albeit not necessarily serious injury, to others. In other words, he was prepared to run that risk.

37 We cannot accept the submission that it was inappropriate for the judge, when sentencing on Count 2, to take account of the specific nature of the allegation made. Moreover, we do not regard such an allegation as was made in Count 2 as in any way wrong or inappropriate in the circumstances. In fairness to Mr. Cardona, this was not a point that he took.

38 That having been said, we accept that in sentencing for causing really serious injury, the court is bound to have regard to the fact that for causing death by reckless or dangerous driving, the appellant could only have been sentenced to 5 years' imprisonment in Gibraltar. We accept that any sentencing guidance has to be considered in that context. However, we cannot accept that must reduce the possible maximum sentence to a given figure, such as 2½ years. These are areas within which, as in so much of sentencing, the judge must be afforded a significant degree of discretion. This court will only interfere in the exercise of that discretion if, having regard to the relevant context, the resulting sentence is manifestly excessive. It is clear to us that the Definitive Guideline on Assault did not really contemplate facts such as the present. It was not easy for the judge to try and fit the case into the guidance. It involved a significant degree of artificiality. Indeed, during the course of argument, my Lord, Moore-Bick, J.A., questioned whether this case might not fall within Category 1, given the significant level of culpability involved in the driving.

39 In part, that artificiality has resulted in the sort of detailed analysis which Mr. Cardona took us through, and with which the skeleton argument dealt in detail. However, as the guidelines themselves state, a court must have regard to any relevant sentencing guidelines, unless to do so would be contrary to the interests of justice. We doubt it can be in the interests of justice to seek, if we may use the expression, to shoehorn particular offending into a guideline which had never contemplated its application to such offending.

40 As to the analysis performed by Mr. Cardona, we do accept there was a degree of double counting in the judge's approach but whether in the final analysis that makes any difference is another matter. As we have said, the judge put this case into Category 2 with a starting point of 1½ years, a range of 1–3 years. Had the factors set out indicating higher culpability contemplated an offence such as the present, it may well be such factors would have been set out in the Guideline. The judge did the best she could in the circumstances in placing the case in Category 2.

41 As we have indicated, Mr. Cardona has taken us through several different cases in which sentences concerning bad or very bad driving were imposed or considered upon appeal in Gibraltar. However, as we have stated, each case depended upon its own facts. Moreover, in none of the cases was the defendant sentenced for unlawfully causing grievous bodily harm. As far as we are aware this is the first case in Gibraltar in which anyone has fallen to be sentenced in such circumstances as present. Those cases are of limited assistance.

42 In the result it seems to us that the interests of justice require us to stand back, taking less account of the Guideline than would normally be the case for the reasons which we have expressed. We have had to consider whether a sentence of 2 years' imprisonment after a plea of guilty was manifestly excessive for causing really serious injury by driving a motor car in such a way as to run the risk of causing injury to other people, having regard to the fact that the maximum sentence for causing death by reckless or dangerous driving was 5 years. We must put aside any element of double counting, we must bear in mind the mitigation advanced on behalf of the appellant. We cannot accept that the judge failed to have regard to the mitigating features. That she did was plain from our citation from her sentencing remarks. We bear in mind the moving letter from the appellant's partner. However, as the judge rightly pointed out, this was very serious offending. We have concluded that while no doubt severe in the terms of the then general statutory framework, we are unable to say that the sentence imposed by the judge was manifestly excessive. We therefore dismiss the appeal.

43 We should finally observe that the issues raised by this case are unlikely to be repeated for, as we have said, the maximum sentence for causing death by reckless or dangerous driving is now 14 years.

44 **MOORE-BICK, J.A.:** concurred.

45 **DUDLEY, C.J.:** concurred.

Appeal dismissed.
