



JUDICIARY OF
ENGLAND AND WALES

In the Crown Court at Cardiff

T20200820

R v Henderson

Sentencing Remarks

1. David Henderson you may remain seated until I ask you to stand.
2. You have been found guilty after a trial of committing the offence of endangering the safety of an aircraft, contrary to Articles 240, 265 and Part 4 of Schedule 13 of the Air Navigation Order 2016. In addition, shortly before the trial, you pleaded guilty to the offence of attempting to discharge a passenger, contrary to s.1(1) of the Criminal Attempts Act 1981 and Articles 250, 265 and Part 3 of Schedule 13 of the Air Navigation Order 2016.
3. It now falls to me to sentence you for these offences. In relation to the offence of endangering an aircraft, I should make it clear at the outset that I am sentencing you on the basis of particulars (i) to (iii) in the indictment, but not particular (iv).
4. These offences arise from two flights which you organised as the operator of aircraft N264DB in January 2019, involving a flight from Cardiff to Nantes and back. The pilot of the aircraft for those flights was Mr David Ibbotson, and the flights were undertaken in return for payment, carrying the footballer Mr Emiliano Sala from Cardiff to and from Nantes.
5. As is well-know, N264DB crashed on its return flight, after going missing at about 20.16 on 21 January 2019, 22 nautical miles north-north-west of Guernsey. The wreckage of the aircraft was found on the seabed, together with Mr Sala's body. Mr Ibbotson's body has never been found.
6. It is important that I record at this point that there is no evidence that the matters giving rise to the offences for which you have been found or pleaded guilty were responsible for the subsequent crash of the aircraft. The prosecution made that clear at the outset of this case, and I make it clear again now in my sentencing remarks. Accordingly, the sentence which I impose does not in any way take into account the fact that the plane crashed on the return flight, nor the tragic deaths of Mr Ibbotson and Mr Sala.
7. The brief background to the offences is as follows. You are a qualified commercial pilot of very considerable experience, who managed aircraft owned by others. You

were involved in hiring those aircraft out on a commercial basis to carry passengers, sometimes flying them yourself for payment, and sometimes putting the hirer in touch with one of a number of pilots who you knew would be paid for their time.

8. So far as the flights in issue at this trial are concerned, you organised these flights without having obtained the Air Operator Certificate which was required in law, and you did not have in place any of the extensive safety or compliance systems required before the Civil Aviation Authority would have considered granting an Air Operator Certificate. The lack of such a certificate was not, as was at times suggested in your defence, a mere piece of paper. As Mr Woodland of the CAA memorably put the matter in his evidence, air safety regulations, and the systems designed to give effect to them, are written in blood.
9. I have no doubt that you were aware that aspects of your aircraft operations were unlawful, and for that reason you took steps to ensure that your operation remained “off the radar” so far as the CAA was concerned. In an email message to Mr Ibbotson, about whom I shall say more in a moment, you referred to two Mandatory Occurrence Reports which the CAA had sent with regard to incidents when Mr Ibbotson was flying the aircraft, and said this:

“We both have an opportunity to make money out of the business model but not if we upset clients or draw the attention of the CAA”.
10. Mr Ibbotson was first introduced to you by another pilot in May 2018, after you had told him that you had work coming out of your ears. You were told that Mr Ibbotson only had a Private Pilot’s Licence or PPL, which did not permit him to carry passengers for reward, and that he was always chasing for money. Although you were told that Mr Ibbotson was experienced, you made no effort to inspect his ratings or his logbook, in order to see what type of experience he had and how relevant it was to the flying he was to undertake for you. Instead, by 23 June 2018, he was flying passengers for money in a flight you had organised. About a week later, Mr Ibbotson undertook another commercial flight organised by you. The person who hired the aircraft on that occasion was a Mr Hedley Aylott who is also one of your character referees. Mr Aylott sent you a message afterwards which was not particularly complimentary about Mr Ibbotson’s flying. On 6 July 2018, you became aware that the CAA had sent the two Mandatory Occurrence Reports in relation to Mr Ibbotson’s flying to which I have already referred. One of those concerned an airspace infringement and the other an alleged runway incursion. While the extent of the latter infringement was disputed, I am sure that these incidents raised at least some concern on your part about Mr Ibbotson’s flying abilities, to the extent that you recognised in an email to him that you needed to give him more support to help him operate effectively.
11. On 14 August 2018 you asked Mr Ibbotson if he could fly at night. The answer to that question, as you soon knew, was no – Mr Ibbotson had not completed the training necessary to obtain a Night Rating. Subsequent communications you had with Mr Ibbotson in October and December 2018 made it clear that he had still not obtained his Night Rating. However, that did not stop you using Mr Ibbotson for night flights. I am

satisfied that you were happy to organise flights in which Mr Ibbotson was flying in breach of the CAA rules because this served the needs of your business, and you did not think that you would be caught. Your attitude is well-captured in an exchange you had with Mr Ibbotson on another topic on 15 August 2018, when he asked if it was legal to fly on a certain basis in France. You replied:

“Who’s gonna know?”

12. On 30 November 2018, Mr Ibbotson’s type-rating for the aircraft used in the January flights expired, and in the following 7 weeks he made no efforts to renew it. I accept that you did not know that Mr Ibbotson’s type-rating had expired. However, the cavalier attitude you adopted to the organisation of the commercial flights of the aircraft you managed meant that you had not kept even the most basic records. Had you done so, you would have known that Mr Ibbotson’s type-rating had expired.
13. Turning to the January 2019 flights, you were contacted by a Mr Wille McKay, a football agent who was an important client of yours, seeking to hire a plane and a pilot to carry a passenger between Cardiff and Nantes over the weekend of 19 to 21 January 2019. You were unable to fly the aircraft yourself because you were due to go to Paris with your wife on a short holiday. I am unable to accept your evidence that you were in any way reluctant to organise an aircraft and a pilot for Mr McKay. I am sure, based on the evidence I have heard, including the timings of the calls and emails, that you were only too keen to assist Mr McKay, who was, as I have said, an important customer, and that your thoughts very soon turned to Mr Ibbotson as the pilot who would fly the plane, even though Mr Ibbotson’s licence did not permit him to carry passengers on a commercial basis. You were aware that Mr Ibbotson was unlikely to say no. As you had been told, he was “always chasing for money”.
14. I am sure that you took a very close interest in these flights, sending numerous messages to Mr Ibbotson about matters which you accepted any pilot should have known, and which you accepted you would not have raised with the holder of a commercial pilot’s licence. I am sure that these communications reflected a lurking doubt in the back of your mind about whether Mr Ibbotson was fully up to the job. I am sure that it was for that reason that, in one of your communications to Mr Ibbotson on 19 January, you said “keep me informed of progress. Nerve wracking”.
15. The two flights were originally scheduled to have been completed in daylight, but you became aware on the afternoon of Sunday 20 January that the return flight from Nantes would take off after dark. Even though you knew Mr Ibbotson did not have a Night Rating, you agreed with Mr McKay that the plane would take off after sunset, which would involve Mr Ibbotson landing in Cardiff with Mr Sala on board well after dark. You had no explanation for why you did not tell Mr McKay that Mr Ibbotson was not qualified to fly at night, and that the flight would either need to take off earlier or be put back to the following day. I am sure that the reason you did not raise this was because you thought it would be damaging to your business. It is striking that the only concern raised in messages between you and Mr Ibbotson about the return flight being put back was as to the increased costs which would be incurred in handling and

landing fees. While the financial arrangements relating to the hire of the aircraft when you were not flying them remain opaque, even on your own evidence you were keen to keep this important client happy. These events, and the business pressures which they reflect, vividly illustrate the very real difference between aircraft which carry passengers for reward, and those which do so in a social context.

16. Your residual anxiety with regard to Mr Ibbotson's flying, now amplified by the fact that he was taking off and landing after dark in winter, is reflected in the attempts you made to follow the aircraft's progress on flight radar. It is also reflected in the messages you sent the following morning, after you became aware that the aircraft, Mr Ibbotson and Mr Sala had been lost, which immediately blamed Mr Ibbotson for crashing the plane.
17. I accept that the crash, with the loss of two souls, was and remains a hugely distressing experience for you, and has had a profound and lasting impact on you. That receives ample corroboration from the numerous character witnesses who have given evidence on your behalf, to whom I shall return. Nonetheless, I am sure that in your statement to the CAA made on 8 June 2020, you made a number of dishonest statements in an attempt to distance yourself from events.
18. The maximum sentence for the offence of endangering an aircraft is one of 5 years' imprisonment. The maximum sentence for the offence of attempting unlawfully to discharge a passenger is one of 2 years. There are no Sentencing Guidelines for these offences, and such authorities as I have been referred to involve offending in very different circumstances. However, they do emphasise the importance of deterrence when sentencing for the offence of endangering the safety of an aircraft.
19. I am satisfied that, in this case, you intentionally breached or flagrantly disregarded the applicable CAA regulations, and that you did so on a pre-meditated basis and for reasons of profit. With the exception of the expiry of Mr Ibbotson's type rating, I am also sure that you were reckless, rather than merely negligent, as to the risk created to the safety of the aircraft by your disregard of the applicable regulations, as manifested by your interactions with Mr Ibbotson in relation to the January flights which I have already set out and as must have been obvious to you given your very great experience as a pilot.
20. So far as harm is concerned, what is relevant in the present context is the seriousness of the harm risked and the degree of risk. In many cases, including this one, endangering the safety of an aircraft will involve an unacceptable risk of death or serious injury to anyone travelling on the aircraft, albeit I accept Mr Spence's submission that that outcome is far from inevitable. I accept, however, that in this case, the risk was a relatively low one, albeit one which could not safely be ignored.
21. There is the aggravating factor here that the unlawful operation of this flight was not an isolated occurrence, and that you were acting from motives of profit.

22. So far as mitigation is concerned, prior to the offences with which I am concerned you were a person of impeccable character. By that I mean not only that you have no convictions or cautions of any kind, but that there is evidence from a number of individuals who have known you for many years of your positive good character, kindness and trustworthiness, which I have taken into account. Many of those witnesses give evidence of their experience of your cautious and safe approach to flying, but in considering that evidence, I must also have regard to the evidence I have heard in this case, and specifically that concerning your dealings with Mr Ibbotson.
23. I also accept that, on the evidence, you acted at all times to ensure that the aircraft itself complied with the regulations concerned with its fitness to fly, although I should record that the aircraft would have been subject to a much more onerous safety and compliance regime had you sought the Air Operator Certificate which was required for the business of carrying passengers for reward.
24. As I have said, I also accept that the crash and its aftermath have had a very serious adverse effect on you and also on three generations of your family, as is clear from the letters I have received.
25. So far as the offence to which you pleaded guilty is concerned, namely that of attempting unlawfully to discharge a passenger, you are entitled to credit for a late guilty plea, in the amount of 10%. In circumstances in which the two offences related to different parts of the same unlawful business venture, being the outward and return flights which you agreed to organise on the same occasion, I have decided to impose a sentence for the offence of endangering the safety of an aircraft which reflects your overall level of culpability for both offences, with a concurrent sentence for count 2.
26. Taking those matters and everything I have heard into account, I am satisfied that the custody threshold has been passed in this case, and that the lowest sentence which I can impose which is commensurate with the seriousness of your offences, and which reflects your guilty plea of count 2, is one of 18 months imprisonment on count 1, with a concurrent sentence of three months' imprisonment on count 2.
27. I have given anxious consideration to the question of whether I should suspend that sentence, given your age and previous good character. I have had well in mind the Sentencing Council Guideline on the imposition of Custodial and Community Sentences. I have also had in mind the Overarching Guidelines. The Pre-Sentence Report obtained in this case notes that you have a very low risk of re-offending, although there are passages in it which suggest that you are struggling to accept your own responsibility for these offences and, as the author of the report puts it, that you continue to believe that in many respects you were not in the wrong. The report also notes your stable and supportive family circumstances, and the severe adverse effect which a custodial sentence would have on you and your family. The report identifies possible community-based sentences involving unpaid work and a curfew.
28. Taking all of these matters into account, I have come to the conclusion that appropriate punishment can only be achieved in this case by a sentence of immediate

custody. The comprehensive safety regime put in place by the CAA exists for the collective benefit of all of society, not just to keep those who fly safe, but to protect anyone who may at any point be in the vicinity of an aircraft as it takes off or lands, or under its flight path. The seriousness of endangering the safety of an aircraft is recognised by the fact that it is subject to a higher maximum sentence, one of 5 years, than other offences under the Air Navigation Order, the maximum sentence for this offence having been increased from 2 years to 5 years by the Air Navigation Order 2005 No. 1970. In my judgment this is an offence in which considerations of deterrence are of particular importance, as the sentencing authorities to which the CAA referred me confirm. I have concluded that the wholesale disregard of the relevant regulations in this case requires the imposition of an immediate sentence of imprisonment.

29. David Henderson, please stand.
30. I therefore sentence you to a period of 18 months' imprisonment. You will be released from custody no later than half of the way through the sentence and the remainder of the sentence will be served on licence, in the community. You must comply with the conditions of your licence, failing which you will be at risk of recall to prison to serve the remainder of the term in custody.
31. There is also a statutory surcharge which applies to you and that must be paid.

Mr Justice Foxton

12 November 2021