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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
The Strand
London
WC2A 2LL

Wednesday 4th October 2018

B e f o r e:

LORD JUSTICE HOLROYDE

MR JUSTICE GOOSE

and

HIS HONOUR JUDGE WALL QC
(Sitting as a Judge of the Court of Appeal Criminal Division)

R E G I N A

- v -

THOMAS JOHN McMEEKIN

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Miss P J Kaufmann QC and Mr J Bunting appeared on behalf of the Applicant

Mr S Heptonstall appeared on behalf of the Crown

J U D G M E N T
(Approved)

Wednesday 4th October 2018

LORD JUSTICE HOLROYDE:

1. On 29th July 2016, in the Crown Court at Leeds, the applicant pleaded guilty to two offences of causing death by dangerous driving and two offences of causing serious injury by dangerous driving. On 21st October 2016 he was sentenced by the Recorder of Leeds (His Honour Judge Collier QC) to a total of seven years six months' imprisonment.

2. The applicant's applications for an extension of time in which to apply for leave to appeal against his sentence and for leave to adduce fresh evidence have been referred to the full court by the Registrar.

3. It is necessary to summarise the circumstances of the offences. So far as possible, we do so without dwelling on distressing details.

4. The applicant was born on 11th May 1993 and is now 25 years old. He was aged 21 at the time of the offences on 7th March 2015. He had the use of a car and was in the habit of using it to give rides to younger teenage passengers. They would contribute some petrol money and he would drive them around. There was clear evidence that on such occasions he would drive dangerously and at high speed. He would perform manoeuvres such as making handbrake turns at speed and he took no notice of any criticisms of his driving. His mother learned what was happening, threatened to take the car from him and on 6th March 2015 told him to return the car to the family home.

5. Nonetheless, the following day the applicant took four teenagers out in the car. Three of them were aged 14: George Wharton, Rhys Baker and Kameron Walkers. The fourth, Joshua

Van Veen was aged 15. Most of those boys joined the applicant at a supermarket car park where he was seen showing off by spinning the car's wheels and screeching its tyres as he drove around. He then set off along a road subject to a speed limit of 40mph. He was driving at high speed and drawing attention to himself by sounding his horn and shouting out of the window. One motorist was so concerned by the manner of his driving that she pulled over. He overtook her and shortly thereafter he came up behind another vehicle. The driver of that vehicle could see that the applicant was not watching the road ahead but was talking to his passenger. He appears to have seen her at the last moment, swerved to avoid her and then lost control. His speed at that point was estimated at rather more than 60mph. The car crossed the road and struck a tree.

6. The consequences were appalling. George Wharton and Rhys Baker died as a result of the injuries which they sustained. Kameron Walters was rendered tetraplegic. Joshua Van Veen suffered a fractured skull and brain injury, was in a coma for several weeks, and has not fully recovered. The applicant, who was not wearing a seat belt, was thrown from the car and rendered tetraplegic. Passers-by who came to assist were affected by the dreadful scene which they encountered.

7. Thus, the applicant's criminal actions ended two young lives, inflicted life-changing injuries on two others and on himself, and caused heartbreak and anguish to many others. Each member of the court has read the Victim Personal Statements of the parents of the boys who were killed and injured. They set out with stark clarity the lasting consequences of these dreadful offences for themselves and their families and the extent to which many lives have been blighted. The court has the moving content of those statements well in mind. We also have in mind the consequences which the applicant has brought upon himself and the anguish which he has caused to his own family, in particular his devoted mother.

8. The severity of the applicant's injuries was such that there was inevitably a long delay before he could be interviewed and a prosecution commenced. He pleaded guilty, as we have said, to the four counts on the indictment. Sentencing was adjourned because, in the light of medical evidence which had been served on the applicant's behalf, the judge very properly wished to make enquiries as to the medical care which would be available in prison.

9. At the sentencing hearing, the judge accepted that the applicant had no memory of the events and gave him full credit for his guilty pleas. In his sentencing remarks the judge referred to the guidelines set out by the Sentencing Guidelines Council for offences of causing death by driving. It was accepted by defence counsel that the case involved a prolonged, persistent and deliberate course of very bad driving and fell clearly within category 1 of the guideline.

10. The judge identified a number of aggravating factors: the causing of two deaths; the causing of serious injury to two other victims; the disregard of warnings given by others; and the fact that the evidence showed the applicant's driving on the day of the offences to have been part of a pattern of such driving and not an isolated incident. He concluded that the harm caused and the level of culpability were such as to justify, after trial, the maximum sentence of fourteen years' imprisonment for the offences of causing death by dangerous driving.

11. The learned judge then considered the two matters which had been urged upon him by way of mitigation. First, he acknowledged that the applicant had expressed profound regret for the deaths which he had caused, but was satisfied that "such regret as you have is very much more focused on yourself than on others". Secondly, the judge reflected on the injuries which the applicant had caused to himself. In this regard, he considered the cases of *R v Qazi and Hussain* [2011] 2 Cr App R(S) 8 and *R v Hall* [2013] 2 Cr App R(S) 68. He considered the medical

report which had been placed before him and he took into account the responses which he had received to the enquiries made as to how the applicant's injuries and disability would be catered for in a prison environment. He rejected a submission that, having regard to the applicant's injuries, there should be no immediate sentence of imprisonment. He did, however, accept that it was appropriate to make some reduction from what would otherwise have been the appropriate sentence to reflect the fact that imprisonment would be much harder for the applicant than for an able-bodied prisoner. He concluded that the provisional sentence of fourteen years should be reduced by credit for the guilty pleas to one of about nine and a half years, and then further reduced to reflect the particular difficulties which the applicant would face in prison. In those circumstances the learned judge imposed concurrent terms of seven and a half years' imprisonment for each of the offences of causing the deaths of George Wharton and Rhys Baker by dangerous driving and concurrent terms of three years' imprisonment for each of the offences of causing serious injury to Kameron Walters and Joshua Van Veen by dangerous driving.

12. No appeal was made against that total sentence at the time. Subsequently, however, application has been made for an extension of time (of about ten months and one week) in which to apply for leave to appeal against sentence. It was not suggested that the judge had taken too high a provisional sentence after trial. The ground of appeal was that the judge had relied upon assertions made by the prison and healthcare authorities, which subsequent events had shown to have been inaccurate, and that if the reality of the applicant's detention had been put before the judge, he would not have passed the sentence he did. In those circumstances, it was said that the sentence was manifestly excessive and that it was an appropriate case for an exceptional application of mercy. The grounds of appeal pleaded detailed allegations of deficiencies in the care which the applicant had received.

13. At the same time, judicial review proceedings were commenced in which a challenge was made to the conditions in which the applicant was serving his sentence and alleging a breach of his article 3 right not to be subjected to torture or to inhuman or degrading treatment or punishment. For some months the criminal appeal proceedings and the judicial review proceedings ran in parallel and there were a number of directions hearings. It is unnecessary for present purposes to dwell on the procedural history. It suffices to say that in July 2018 the judicial review proceedings were separated from the criminal appeal. It is accepted on behalf of the applicant that for the purposes of this hearing no allegation is made that there has been a breach of the applicant's article 3 rights and this court is not asked to consider whether there have been deficiencies in the care of the applicant in prison. In that regard, we note that a very detailed care plan is now in place.

14. The basis on which the appeal is brought has, accordingly, altered. The ground of appeal which the applicant now advances before this court is that his medical condition is such that, as an act of mercy in the exceptional circumstances of his case, a lesser sentence than would otherwise be appropriate is justified. The argument on his behalf is, in essence, that the applicant's medical condition has markedly deteriorated since he was sentenced, in a manner and to a degree which was not foreseen by the judge below, and that the sentence should therefore be reduced significantly so as to allow for his release either immediately or in the very near future. In order to advance that ground of appeal, the applicant necessarily also seeks an extension of time, leave to amend his grounds of appeal and leave to rely on fresh evidence, in particular expert medical evidence as to the deterioration in the applicant's medical condition.

15. The Criminal Procedure Rules and the Criminal Practice Direction have very recently been amended, with effect from 1st October 2018, to require an application to be made, pursuant to rule 36.14(5), when an applicant wishes to rely on a ground of appeal which was not identified

in the Appeal Notice. Paragraph (c) of that rule contains a non-exhaustive list of factors to be considered by the court when hearing such an application. These include the extent of and reasons for the delay in advancing a fresh ground and the interests of justice. Paragraph (e) states that the hurdle for an applicant is a high one.

16. We shall return shortly to the developing nature of the applicant's case. So far as procedural considerations are concerned, we recognise that the accumulating medical evidence has been relied upon by the applicant in the submissions made at directions hearings and therefore comes as no surprise to the respondent. We have, therefore, considered the applications on the basis of the revised grounds of appeal. Similarly, we have considered the proposed fresh evidence *de bene esse*. We have, therefore, focused on the merits of the case advanced on behalf of the applicant.

17. At the heart of the appeal lies the proposition that the medical evidence considered by the judge below did not fully inform him of the severity of the applicant's condition and did not alert him to the risk of deterioration. It is further submitted that the evidence considered by the judge has, in any event, been overtaken by events and that the further medical evidence now available shows the applicant's physical condition to be substantially worse than the judge could have had in mind when deciding by how much he would reduce the sentence which would otherwise have been appropriate. It is therefore necessary to summarise the medical position as it was presented to the judge below and the position as it is now shown by the further reports which the applicant seeks to adduce as fresh evidence.

18. The applicant was diagnosed with epilepsy at the age of 7. At the age of 14, he was diagnosed with a severe degree of autistic spectrum disorder. Those long-established conditions were, of course, known to the judge when he passed sentence. The judge was also aware from

the medical evidence then before him that, as a result of his dangerous driving, the applicant had suffered multiple injuries, of which the most significant was a fracture of the C7 vertebra resulting in tetraplegia. He had also sustained injuries to his lung and spleen and a fracture of the humerus.

19. The judge was provided with a report dated 23rd June 2016 by Mr Firas Jamil, a Consultant Surgeon and expert in dealing with spinal injuries. The report described the consequences of the injury to the applicant's spinal cord:

> "He will no longer have the ability to walk, move his hands, feed himself, reach for a drink and give himself a drink. He is also now and for the future unable to do all personal care, including transferring out of bed, mobility on his legs, bathing, showering toileting, voluntary bowel and bladder control, drying, dressing and feeding himself."

Mr Jamil's report went on to say that the applicant required full-time care and would need to be turned every three or four hours in bed, even at night, because he would be unable to turn himself.

20. Clearly, therefore, the evidence before the judge showed that prison would be extremely difficult and uncomfortable for the applicant. It does not appear that the judge was specifically addressed about what might happen in the future and did not expressly refer to the future in his sentencing remarks. It does not, however, appear that there was anything before the judge to suggest any prospect of any improvement. On the contrary, Mr Jamil's report noted that there had been no change in the applicant's neurological status for over fifteen months, when most relevant neurological recovery in a case such as this would occur in the first three months after injury. We think it likely that the learned and highly experienced judge will, in any event, have had in mind the possibility that over the course of the sentence the applicant's condition might

worsen.

21. In the months since he was sentenced, the applicant has been hospitalised on a number of occasions for a variety of problems, including sepsis, high blood pressure, infection and severe pressure sores. In late September 2017, he was again admitted to hospital. In early November 2017, he was moved from that hospital to another specialising in spinal injuries. In December 2017, he underwent a colostomy. He remained in hospital until early August 2018.

22. In the further medical reports which have been obtained, expert witnesses express differing opinions as to whether the applicant had developed complications of his tetraplegia before he began his sentence of imprisonment, or only after that time. The experts are, however, agreed that the applicant has developed severe contractures and flexion deformity in his hip and knee joints, a left hip joint dislocation and flexion deformity in all his fingers. He has severe pressure sores. A catheter is in place. So, too, is a pump used in the treatment of his severe spasticity in both lower limbs. As a consequence of his colostomy, he suffers from severe stomach bloating and pain. He is at present, effectively, bedridden and unable to be transferred to his wheelchair. The flexion deformities cannot be reversed and treatment can, at best, seek to arrest any further worsening.

23. In a joint report, dated 20th April 2018, Mr Jamil and another consultant with expertise in spinal injuries, Mr Osman, said that the applicant requires regular assessment and treatment by an appropriately skilled occupational therapist, without which there is a likelihood that he will lose the use of his right hand, which is his only partially functioning hand. They both express the opinion that his life expectancy is about twelve and a half years less than it would have been if he had not suffered the injury to his spinal cord, and that there will be a considerable further reduction in life expectancy if he continues to refuse care in the way he has done hitherto.

24. Although the applicant has some cognitive impairment and suffers from autism, he does not suffer from mental illness. The evidence of the relevant expert witnesses is that the applicant has capacity to make decisions about his treatment and his care. Unfortunately, not all his decisions have been sensible. In particular, he has repeatedly failed to co-operate with or assist his care and treatment. This has been so when he was living with his mother before sentencing, when in prison and during the periods when he has been in hospital. It is an important consideration, because the medical evidence on which the applicant relies includes a clear statement that compliance with treatment is "one of the important preventative measures from a tetraplegic patient".

25. Despite the importance of co-operation and compliance, the very recent and detailed care plan notes that there is a continuing refusal to co-operate. This repeated refusal to co-operate in treatment aimed at helping the applicant is difficult to understand. There is no evidence of depression or of suicidal ideation. Miss Kaufmann QC invites us to take a sympathetic view of his failure to act in his own best interests, notwithstanding that he has capacity to make decisions, because of his autism and his low intellect.

26. The principles to be applied in circumstances such as these have recently been considered in *R v Stevenson; R v Minhas* [2018] EWCA Crim 318; [2018] 2 Cr App R(S) 6 and are not in dispute. In that case the court referred to the statutory purposes of sentencing set out in section 142 of the Criminal Justice Act 2003 and to the power of the Secretary of State, under section 248 of that Act, to release a prisoner on compassionate grounds. The court then referred to the well-established principles in *R v Bernard* [1997] 1 Cr app R(S) 135, followed in later cases such as *Qazi* and *Hall*. These include the principles that a serious medical condition, even if it is difficult to treat in prison, will not automatically entitle an offender to a lesser sentence than

would otherwise be appropriate, but that a serious medical condition may enable a court, as an act of mercy in the exceptional circumstances of a particular case, to impose a lesser sentence. The court also referred to *R v Clarke; R v Cooper* [2017] EWCA Crim 393; [2017] 1 WLR 3851, in which the Vice-President endorsed the principles in *Bernard* and stated that factors of extreme age or ill-health should be taken into account in the limited way identified in *Bernard* and that they have to be balanced against the gravity of the offending, including the harm done to victims, and the public interest in setting appropriate punishments for very serious crimes.

27. In *Stevenson; Minhas* the court addressed the issue of whether, on appeal, account could be taken of a significant deterioration in a medical condition which was known to the sentencer. Although the general principle is that this court will only interfere with a sentence if persuaded that it was wrong in principle or manifestly excessive in length at the time when it was passed, the case law shows that a more flexible approach may properly be taken in cases of a significant deterioration in a known medical condition. The court concluded that it may have regard to such a deterioration, but that the cases in which it would be appropriate to do so are rare. The court expressed the view that in the case of serious and worsening ill-health, the combination of the *Bernard* principles and the criterion for fresh evidence set out in section 23(2)(b) of the Criminal Appeal Act 1968 "is one which will present a substantial obstacle to success in all but the most compelling cases".

28. We are grateful to counsel on both sides and those who instruct them for the very careful and thorough submissions which we have heard. We particularly recognise the great care which has been taken in the preparation and presentation of the applicant's case. On his behalf it is submitted that there are a number of features of the applicant's condition which are now clear, but which were not known to or anticipated by the judge when sentencing:

(1) The extent of the applicant's spasticity: in particular, the contractures in his limbs, for which there is no prospect of rehabilitation, and the consequent dislocation of the left hip.

(2) The number and severity of the pressure sores which have developed and which seriously limit the applicant's ability to leave his bed, sit in his wheelchair and socialise. Miss Kaufmann, in her oral submissions, pointed out the contrast between the present position and the extent to which the applicant was able to socialise even a year ago, and his vulnerability when confined to bed in prison.

(3) The risk that the applicant will lose the use of his right hand if further deterioration is not prevented, coupled with the likelihood that there will be further deterioration, especially if the applicant fails to co-operate with his treatment.

(4) The fact that the applicant has had to undergo a colostomy, which the expert witnesses agree is extremely unusual in the case of a young tetraplegic.

(5) The applicant's predictable lack of co-operation, which is likely to make his condition yet worse in the future.

29. In summary, it is submitted that the picture for the applicant is exceptionally bleak and far more so than the judge appreciated from the limited evidence and information before him. It is submitted that if the applicant remains in prison, he is likely to continue, at least periodically, to refuse treatment, with the result that he will suffer further deterioration and the loss of amenity, with an associated reduction in his life expectancy. It is submitted that he would pose no risk to

the public if at liberty and would be more likely to comply with treatment if he were released and returned to the care of his mother. In addition, under the care of his mother, he would not be deprived of socialisation in the way which is likely to occur in prison.

30. On behalf of the respondent, it is pointed out that there has been a complete change in the character of the appeal since the appeal was commenced. Mr Heptonstall notes that the applicant has, thus far, spent a significant proportion of his sentence in hospital, rather than in prison. He submits that, notwithstanding the almost daily visits which the applicant has received from his mother during the many months he was in hospital, he has not been prevented from repeated failures to co-operate with his treatment. Mr Heptonstall submits that it is compliance with the treatment, rather than the fact of incarceration, which is the principal factor in relation to the applicant's life expectancy. As a simple illustration of the sort of non-co-operation which has been demonstrated by the applicant, Mr Heptonstall points to an occasion as recently as 1st June 2018 when, following many months in hospital, the applicant refused to wear a stretching boot intended to aid the position of his foot, but instead insisted on wearing trainers on the basis that, if released from prison, he would wear his trainers, so he should wear them now.

31. It is submitted that a high standard of treatment and care is now available to the applicant in prison and that it would be wrong to allow him to engineer a situation in which he relied on his own non-cooperation to gain an inappropriately lenient sentence. It is argued that the judge below adopted an approach which was correct in principle and which afforded the applicant a significant degree of mercy. It is further submitted that the matters now relied upon by the applicant are to a considerable extent foreseeable risks which have come to pass, partly as a result of the applicant's own refusal to co-operate.

32. We have reflected on those submissions. In our view, the following considerations are

important. First, as the judge rightly recognised, the severity of the applicant's injuries and the consequent difficulties which he faces in prison made it appropriate to reduce the sentence below the level which would be appropriate for an able-bodied offender. That is so notwithstanding that the injuries were caused by the applicant's own crime.

33. Secondly, there has been a deterioration in the applicant's condition since he was sentenced. That deterioration has occurred in ways and to an extent which were not explicitly predicted by the medical evidence relied upon at the sentencing hearing.

34. Thirdly, it is not, however, the case that every deterioration from the expected course of a medical condition will make it appropriate to reduce the sentence further. When determining the extent to which a sentence otherwise appropriate should be reduced on grounds of an offender's ill-health, the court cannot make a precise assessment of every detail of the medical position. Nor can it make a precise forecast of how the offender may cope with developments, whether favourable or unfavourable, in his medical condition. The court can only form a broad view as to the overall effect of the medical problems and a broad assessment of the extent to which the appropriate term of imprisonment would be harder for the offender concerned than for other prisoners. It follows that this court cannot be asked to re-assess the impact of a medical condition whenever there is a departure from its usual or anticipated course. Arguable ground for a further reduction of a sentence which has already been reduced can only arise where it can be said that the present condition makes imprisonment even harder to bear than had previously been assessed and does so to such an extent that the *Bernard* principles can properly be invoked and the sentence said to be manifestly excessive. Moreover, the court must always keep in mind not only considerations of the offender's ill-health, but also the need to impose appropriate punishment for serious offending.

36. Fourthly, it is clear that the medical picture before the sentencing judge was, in any event, a bleak one. The passage which we have quoted from Mr Jamil's June 2016 report informed the judge that the applicant would require a high level of daily care and would be severely restricted in the activities of daily living.

37. Fifthly, the deterioration in the applicant's condition is, to some extent, attributable to his refusal to co-operate with his treatment. It is not possible to quantify with any precision the extent to which he has failed to act in his own best interests. But, on any view, he has made a significant contribution to the worsening of his condition. Given that this has been a matter of choice by an adult who has capacity to make decisions about his treatment, we regard that as a factor to which weight must be given when striking the balance of the considerations to which we have referred. We do not accept the submission that the applicant's low intellect and autism should mean that less weight is given to his lack of co-operation. There is nothing before us to suggest that he does not understand that he can choose to help himself or choose not to do so. Nor do we think that parental input can be relied upon to the extent submitted on the applicant's behalf. Sadly, and for whatever reason, it has not proved effective so far in encouraging the applicant to act in his own best interests.

38. Lastly, we referred earlier to the developing nature of the applicant's case on appeal. The initial criticisms of the care regime in prison, even if valid at an earlier stage of these proceedings, are no longer pursued. There is a detailed care plan in place and we must proceed on the basis that it will be implemented. In principle, the applicant has a remedy in the civil courts if it is not. This is not, therefore, a case in which it is now said that the judge acted on inaccurate information as to the care regime or that the applicant cannot receive appropriate care in prison.

39. In our judgment, the learned judge adopted the correct approach to sentencing in this difficult case. He made a substantial reduction from the sentence which would otherwise have been appropriate in order to recognise the additional hardship to the applicant of a prison sentence. We accept that the applicant's outlook is very bleak and that his condition has deteriorated since sentence. It has done so, however, from what was in any event a position of severe disability and substantial dependence on care, which was reflected in the substantial reduction which the judge made. The deterioration has, to a significant degree, been contributed to by the applicant's own conduct. Having brought his injuries upon himself, he has chosen not to co-operate with treatment for them. We cannot accept the submission that the sentence should be reduced on the ground that continued imprisonment may result, at least some of the time, in further non-co-operation by the applicant. Such an approach would, in our view, focus exclusively on the applicant and would lose sight of the need for appropriate punishment for his grave offending.

40. In all of the circumstances now known to the court, we are not persuaded that the sentence, already substantially reduced below what would otherwise have been appropriate, is manifestly excessive and should be further reduced. A further reduction would, in our judgment, fail to give proper weight to the gravity of the offending and of the harm caused.

41. It follows that no purpose would be served by our granting the application for an extension of time or the other applications which are before the court because, even if we take the case at its highest in the applicant's favour, we are not persuaded that an appeal could succeed.

42. In those circumstances, we refuse the application for an extension of time, with the result that the other applications fall away and the sentence remains as before.

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