

Court of Appeal

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***Regina v A**

[2020] EWCA Crim 407

2020 March 10; 17

Simon LJ, Fraser, Hilliard JJ

B

Road traffic — Dangerous driving — Causing death by — Defendant parking car on hard shoulder of motorway in early hours of morning with no lights on — Truck colliding with car resulting in death to one passenger and serious injury to another — Defendant charged with causing death and serious injury by dangerous driving — Judge acceding to submission of no case to answer on ground particular circumstances of collision not reasonably foreseeable — Whether judge adopting correct approach to causation — Road Traffic Act 1988 (c 52) (as amended by Road Traffic Act 1991 (c 40), s 1 and Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c 10), s 143(2)), ss 1, 1A

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The defendant was driving three friends home in the early hours one November morning when she pulled over on to the hard shoulder of the motorway where she remained for about 15 minutes with no hazard or other lights displayed. While the defendant was still parked on the hard shoulder, a truck that was passing in the outside lane of the motorway at about 70 mph suddenly swerved across the other lanes and struck her car. As a result of the collision one of the defendant's passengers died and another suffered serious injury. The defendant was charged with causing death by dangerous driving and causing serious injury by dangerous driving, contrary to sections 1 and 1A of the Road Traffic Act 1988¹. The trial judge acceded to the defendant's submission of no case to answer, holding that a jury would not be able to conclude that it had been reasonably foreseeable that a third party, at that time of day when the traffic was very light, would suddenly at high speed career across the motorway and collide with a stationary car on the hard shoulder; and that, therefore, it would not be open to a jury to conclude that the defendant had caused the death and serious injury of her passengers.

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On the Crown's appeal—

Held, allowing the appeal, that in order for a defendant's dangerous driving to have caused death or serious injury for the purposes of sections 1 or 1A of the Road Traffic Act 1988, it was not necessary that the particular circumstances in which the collision had occurred, or the exact form of the collision, had been reasonably foreseeable; that, in the circumstances of the present case, what had to have been sensibly anticipated was that another vehicle might leave the carriageway and collide with the defendant's parked car; that, if a driver remained stationary in her car on the hard shoulder of a motorway for 15 minutes in the early hours of a November morning, without displaying any lights, a jury could properly conclude that some form of collision could occur and that, if the car were occupied, death or serious injury could be caused; and that, accordingly, the judge's ruling was either wrong in law or involved an error of principle and a fresh trial would be ordered (post, paras 27, 33, 35–39).

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G

R v Girdler [2010] RTR 28, CA considered.

The following cases are referred to in the judgment of the court:

R v Galbraith [1981] 1 WLR 1039; [1981] 2 All ER 1060; 73 Cr App R 124, CA
R v Girdler [2009] EWCA Crim 2666; [2010] RTR 28, CA

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¹ Road Traffic Act 1988, s 1, as substituted: "A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

S 1A(1), as inserted: "A person who causes serious injury to another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence."

- A *R v Maybin* [2012] 2 SCR 30
R v Wallace (Berlinah) [2018] EWCA Crim 690; [2018] 2 Cr App R 22, CA

No additional cases were cited in argument.

The following additional case, although not cited, was referred to in the skeleton arguments:

- B *R v Hennigan* [1971] 3 All ER 133; [1971] RTR 305; 55 Cr App R 262, CA

APPEAL pursuant to section 58 of the Criminal Justice Act 2003

The defendant, A, was charged on indictment with (1) causing death by dangerous driving and (2) causing serious injury by dangerous driving. At the close of the prosecution case the judge acceded to the defendant's submission that there was no case to answer on either count. The prosecution applied for leave to appeal pursuant to section 58 of the Criminal Justice Act 2003 on the ground that the judge had erred in law in acceding to the submission of no case to answer.

- C The facts are stated in the judgment of the court, post, paras 4–9.

- D *Wayne Cleaver* (instructed by *Crown Prosecution Service*) for the Crown.
Richard Dawson (instructed by *Lyons Davidson Solicitors, Bristol*) for the defendant.

The court took time for consideration.

17 March 2020. **SIMON LJ** handed down the following judgment of the court.

- E *Introduction*

1 This is an application by the prosecution for leave to appeal against a terminating ruling in the Crown Court, under section 58 of the Criminal Justice Act 2003.

- F 2 The defendant faced two charges: count 1, causing death by dangerous driving and count 2, causing serious injury by dangerous driving.

3 She was jointly charged with a man (L) who pleaded guilty to these charges as well as a further count of causing serious injury by dangerous driving (count 3).

4 The circumstances giving rise to these charges arose from a collision on the M1 in November 2017.

- G 5 The prosecution case was that in the early hours of the morning a truck driven by L struck the rear of a car driven by the defendant, at a time when the car was stationary on the hard shoulder, some 500 m from an exit slip road.

- H 6 The defendant and her three friends (M, C and K) had been out clubbing. The defendant was the designated driver, and at the end of the evening her intention was to drive her friends back home. They set off at approximately 3.30 a.m. and headed north up the motorway. In the course of this journey the defendant and M began to quarrel. The passengers were drunk and were beginning to annoy the defendant; and she became so irritated by them that she pulled over on to the hard shoulder of the motorway. She remained there for a few minutes before continuing on the journey, before again pulling onto the hard shoulder and remaining there for

about 15 minutes. It appears that K got out of the car and would not return. The defendant remained in the driver's seat. No hazard or other lights were displayed on the car. A

7 At some point, another driver proceeding in the same direction (AC) had to take evasive action to avoid a collision with the open door of the defendant's car. He swerved into the middle lane and sounded his horn to indicate the danger being caused. It appears that the door was then closed. B

8 Another prosecution witness (S) described L's truck passing him in the outside lane at about 70 mph, before suddenly swerving across the other lanes and into the hard shoulder. The truck struck the defendant's car. C died as a result of the collision, and both M and the defendant suffered serious injury. B

9 The prosecution was unable to say what had caused the truck to veer to the nearside, but it was believed that L had fallen asleep. C

10 L and the defendant were jointly charged with causing death by dangerous driving (count 1) and causing serious injury to M by dangerous driving (count 2). L, alone, was charged with causing serious injury to A by dangerous driving (count 3) C

11 The prosecution case was that both L and the defendant were responsible for the collision. Although the defendant's car was not moving at the time, (1) as a matter of law the defendant was "driving", (2) that driving was dangerous, and (3) it was a contributory factor in the collision. D

12 In September 2019 an application was made on the defendant's behalf to dismiss both charges against her under paragraph 2(2) of Schedule 3 to the Crime and Disorder Act 1998 and *R v Galbraith* [1981] 1 WLR 1039. The judge hearing the application ruled on the papers that there was sufficient evidence to prove each ingredient of the offence and therefore a case to answer. E

13 At the close of the prosecution case at the trial which followed, a further submission of no case to answer was made before the trial judge, who was not the judge who had heard the earlier application.

The ruling

14 In his careful and considered ruling, the trial judge dealt with the two key factors in issue: dangerousness and causation. F

15 In relation to dangerousness, he rejected the defendant's submission of no case in the following terms:

"there is evidence upon which a properly directed jury could conclude that this was not an emergency or was one within the power of [the defendant] to control to an extent that would have allowed her to move on. The question of dangerousness is one for a jury." G

16 Doubtless consideration of the relevant provisions of the Highway Code would inform an answer to this question.

17 However, the judge accepted the defendant's submission in relation to causation.

18 He referred to the case of *R v Girdler* [2010] RTR 28, to which we will return later in this judgment, and said: H

"There is evidence that [the defendant] had at one point her door open into lane 1 of the carriageway and was sitting with her legs out of the car, causing those in lane 1 to swerve or take evasive action. If the collision

A had in any way been connected to such action, then there would be a basis for the jury to reach an adverse finding. However, that is not the case.”

19 Later, he added:

B “In my judgment the prosecution evidence at its highest cannot provide a sound basis upon which a jury properly directed could conclude that it was reasonably foreseeable that a third party—at 4.30 a m on a Saturday morning when the traffic was very light—would be so distracted by tiredness or some other prevailing condition that he would suddenly at high speed career across all three lanes of the motorway and into the hard shoulder, coming to his senses too late to avoid colliding with [the defendant’s] stationary car . . .

C “I am satisfied that in the very case-specific circumstances of these allegations, L’s dangerous driving can only constitute a free, deliberate and informed act, that is a new and intervening act that broke the chain of causation created by the presence of [the defendant’s] car on the hard shoulder, whether or not her presence there would be found by the jury to constitute dangerous driving. It is not open, in my judgment, for a jury properly directed to conclude that [R] caused (as in caused in law) the collision that led to the untimely death of [C] and the serious injury to [M].”

The grounds of appeal and response

E 20 For the prosecution, Mr Cleaver submitted (without risk of contradiction) that issues of fact were for the jury. In order to prove causation of death by the dangerous driving, the prosecution needed only to establish that the defendant’s driving was *a* cause, it need not be *the* cause, nor even *the principal* or *a substantial* cause of the collision. The defendant had created dangerous conditions by stopping where she did, and those conditions became increasingly dangerous the longer the car remained there. The longer this period, the more reasonably foreseeable it became that a collision would occur. The test of reasonable foreseeability was an objective one to be determined by the jury. Among the relevant factors was the action by C in sounding his car horn and taking evasive action to avoid a collision when the car door was open.

F 21 The judge’s approach to the issue of what he described as “legal and imputable causation” was too confined. A defendant does not have to reasonably foresee that a collision would occur in the precise circumstances in which it in fact occurred. It would be open to a jury to find that it was reasonably foreseeable that by stopping her car on the hard shoulder a collision might occur with a vehicle travelling in the same direction.

G 22 In resisting the prosecution’s appeal, Mr Dawson submitted that the judge was correct to rule that there was no case to answer for the reasons he gave. It had always been accepted that the defendant’s driving needed only be more than a minimal contribution to the death and injury. The prosecution evidence, taken at its highest, could not provide a sound basis upon which a properly directed jury could conclude that it was reasonably foreseeable that a third party, at 4.30 a m on a Saturday morning, when the traffic was very light, would suddenly cross from the outside carriageway on to the hard shoulder, and collide with the defendant’s stationary car. L’s dangerous driving had broken the chain of causation. His driving had

effectively superseded the defendant's driving as the cause of the death and serious injuries. The judge had correctly interpreted the case of *Girdler* and the specimen direction formulated by the court in that case.

Consideration of the arguments

23 Although the appeal is put in a number of ways they can be conveniently be stated in the form of two questions: first, whether the judge's interpretation of *Girdler* resulted in an approach to the issue of causation that was too confined; and if so, whether there was a case for the jury to consider on the facts?

24 In *R v Girdler* [2010] RTR 28, the court was concerned with a collision on a major road in different circumstances. The appellant had driven into the back of a taxi. The collision propelled the taxi into the fast lane leaving it broadside to the oncoming traffic. A car in the fast lane collided with the taxi, killing the driver of the car and the taxi. In that case the court considered how a jury should be directed when, in a prosecution for causing death by dangerous driving, a defendant submits that he did not cause the death, but that the driver of another car did so. The context was the hearing of an appeal against conviction based on a misdirection by the trial judge. After a full review of authorities on what the court described as a "new and intervening act or event", the court said this at para 43:

"We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were sure that his dangerous driving was more than a slight or trifling link to the death(s) then: the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur. The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary, it could be made clear to the jury that they are not concerned with what the defendant foresaw."

25 The issue on this appeal is how to apply the words "in the circumstances" in the phrase, "it could sensibly have been anticipated that a fatal collision might occur in the circumstances" in which the collision occurred.

26 The defendant's argument is that the court must look at the particular circumstances or specific chain of circumstance in which the collision occurred. On this basis, in the present case, the jury would have to be sure that it could be sensibly anticipated that another driver would, in the judge's words, "be so distracted by tiredness or some other prevailing condition that he would suddenly, and at high speed, career across all three lanes of the motorway and onto the hard shoulder".

27 In our judgment the law does not require that the *particular* circumstances in which a collision occurs should be foreseeable.

28 In *R v Maybin* [2012] 2 SCR 30 the Canadian Supreme Court considered a case concerning two violent attacks on a victim. The defendant and his brother initially punched the victim in a bar room brawl rendering him unconscious. Soon after this, the bar's bouncer punched him on the head. The victim later died of a brain haemorrhage. The medical evidence was inconclusive as to which blows had caused the death. The trial judge

A acquitted the brothers and the bouncer of manslaughter. The Court of Appeal of British Columbia allowed a prosecution appeal in respect of the brothers and ordered a new trial. The case was then taken on appeal to the Supreme Court, which dismissed the brothers' appeal.

B 29 The judgment of the court (LeBel, Fish, Abella, Rothstein, Moldaver and Karakatsanis JJ) was given by Karakatsanis J. Her judgment, which was closely reasoned by reference to principle, authority and academic opinion reached this view on causation:

C "34. In my view, the chain of causation should not be broken only because the specific subsequent attack by the bouncer was not reasonably foreseeable. Because the time to assess reasonable foreseeability is at the time of the initial assault, rather than at the time of the intervening act, *it is too restrictive to require that the precise details of the event be objectively foreseeable*. In some cases, while the general nature of the ensuing acts and the risk of further harm may be reasonably likely, the specific manner in which it could occur may be entirely unpredictable. From the perspective of moral responsibility, it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts."

D "38. For these reasons, I conclude that it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. *Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct . . .*" (Emphasis added throughout.)

30 The judgment concludes (at para 60):

E "Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused's acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending on the factual context. However, the analysis must focus on first principles and recognise that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death."

G 31 Although the expressions "moral responsibility" and "moral connection" find little echo in the domestic approach to issues of causation, an argument that allows a defendant to avoid criminal responsibility on the basis of arguments about the particularity of circumstances would not appear to be consonant with the approach that is taken in this jurisdiction.

H 32 In *R v Wallace (Berlinah)* [2018] 2 Cr App R 22, this court was concerned with an argument about an intervening act in very different circumstances. However, the court referred to this statement at para 84; and, although it did not specifically endorse it, the approach was at least consistent with the direction that was proposed by the court at para 86(3)(b).

"Are you sure that at the time of the acid attack it was reasonably foreseeable that the defendant would commit suicide as a result of his

injuries? In answering this question consider all the circumstances, including the nature of the attack, what the defendant did and said at the time and whether or not [the victim's] decision to undergo voluntary euthanasia fell within the range of responses which might have been expected from a victim in his situation. If your answer is yes, your verdict on count 1 will be guilty. If your answer is no, your verdict on count 1 will be not guilty."

33 Our view that the particular circumstances of a collision would not have had to be foreseen is supported by the editorial comment in *Blackstone's Criminal Practice 2020*, para A1.32:

"even an accidental or unintended intervention may break the chain of causation if it was not reasonably foreseeable in the circumstances (*Girdler* [2009] EWCA Crim 2666). This does not mean that the exact form of any such intervention must have been foreseeable at the time of the original assault etc in order for the chain of causation to remain unbroken. If the general form and risk of further harm was reasonably foreseeable, *it may not then matter if the specific manner in which it occurred was entirely unpredictable* (*Wallace* [2018] 2 Cr App R 22, at para 84, citing *Maybin* 2012 SCC 24 (SC Canada))." (Emphasis added.)

34 Perhaps unsurprisingly, the views of the editors of *Smith, Hogan & Ormerod*, 15th ed (2018), at p 71 are to similar effect.

35 What had to be sensibly anticipated was that another vehicle might leave the carriageway and collide with the defendant's parked car. It would not be necessary for the jury to be sure that the particular circumstances of the collision or "the exact form" of the subsequent act was reasonably foreseeable.

36 It follows that, in our view, the judge adopted too confined an interpretation of the *Girdler* formulation, and as a consequence he erred in his conclusion that there was no case to answer.

37 If a driver leaves a car on the hard shoulder of a motorway for 15 minutes at 4.30 a.m. on a November morning, without displaying any lights, a jury could properly conclude that some form of collision could occur, and that, if it were occupied, death or serious injury could be caused.

38 Accordingly, in the words of section 67 of the Criminal Justice Act 2003, the judge's ruling was either wrong in law or involved an error of principle.

39 In those circumstances, and as provided by section 61(4)(b) of the Act, we will order a fresh trial of the defendant on count 1.

Appeal allowed.
Retrial ordered.

CLARE BARSBY, Barrister