

ENGLAND AND WALES / JUDGMENT

Dales, R. v

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Neutral Citation Number: [2011] EWCA Crim 134 No: 2010/4151/D2 IN THE COURT OF APPEAL
CRIMINAL DIVISION Royal Courts of Justice Strand London, WC2A 2LL Monday, 31 January 2011
B e f o r e: LORD JUSTICE JACKSON MR JUSTICE WYN WILLIAMS THE COMMON SERJEANT
(HIS HONOUR JUDGE BARKER QC) (Sitting as a Judge of the CACD)

- ----- Between: R E G I N A v ROBERT DALES
- ----- Computer Aided Transcript of the Stenograph Notes of WordWave
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- ----- Miss A Evans appeared on behalf of Applicant Crown Mr W Davis
appeared on behalf of the Defendant Respondent
- -----

Judgment

1. 2. 3. 4. 5. 6. LORD JUSTICE JACKSON: This is an application by the prosecution under section 8 of the Criminal Appeal Act 1968 (to which we shall refer as "the 1968 Act") for leave to re-arraign Robert Dales out of time. We shall refer to Robert Dales as "the defendant". The facts giving rise to this application are as follows. The defendant was involved in two road traffic accidents in 2009. The first accident occurred on 29th April 2009. It was caused by the defendant's careless driving. It resulted tragically in the death of a 15-year-old girl, Rachel Deradour, who was a passenger in the defendant's car. The second accident occurred on 29th December 2009. On this occasion the defendant had three passengers in his vehicle, Cydney Rimmer, Aimee Kirby and Sam Norris. The defendant overtook a lorry, lost control, skidded across the road and hit a lamp post. The car rolled over. The defendant and his passengers suffered minor injuries. The defendant was charged with dangerous driving in respect of the second accident. On 20th April 2010 at St Albans Crown Court the defendant pleaded guilty to the offence of causing death by careless driving in respect of the first accident. Sentence was adjourned until the outcome of the dangerous driving charge was known. In June 2010 the defendant stood trial at St Albans Crown Court on a single count of dangerous driving in respect of the second accident. In the course of that trial the prosecution, with the leave of the trial judge, put in evidence of the defendant's previous driving as evidence of bad character. That evidence included the fatal accident on 29th April 2009 and the defendant's conviction in respect of that matter. On 1st July 2010 the jury

convicted the defendant of dangerous driving. On 21st July, Her Honour Judge Catterson sentenced the defendant for both offences, namely causing death by careless driving on 29th April 2009 and dangerous driving on 29th December

2009. The judge imposed concurrent sentences of eight months detention in a young offender institution on each count. She also disqualified the defendant from driving for four years and ordered that he be required to pass an extended driving test before being allowed to drive again. The defendant successfully appealed against his conviction for dangerous driving on the grounds that the bad character evidence ought not to have been admitted at his trial in June. On 28th October 2010 the Court of Appeal made the following order. The court quashed the conviction for dangerous driving. In respect of the offence of causing death by careless driving the court substituted a sentence of six months detention in a young offender institution. The court substituted a term of three years disqualification for the term of four years disqualification which had previously been imposed in respect of the two offences. The court directed that the defendant should be retried on the charge of dangerous driving. The court directed that the defendant be re-arraigned upon a fresh indictment within two months. The Court of Appeal also directed that the retrial take place at a Crown Court to be determined by the Presiding Judge of the South Eastern Circuit. The papers in this matter were then sent back by the Court of Appeal to St Albans Crown Court. On 9th November 2010 the Resident Judge at St Albans Crown Court directed that the case should be transferred to Luton. The court file was sent to Luton. It is unclear whether or not transfer notices were sent out to all parties by St Albans Crown Court. On 18th November 2010 the Crown Prosecution Service ("the CPS") sent a new indictment to St Albans Crown Court. St Albans Crown Court say that they sent that new indictment to Luton Crown Court by DX. Luton Crown Court assert that they never received the new indictment. On 10th December 2010 the Luton Crown Court Listing Officer emailed the CPS enquiring where the new indictment was. There was some confusion about the case reference number, but that was resolved in further exchanges between the CPS and the Crown Court. Thereafter the CPS never responded to the query from the Luton Crown Court. CPS staff members have differing recollections as to why that was. It does appear, however, that the matter was overlooked during the preparations for the CPS Christmas party on the evening of Friday 10th December. Time went by. The two month deadline expired. In January 2011 the CPS realised what had happened. They arranged for the case to be listed on 5th January, but by then it was too late to re-arraign the defendant. In those circumstances the prosecution launched the present application under section 8 of the 1968 Act. That section provides as follows: "(1) A person who is to be retried for an offence in pursuance of an order under section 7 of this Act shall be tried on a fresh indictment preferred by direction of the Court of Appeal, but after the end of two months from the date of the order for his retrial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal give leave. (1A) Where a person has been ordered to be retried but may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a

judgment and verdict of acquittal of the offence for which he was ordered to be retried.

(1B) On an application under subsection (1) or (1A) above the Court of Appeal shall have power— (a) to grant leave to arraign; or (b) to set aside the order for retrial and direct the entry of a judgment and verdict of acquittal, but shall not give leave to arraign unless they are satisfied— (i) (ii) that the prosecution has acted with all due expedition; and that there is a good and sufficient cause for a retrial in spite of the lapse of time since the order under section 7 of this Act was made." SMITH BERNAL WORDWAVE 7. The prosecution application is therefore made under section 8(1B) of the 1968 Act. The defence oppose that application and apply under section 8(1A) for an order that the order for retrial be set aside.

8. We will deal first with the prosecution application. The prosecution has two hurdles to overcome as set out in the latter part of section 8(1B) of the 1968 Act. The first hurdle is to demonstrate that the prosecution has acted with all due expedition. The second hurdle is to demonstrate that there is a good and sufficient cause for a retrial in spite of the lapse of time. We shall focus initially on the first hurdle. This hurdle was considered by the Court of Appeal in *R v Jones* [2002] EWCA Crim. 2284; [2003] 1 Cr. App. R 20. The facts of *Jones* are immaterial. The court did however give helpful guidance in its judgment in that case concerning the effect of section 8(1B) of the 1968 Act. Three propositions of importance emerge from that guidance. First, the test set out in section 8(1B) is less onerous than the test relating to custody time limits. The latter test requires "due diligence and expedition". The test in relation to section 8(1B) is restricted to "due expedition". Secondly, the want of due expedition must relate to the arraignment not to other aspects of case preparation. Thirdly, the primary duty to comply rests on the court. However, all parties to the proceedings are also under a duty to co-operate to ensure that the defendant is re-arraigned within the two month time limit. 9. 10. In the case of the prosecution, the duty to take steps to ensure that arraignment takes place in time is expressly spelt out in section 8(1B)(i) of the 1968 Act. It is the prosecution which must demonstrate that it has acted with all due expedition in relation to rearraignment. In this case there were some failures by court staff in effecting the transfer of the indictment between St Albans and Luton. It is not clear which court was at fault. However, the Listing Officer at Luton took sensible steps in order to put matters right. The real cause of the problems in this case lay with the CPS. There were in our view three principal errors by the CPS. First, the CPS failed to enquire where the retrial would take place. The CPS ought to have made specific enquiries about this matter since it was left open by the court's order of 28th October 2010 which court would be selected as venue for the retrial. It was not sufficient for the CPS simply to send the indictment to St Albans Crown Court. Secondly, and most importantly, the CPS failed to respond to the Luton List Officer's enquiry of 10th December as to where the indictment was. This omission is in the view of this court particularly serious. In the written application advanced by the prosecution today, reference is made to the fact that the enquiry from the Luton Crown Court coincided with a "team seasonal event" - which is a euphemism for a Christmas party. In our view matters of that nature cannot possibly excuse the failure of the prosecution.

Thirdly, as time ticked by and the two month period elapsed, the prosecution failed to contact the court or to take any steps to ensure that the matter was listed, so that the defendant could be re-arraigned within the two month period.

11. No serious criticism of the defence has been advanced at the hearing today. The clerk to defence counsel contacted Luton Crown Court on 1st December 2010 to ask when the plea and case management hearing would be listed. It is not suggested that the SMITH BERNAL WORDWAVE defence were at fault in failing repeatedly to chase the court. Anyway, the court could not take matters further until the indictment had been drafted and received. That clearly was not a matter which fell within the province of the defence.
12. Looking at all these matters in the round, we would therefore hold that the prosecution fail in this application at the first hurdle. The prosecution are quite unable to demonstrate that they have acted with all due expedition. It follows that this application must be refused.
13. We deal more briefly with the second hurdle. The second hurdle, it will be recalled, is whether there is good and sufficient cause for the retrial in spite of the lapse of time. Competing arguments have been advanced today by counsel in relation to this issue. Defence counsel points out that when the defendant was released from detention he only had 12 days left to serve in respect of the total sentence which had been passed in respect of both driving offences. If, therefore, the defendant is retried and convicted, the court of retrial cannot impose a sentence of detention upon the defendant which is any longer than 12 days. Secondly, the original court imposed a disqualification for four years; three years of that disqualification still stand. Therefore, in the event of conviction, the court of retrial cannot impose a sentence of disqualification for this offence of longer than one year. It therefore follows that the powers of the court at the retrial will be distinctly limited. Defence counsel points out that it was a finely balanced decision in those circumstances whether or not to order a retrial at all and in the circumstances it would be quite wrong to go ahead with a retrial after the time limit has not been met.
14. Counsel for the prosecution points out that the sentence which could be imposed upon retrial is not the only consideration. It is also important, if the defendant be guilty of dangerous driving, that the conviction for such offence should be there upon his record. The prosecution also points out that administrative arrangements could be made for an early retrial at the Luton Crown Court. However, this latter observation does not take into account the possible difficulties in making available the defence expert witness and enabling the defendant to present his case at a trial even though a trial window could apparently be offered as from tomorrow.
15. We agree that it would be in the public interest to give effect to the Court of Appeal's order for a retrial, which order was made in October of 2010. There is much in the history of this case that gives us cause for disquiet. Nevertheless, the retrial, if it takes place, will involve oral evidence from four eyewitnesses who at the first trial gave starkly different accounts of events. In such a case there are good reasons for holding any such retrial as soon as

possible. Sound reasons of policy underlie section 8(1) of the 1968 Act, which should not be lightly disregarded. In our view, the circumstances of this case do not make it appropriate to override the two month time limit and direct that the retrial should go ahead, despite the circumstances which we have mentioned in this judgment.

16. Let us now draw the threads together. There have been a series of lamentable failures on the part of the prosecution which make it impossible to satisfy the first limb of the SMITH BERNAL WORDWAVE test in section 8(1B) of the 1968 Act. Accordingly, the prosecution application is dismissed and the defence application to set aside the order for retrial succeeds. SMITH BERNAL WORDWAVE

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