APPEAL COURT, HIGH COURT OF JUSTICIARY

[2019] HCJAC 91
HCA/2019/000439/XC

Lord Brodie
Lord Drummond Young
Lord Turnbull

OPINION OF THE COURT

delivered by LORD BRODIE

in

THE APPEAL UNDER SECTION 62 OF THE CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

ASG

Appellant

against

HER MAJESTY'S ADVOCATE

Respondent

Appellant: Ogg, Sol Adv; Callahan McKeown & Co Ltd, Renfrew Defence Lawyers
Respondent: Farquharson QC AD; Crown Agent

10 December 2019

Introduction

[1] The appellant was indicted in the High Court in respect of three charges, the first of which was in the following terms:

> "(001) on 10 January 2016 on a road or other public place, namely Charles Avenue at its junction with High Street, both Renfrew you [ASG] did cause the death of [the deceased] by driving a mechanically propelled vehicle, namely motor car …

> dangerously and did drive said motor car without corrective eyewear when your vision was below the standard required for driving, fail to observe [the deceased] crossing the road there and did strike him with your said motor car to his severe injury whereby he died in consequence thereof at The Royal Alexandra Hospital, Paisley on 15 January 2016: CONTRARY to the Road Traffic Act 1988, Section 1"

[2] The appellant was cited to a preliminary hearing on 4 July 2018 but that and three subsequently fixed preliminary hearings were discharged. At a preliminary hearing on 22 February 2019 the court was advised that a plea in bar of trial had been lodged on the ground that the appellant suffered from vascular dementia and was accordingly unfit for trial. Having considered the medical reports provided to it and having regard to the criteria set out in section 53F of the Criminal Procedure (Scotland) Act 1995, the court found, in terms of section 54(1), that on the balance of probabilities the appellant was unfit to stand trial by reason that he suffered from vascular dementia and appointed a diet for an examination of facts in terms of section 55 of the Act.

[3] The examination of facts took place on 22 July 2019 and the following days before the temporary judge. Identification of the appellant as the driver of the motor car at the relevant time having been agreed, the attendance of the appellant was excused in view of his medical condition, in terms of section 55(5) of the 1995 Act. On 26 July 2019 the temporary judge found that he was satisfied beyond reasonable doubt that the appellant had committed the offence libelled in charge (001) and that, on the balance of probabilities, there were no grounds for acquitting him. In terms of section 55(2) of the Act the temporary judge adjourned the diet for the preparation of psychiatric reports. The advocate depute had previously indicated to the court that he was no longer seeking a determination in respect of the other two charges on the indictment.

[4] The appellant has appealed the temporary judge's finding in terms of section 62(1) of the 1995 Act. The grounds of appeal are set out in a Note of Appeal lodged on 19 August

2019. They have been elaborated in written submissions dated 27 October 2019. Put short, it is the appellant's contention that the evidence led was insufficient to allow the temporary judge to make the inferences necessary for a conviction of the appellant on charge (001).

The examination of facts

Evidence

[5] In his report to this court the temporary judge summarises the evidence heard by him as follows:

> "[2] …Constable Ian Murray is a police officer attached to the road traffic division. He is an advanced police driver and authorised to test road vehicles. On Sunday, 10 January 2016 he was on duty in a marked police vehicle along with his colleague Constable McNab. At around 12:45 pm they received a request to attend at the locus following the report of a road traffic accident. They immediately attended Charles Avenue and noted that traffic diversions were in place. An accident appeared to have occurred within Charles Avenue at its junction with High Street Renfrew. The officer was referred to photographs of the locus and confirmed that there was a car park to the west of Charles Avenue and that was surrounded by a small wall. Further to the west beyond the car park was the Wallace Bar. The officer indicated that it was light and visibility was good although there had been light rain. Neither the weather nor the existence of the wall would obscure a driver's view on entering into Charles Avenue from the High Street. As the officers approached the locus they observed a blue Peugeot motor vehicle [registration number specified]. It was parked on the left hand side of Charles Avenue. The officers indicated that there was a male sitting in the driver's side of the vehicle. He identified himself to the officers as the [appellant]. He had been the driver of the vehicle. At that time there was also an ambulance and other police officers in attendance. An elderly man was lying in the centre of the roadway near to the road markings on the middle of the road. He had cleared the first half of the roadway to the east and was lying partially on the side of the roadway next to the car park. The officer quickly spoke to the [appellant] to see if he was all right. He was still in the car at that time. The officer asked [the appellant] what had happened and he immediately told the officer that he had been travelling from his home and as he entered the junction at the locus he did not see a pedestrian crossing the road. It had been [the appellant's] intention to drive into the car park. He confirmed that the other male had been on the road when he struck him. [The appellant] claimed that he simply did not see him. The officers indicated that he carried out a quick observation of the locus and could not see anything that would have obstructed [the appellant's] view of the locus as was turning into Charles Street. The officer was advised that paramedics wanted to take the complainer to hospital and he therefore asked them if he could have a quick word

with [the complainer] before they left. He was given approval and quickly spoke to the complainer. The complainer had indicated to him that he left his house further east along High Street. He had been walking west with the intention of going to the Wallace Bar where he was hoping to watch football with some of his friends. In order to do that he crossed west along Charles Avenue going from right to left. As he was crossing the road a vehicle turned into the junction and struck him. Whilst [the complainer] was talking to the officer he was receiving treatment from paramedics. He was obviously suffering from injuries to his lower limbs and the cut to his head. Although he was in pain and discomfort the officer indicated that he was lucid and not lethargic. After [the complainer] spoke to the police officer, he was then taken by ambulance to the Royal Alexandra Hospital Paisley. After the complainer had left the locus the officers carried out an inspection of the roadway. He did not detect any skid marks. There was nothing to demonstrate that [the appellant] had lost control of the vehicle. The road surface was wet but not to a degree that it would affect tyre performance. He then proceeded to examine the car. There were no obvious defects to the vehicle. The officers did not detect anything which would obstruct the driver's view. In terms of section 172 (2) of the Road Traffic Act 1988 the appellant was asked to identify the driver at the material time. He confirmed that he had been driving the car. It was his vehicle and a DVLA check confirmed that. The key to the vehicle was still in the ignition barrel and the officers carried out a brief check of the vehicle. Throughout the time when the police officers spoke to the appellant he had not been wearing glasses. The officers carried out a breath test on the appellant with a negative result. The officers then made it clear to the appellant that they would require him to undertake an eyesight test in terms of section 96 of the said Act. He agreed to do so. The officers indicated to him that they would carry out this test in the car park. The appellant knew the purpose of the officer's request and voluntarily went with them. He was not wearing glasses at the time. The officers measured out a distance of 20 m from the vehicle in the car park and asked the appellant to read the number plate of the vehicle selected. The vehicle selected was an Audi mark 3 vehicle with registration number LG11WSU. The appellant was asked to read the digits out aloud and told the officers that the number was YUZBYU. He did not identify any number on the plate. Prior to undertaking that test and throughout the time he was with the said police officers, the appellant did not indicate to the officers that he required glasses. He had not asked to use glasses whilst undertaking the test and made no reference to wearing glasses at the time of the said accident. The officers indicated to the appellant that because he had failed to correctly read the number plate that he would no longer be permitted to drive any further that day and he said 'okay'. The officer confirmed that he never mentioned the fact that he needed glasses. The officer was asked to confirm whether or not they saw evidence of glasses in the said motor vehicle. The officer confirmed that the vehicle was extremely untidy. He indicated that there were a lot of items thrown about the vehicle. In the back seat of the car he saw several pairs of glasses, all thrown about the back seat. The appellant was cautioned and charged with various road traffic charges and made no reply. The officers thereafter contacted DVLA regarding the appellant's eye test failure and received notification the following morning that the appellant's licence was immediately revoked. This was intimated by both officers to the appellant. He never protested at any time that an

injustice had occurred because he had been wearing glasses when the incident happened.

[3] I next heard evidence from Constable Brian McNab. He corroborated the evidence of his colleague Constable Murray. In particular he referred to the results of the eyesight test carried out at the locus. He confirmed that there were no defects in the car attributable to the said incident. He did note that on the bonnet were 'cleaning marks'. These were situated in the middle of the bonnet and we are consistent with clothing of the victim coming into contact with the bonnet of the car immediately at the collision. The complainer's clothing would have removed some of the grime from the bonnet and the mark extended down to the registration plate. This was, in his opinion, consistent with the vehicle having struck a pedestrian. Constable Caroline Harrod was the first police officer on the scene immediately after the incident. She referred to seeing the car, driven by the appellant, parked within Charles Avenue. She saw the complainer lying on the ground. His feet were next to the vehicle with his head pointing towards the North. He had been over the middle of the road. She confirmed that she spoke to the appellant at the time. He confirmed that he was the driver of the said vehicle. He was not wearing glasses. Apart from seeing the complainer lying in a middle-of-the-road, she also noted his walking stick lying close by and his cap was lying on the bonnet of the said vehicle. She was particularly concerned for the welfare of the complainer and spent the remainder of her time caring for him along with the paramedics. The paramedic Andrew McCrossan gave evidence regarding the location of the complainer when he arrived at the locus. This evidence was consistent with that of the police witnesses. Constable Sandy Murray together with his colleague Constable Leonard, carried out a reconstruction. They examined the vehicle and noted the cleaning marks previously referred to. The officers noted the position of the complainer on the road. They reported that there was nothing else which could have contributed to the accident apart from driver error. The officers were of the clear view that there was no other reason for this accident apart from the fact that the driver did not see the complainer when he carried out his manoeuver to drive his vehicle into the locus from High Street. I heard evidence from Mr Angus Baird who is a retired optometrist. He confirmed that he carried out regular eyesight examinations of the appellant. He also confirmed that the appellant would be fit to drive, provided he wore the appropriate corrective eyewear. I heard other evidence from pathologists and a clinician regarding the potential cause of the complainer's death. I have not included a narration of that evidence in this report as it is not referred to in the note of appeal."

Submissions and findings

[6] The temporary judge records that at the conclusion of the evidence defence counsel made submissions in terms of section 97A of the Criminal Procedure (Scotland) Act 1995. Counsel submitted that there was no evidence to support the averment in charge (001) in

relation to corrective eyewear. In view of the terms of the charge an essential element had not been proved and as a result it would not be competent to return a conviction as libelled although it was conceded that a finding in respect of careless driving could be made. Defence counsel also advanced a submission as to the sufficiency of the evidence to establish a causal connection between the collision and the death of the appellant but as this argument is not insisted on in the appeal, the temporary judge does not record it.

[7] In response to the submission that the evidence was insufficient to establish that the appellant had not been wearing corrective eyewear and that therefore the element of dangerous driving had not been established, the advocate depute submitted that the reference to corrective eyewear was only a narrative element of charge (001) and could be removed if necessary; what remained would still be sufficient to prove the charge of a contravention of section 1 of the Road Traffic Act 1988.

[8] The temporary judge repelled the section 97A submission. No evidence was led on behalf of the appellant. The advocate depute advised the court that he would no longer be seeking a determination on charges (002) and (003) on the indictment. In final submissions parties maintained the respective positions adopted in relation to the section 97A submission.

[9] In what was an *ex tempore* judgement the temporary judge explained that there was clear evidence from the police officers who carried out a reconstruction that there had been no obvious obstructions which would have obscured the driver's vision on turning from High Street into Charles Avenue. A collision occurred between the complainer and the appellant's vehicle. According to the evidence available to the court it had been proved that the driver of the vehicle, namely the appellant, had failed to see the complainer notwithstanding the fact that the complainer had crossed at least half of the roadway

heading west. There was no evidence whatsoever that the appellant had been wearing glasses at the time of the accident. He did not report to the police officers that he required glasses. No one saw him wearing glasses immediately after the accident. He was obliged to undertake an eyesight test in the car park to the west of the locus. He did not advise the officers that he would require his glasses prior to taking the test. He failed the test spectacularly. Because of the results of the test the officers indicated to him that he would not be allowed to drive further. The temporary judge explained that he accordingly took the view that in all the circumstances charge (001) had been proved beyond reasonable doubt and made a finding accordingly. He further found on the balance of probabilities that there were no grounds for acquitting the appellant.

Submissions before this court

Appellant

[10] Ms Ogg, Solicitor Advocate, appeared on behalf of the appellant. She submitted that there had been insufficient evidence to allow the inference that the appellant was not wearing his glasses at the time of the collision. Proof of such a failure was necessary to bring the appellant's driving within the ambit of section 1 of the 1988 Act; without it, the driving could amount only to careless driving. It was accepted, however, that if the appellant were successful, then the appropriate disposal would be a finding that he had done an act or acts constituting the offence of causing death by careless driving in terms of section 2B of the 1988 Act.

[11] While Ms Ogg initially suggested that the temporary judge was not entitled to draw the inferences that he did in relation to the alleged failure to wear corrective eyewear, that submission was ultimately refined to an assertion that the temporary judge ought not to

have drawn any such inferences. He had to be satisfied beyond reasonable doubt that the offence had been committed. He ought to have borne in mind that the appellant could not give evidence. No alternative explanation was ever going to be offered in this case because of the appellant's incapacity. Accordingly, the temporary judge ought to have taken greater care over the evidence. There was no direct evidence that the appellant was not wearing glasses at the time of the collision. The police officers could only speak to the positions of the now deceased complainer and the appellant's vehicle after the event. Nothing ought to have been inferred from the fact that the appellant had not asked police officers for, or mentioned, his glasses; he was exercising his right to silence. He had not been cautioned and there was no onus on him to advise the police as to his visual acuity. Further, no enquiry had been made by the attending officers as to whether the appellant had been wearing his glasses. He could have taken them off and put them in the back of the car.

[12] Ms Ogg submitted that absent proof of a failure to wear glasses, the test for dangerous driving in section 2A of the 1988 Act could not be met. Although there was no obstruction to the driver's view as he approached the turn on High Street, Charles Avenue, where the collision occurred, was a narrow road. It would not have taken the deceased long to get to the middle of the roadway from the pavement. The appellant was carrying out a manoeuvre at the same time, and so had limited opportunity to see the deceased. In the absence of some other aggravating factor, such as excessive speed, in colliding with the deceased the appellant could only be held to be guilty of careless driving.

Respondent

[13] The Crown's position was that the issue of whether the appellant was wearing his glasses at the time of the collision was not determinative. The appellant had struck a

pedestrian who was in the middle of the roadway in circumstances where visibility was good and there was nothing to obstruct his view of the road. The roadway was not very narrow as had been suggested; it was a road capable of taking two-way traffic. The appellant was turning a corner, which was to his left, unaware of what he might face in the course of and after making the turn and ought to have been keeping a proper lookout. In all the circumstances, his driving was dangerous in terms of the 1988 Act.

[14] The usual practice was for indictments for dangerous driving to contain a narrative of what it was that was averred to have rendered the driving dangerous. Here, the reference in the charge to the appellant not wearing corrective eyewear stemmed from the appellant's admission that he did not see the pedestrian. The narrative simply took that one step further. There was no other explanation for the collision with the pedestrian. The inference was that, in all the circumstances, the driving fell far below the standard of the careful and competent driver and accordingly was dangerous in terms of the 1988 Act.

[15] There was, in any event, a wealth of evidence allowing the inference that the appellant had not been wearing his glasses at the time of the accident. The appellant could not say that the temporary judge had not been entitled to draw that inference. The roadside eye test had followed the appellant's admission to police officers that he did not see the deceased. This was against a background of the appellant being aware that he required corrective eyewear when driving. There were several pairs of glasses in the back seat of the car. The appellant knew the purpose of the roadside eye test (see section 96(2) of the 1988 Act) and had completed it voluntarily. He had failed to read the number plate and was not permitted to drive any further that day, which he had accepted. In the circumstances, the temporary judge had been correct to find as he did.

Decision

[16] The purpose of an examination of facts ordered under section 54(1)(b) of the 1995 Act is for the court (constituted by a judge or sheriff sitting alone) to determine whether it is satisfied: (a) beyond reasonable doubt, as respects any charge, that the appellant did the act or made the omission constituting the offence; and (b) on the balance of probabilities, that there are no grounds for acquitting the appellant. In the present case the temporary judge records in his report to this court that he took the view that charge (001) on the indictment, as amended, had been proved beyond reasonable doubt and that he made a finding accordingly in terms of section 55(2) of the 1995 Act (as the minute confirms). Thus the temporary judge determined that the appellant did cause the death of the deceased by driving his motor car dangerously. Given that determination, it has not been suggested that there were any possible grounds for acquitting the appellant. However, for perhaps the avoidance of doubt and certainly in strict compliance with section 55(1)(b) of the 1995 Act, the temporary judge went on to determine that there were no grounds for acquitting the appellant. Whether or not that was necessary is of no importance; no criticism is made of the temporary judge in that respect.

[17] What is criticised in this appeal under section 62(1) of the 1995 Act is the temporary judge's determination and consequent finding that the appellant caused the death of the deceased by driving his motor car dangerously. That determination depended on a further determination that the temporary judge must be taken to have made which was that, as is averred in the charge, the appellant did drive his motor car without corrective eyewear when his vision was below the standard required for driving and that the further determination that the appellant had been driving dangerously was not one that the temporary judge ought to have made.

[18] We shall have to address that contention but first it is convenient to say something about the powers of the court in an appeal under section 62(1) of the 1995 Act against a finding made under section 55(2). The reference in the statute to "appeal" is quite unqualified. There is no restriction, for example, limiting an appeal to certain grounds. That would suggest that in an appeal of this sort the Appeal Court is in a similar position to the Inner House when reviewing a decision by a Lord Ordinary. Accordingly, the principles governing the exercise by an appellate court of its power to interfere with a decision at first instance which are discussed in *McGraddie* v *McGraddie* 2014 SC (UKSC) 12; *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at paras [66] to [67]; *Royal Bank of Scotland PLC* v *Carlyle* 2015 SC (UKSC) 93; and *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at paras [38] to [52], will apply. For present purposes we do not see this as giving rise to difficulty. We do not understand Ms Ogg's criticisms of the temporary judge as including any challenge to his determinations of primary fact. Rather, she criticises an inference that he drew from the primary facts: that the appellant was not wearing corrective eyewear at the time that he drove into collision with the deceased; and she criticises a conclusion that the temporary judge arrived at from an application of the relevant law to the facts as determined by him: that the appellant was driving dangerously. These matters, the drawing of an inference and the application of the law to the facts, are sorts of decisions which appellate courts are generally well equipped to reconsider for themselves. That is certainly so in this case and that is the approach which we have taken.

[19] We turn first to the question as to whether, on the evidence as summarised by the temporary judge, it should be inferred that the appellant was not wearing necessary corrective eyewear at the time of the collision. The question has to be determined as a matter of inference because no witness was led who could speak directly to the point. That

said, in circumstances where the first witness arrived on the scene within 5 minutes of the collision, the temporary judge records that there was no evidence whatsoever that the appellant had been wearing glasses. He did not wear glasses at any time when in the company of the police officers who investigated the accident. That is in the context where, as was demonstrated by the eye test carried out in the car park adjacent to the scene under the power conferred by section 96 of the 1988 Act and the evidence of the optometrist, Angus Baird, the appellant required corrective eyewear in order to be fit to drive. The appellant had several pairs of glasses "thrown about" on the back seat his car. Had he been wearing glasses when driving it is of course possible that he might have removed them after the collision, but then one would expect them to be laid on the dashboard or somewhere similar in the front of the car or perhaps retained on the appellant's person; not "thrown" onto the back seat. There was no evidence of the presence of other glasses either in the front of the car or on the appellant's person. The appellant did not produce glasses or offer to produce glasses to wear during the eye test despite the fact, as the temporary judge found, that the appellant knew the purpose of the test. There is then the appellant's admission that he had not seen the now deceased crossing the road. The deceased was elderly. He walked with the assistance of a stick. He was struck when about midway across Charles Avenue, a street about 5 metres wide. Light and visibility were good. Despite the presence of a low wall to the appellant's left as he made the turn into Charles Avenue from High Street there was nothing to obscure his view. No skid marks were detected. The appellant's car had no mechanical defects. It was the opinion of the police officers that there was no other reason for the accident than, as the appellant said, he did not see the now deceased when he carried out the turning manoeuvre.

[20] That the appellant was found not to be wearing glasses shortly after the accident, that no glasses were found in a place where he might be expected to have placed them had he been wearing them when driving, that he did not produce glasses thereafter despite participating in an eye test, that he attributed the accident to his not seeing a presumably slow-moving pedestrian who was in plain sight, and that the attending police officers could only explain the accident as having occurred because the appellant had not seen the pedestrian, taken together, leads us to infer that the appellant was not in fact wearing the corrective eyewear which was necessary if he was to be fit to drive and that it was the appellant's consequently impaired vision which caused him not to see the now deceased and therefore to drive his car into a collision. Not to wear necessary corrective eyewear when driving, is to drive in a way that falls far below what would expected of a competent and careful driver and this would be obvious to a competent and careful driver. Accordingly, having regard to section 2A of the 1988 Act we conclude, on the primary facts determined by the temporary judge, that the appellant did the act which constituted the offence of contravention of section 1 of the Act with which he had been charged.

[21] We have therefore come to the same conclusion as the temporary judge. That is sufficient to dispose of the appeal by refusing it. However, even had we been unable to conclude beyond reasonable doubt that the appellant had not been wearing the necessary corrective eyewear when he drove his car into collision with the now deceased we would have concluded that the appellant did an act which constituted the offence of contravention of section 1 of the 1988 Act. We accept the advocate depute's submission that conviction of charge (001) on the indictment was not dependent on proof of the libel "drive said motor car without corrective eyewear when your vision was below the standard required for driving". The fact of a collision with a slow-moving pedestrian in the course of a car completing a turn

from a major to a minor road where there is nothing to obscure the driver's vision and no reason to explain the accident other than the driver not having seen the pedestrian is, in our opinion, sufficient to lead to the conclusion that the driver was driving in a way that fell far below what would be expected of a competent and careful driver and this would be obvious to such a competent and careful driver.

[22] As already indicated, the appeal is refused.