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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 2 OF 2003) (GAVIN JAMES ROBINSON)

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 6 OF 2003) (GRAEME HUMPHREYS)

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 7 OF 2003) (COLM PETER McGUONE)

REFERENCE BY HER MAJESTY'S ATTORNEY GENERAL FOR NORTHERN IRELAND (NO 8 OF 2003) (DEAN NOEL JAMES)

Before: Carswell LCJ, Nicholson LJ and Kerr J

CARSWELL LCJ

Introduction

[1] The matters with which we shall deal in this judgment are four references brought by the Attorney General for Northern Ireland under section 36 of the Criminal Justice Act 1988. Two of the cases concern causing death by dangerous driving, contrary to Article 9 of the Road Traffic (Northern Ireland) Order 1995 (the 1995 Order), one causing grievous bodily injury by dangerous driving, contrary to the same provision, and one causing death by careless driving when under the influence of drink, contrary to Article 14 of the 1995 Order. In each of the cases the Attorney General sought leave to bring the reference, on the ground that the sentence imposed by the court was unduly lenient. We gave leave in each case and proceeded with the references. We considered a fifth reference, also concerning causing death by dangerous driving, but adjourned it after hearing argument in order to obtain a pre-sentence report. We shall give our decision in the last-mentioned case in a separate judgment at a later date.

Death and Injury on the Roads

[2] The incidence of death and injury caused by road traffic accidents has been the subject of increasing public and Parliamentary concern over a number of years. The Attorney General in opening the case referred to published figures which show that 13,000 people are injured on the roads in Northern Ireland each year, some 1600 seriously, and 150 are killed. In the last ten years the annual total of road casualties has risen by 25 per cent. The cost to the economy of Northern Ireland is estimated at over £100 million per annum.

[3] That increasing concern has been reflected both in legislation and in the pattern of sentencing for offences such as those which are before this court. Maximum sentences have been lengthened and legislation is now proposed which would increase them further. The courts have responded to the intention of Parliament, which is based upon a general public view that judges should pass heavier sentences than in the past on drivers who commit such offences, both by way of punishment and in order to attempt to deter others from behaving in the same anti-social fashion. As Kay LJ stated in *Attorney General's Reference No 56 of 2002 (Nnamdi Megwa)* [2003] 1 Cr App R (S) 476 at 483:

> " … there can be no question at all but that the courts have reacted to the views of Parliament and the views of the public about matters of this kind, and sentences that would have been deemed appropriate 10 years ago now would not begin to be considered to be right. Sentences have been very substantially increased. It is necessary for any judge sentencing in matters of this kind to take that on board and to pass a sentence that properly gives effect to that general increase."

The Legislation

[4] Dangerous driving causing the death of or grievous bodily injury to another person is made an offence by Article 9 of the 1995 Order. Dangerous driving *simpliciter* is governed by Article 10, and causing death or grievous bodily injury by driving without due care and attention, having consumed alcohol over the prescribed limit, is made an offence by Article 14. The maximum penalty for offences under Article 9 or Article 14 is ten years' imprisonment, whereas for dangerous driving it is two years. These limits are at present subject to Parliamentary review, but it appears likely that there will continue to be a disparity between the sentences which may be imposed for these offences, reflecting the importance which Parliament considers should

be placed upon the consequence of death or serious injury when determining the appropriate sentence.

[5] When it enacted the 1995 Order Parliament doubled the maximum sentence for Article 9 offences from five to ten years. In commenting on this in *R v Sloan* [1998] NI 58 at 63-4 we stated:

> "This substantial increase from five to ten years was Parliament's response to the growing carnage on the roads due to dangerous driving (previously described as reckless) which in turn is often due to excessive speed or driving when under the influence of drink or drugs. In taking this course Parliament was itself responding to a growing volume of complaints by members of the public whose friends and relatives were being killed or seriously injured in increasing numbers on the roads. In their turn the courts have been ready to play their part in trying to make the roads a safer place by imposing sentences which reflect the culpability of the driving and as was said by Roch LJ in *A-G's Ref (No 30 of 1995)* [1996] 1 Cr App R (S) 364 at 367 a proper sentence `must now have in it elements of retribution and deterrence`."

[6] Dangerous driving is defined by Article 11 as follows:

> "11.-(1) For the purposes of Articles 9 and 10 a person is to be regarded as driving dangerously if (and, subject to paragraph (2), only if) –
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> (a) the way he drives falls far below what would be expected of a competent and careful driver; and
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> (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.
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> (2) A person is also to be regarded as driving dangerously for the purposes of Articles 9 and 10 if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

> (3) In paragraphs (1) and (2) "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those paragraphs what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.
>
> (4) In determining for the purposes of paragraph (2) the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

It is to be noted that the less serious form of culpable driving, characterised as careless, which causes death or grievous bodily injury, carries the same maximum penalty as the offence of dangerous driving if the offender was unfit to drive through drink or had consumed alcohol over the limit. Lord Taylor of Gosforth CJ observed in relation to this in *Attorney General's References Nos 14 and 24 of 1993 (Shepherd and Wernet)* (1994) 15 Cr App R (S) 640 at 643:

> " … causing death by the less serious form of culpable driving, characterised as careless, carries the same maximum sentence if coupled with driving whilst unfit through drink or over the limit. The latter offences do not require proof of a causal connection between the drink and the death. Thus, under section 3A, whoever drives with excess alcohol does so at his or her peril, and even if the driving is merely careless but death results, the courts' powers to punish are the same as for causing death by dangerous driving."

He added that prison sentences are required to punish offenders, to deter others from drinking and driving and to reflect the public's abhorrence of deaths being caused by drivers with excess alcohol.

The Review in these References

[7] The Attorney General asked the court to review the level of sentencing in the type of case now before us and, although we have had occasion to pronounce on it on a number of occasions in the last few years, we have taken

the opportunity to conduct a thorough review. We have received much assistance from the advice given to the Court of Appeal by the Sentencing Advisory Panel in its document on causing death by dangerous driving published in February 2003 and from the guideline case of *R v Cooksley and others* decided by that court in April 2003. Although there are areas of the law in which we have felt it right to depart from the levels of sentencing adopted in England and Wales, we consider that in this area there is no ground for doing so and that we should maintain consistency with those levels.

[8] We should make it clear that in considering the sentences in the cases before us we have done so without regard to the possibility of an increase in the maximum sentences. We would observe, however, that if they are increased it is unlikely to be appropriate to impose a *pro rata* increase in all sentences for these offences. Rather we think it probable that the range should be stretched, so that the worst cases are more heavily penalised, while the least culpable offences may not be materially increased, and those in between are placed at some suitable point on the scale.

[9] The particular difficulty in sentencing for dangerous driving causing death was described in the Chairman's Foreword to the Sentencing Advisory Panel's advice at page 1:

> "By definition, it is one which always gives rise to extremely serious harm: the death of at least one victim (and in some cases serious injury to others). Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by dangerous driving did not *intend* to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others."

It is only right also to bear in mind the observation of Lord Woolf CJ, giving the judgment of the court in *R v Cooksley,* when he said at paragraph 33:

> " … those who commit offences of dangerous driving which result in death are less likely, having served their sentences, to commit the same offence again. Apart from their involvement in the offence which resulted in death, they can be individuals who would not otherwise dream of committing a crime."

The synthesis adopted by the Panel is that the outcome of the offence, including the number of people killed, is relevant to the sentence, but the primary consideration must always be the culpability of the offender. This approach was approved by the Court of Appeal in *R v Cooksley* at paragraph 11 of its judgment, when it laid down a number of propositions:

> "11. Before referring to the Guidelines, we would make the following points about sentencing for death by dangerous driving:
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> i) Although the offence is one which does not require an intention to drive dangerously or an intention to injure, because before an offender can be convicted of dangerous driving, his driving has to fall "far below" the standard of driving that would be expected of a competent and careful driver and the driving must be such that it would be obvious to the same competent and careful driver that driving in that way would be dangerous, it will usually be obvious to the offender that the driving was dangerous and he therefore deserves to be punished accordingly.
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> ii) In view of the much heavier sentence which can be imposed where death results as compared with those cases where death does not result, it is clear that Parliament regarded the consequences of the dangerous driving as being a relevant sentencing consideration so that if death does result this in itself can justify a heavier sentence than could be imposed for a case where death does not result.
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> iii) Where death does result, often the effects of the offence will cause grave distress to the family of the diseased. The impact on the family is a matter that the courts can and should take into account. However, as was pointed out by Lord Taylor CJ in Attorney General's References Nos. 14 and 24 of 1993 (Peter James Shepherd, Robert Stuart Wernet) [1994] 15 CAR (S) 640 at P644:
>
> `We wish to stress that human life cannot be restored, nor can its loss be measured by the length of a prison sentence. We recognise that no term of months or years imposed on the offender can reconcile the family of a diseased victim to

> their loss, nor will it cure their anguish.'
>
> iv) A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence."

[10] There are logical difficulties in imposing a heavier sentence upon a driver whose driving has caused a death than upon one whose driving was just as dangerous but did not result in the same tragic consequence. It has to be accepted as a pragmatic approach which reflects the clear intention of Parliament and the sense of justice of the general public: cf *R v Pettipher* (1989) 11 Cr App R (S) 321 and *R v France* [2002] EWCA Crim 1419, cited in paragraphs 18 and 19 of the Sentencing Advisory Panel's advice. There is a definite deterrent element in the sentencing policy, for it is important to discourage drivers from driving in an irresponsible way, from wilful and reckless behaviour and from impulsive and impatient taking of chances. In the case of careless driving causing death it is difficult to deter drivers from committing such acts, which may be only a brief misjudgment rather than an obviously dangerous course of action which should be avoided. It is doubtless for this reason that careless driving causing death carries a heavy penalty only if the driver is unfit to drive through drinking or over the prescribed limit, which is clearly to be deterred.

The Sentencing Guidelines

[11] The Sentencing Advisory Panel propounded a series of possible aggravating factors, which were adopted by the Court of Appeal in *R v Cooksley*, with the caveat that they do not constitute an exhaustive list. The court also pointed out that they cannot be approached in a mechanical manner, since there can be cases with three or more aggravating factors which are not as serious as a case providing a bad example of one factor. The list is as follows:

"*Highly culpable standard of driving at time of offence*

(a) the consumption of drugs (including legal medication known to cause drowsiness) or of alcohol, ranging from a couple of drinks to a 'motorised pub crawl'

(b) greatly excessive speed; racing; competitive driving against another vehicle; 'showing off

(c) disregard of warnings from fellow passengers

(d) a prolonged, persistent and deliberate course of very bad driving

(e) aggressive driving (such as driving much too close to the vehicle in front, persistent inappropriate attempts to overtake, or cutting in after overtaking)

(f) driving while the driver's attention is avoidably distracted, e.g. by reading or by use of a mobile phone (especially if hand-held)

(g) driving when knowingly suffering from a medical condition which significantly impairs the offender's driving skills.

(h) driving when knowingly deprived of adequate sleep or rest

(i) driving a poorly maintained or dangerously loaded vehicle, especially where this has been motivated by commercial concerns

Driving habitually below acceptable standard

(j) other offences committed at the same time, such as driving without ever having held a licence; driving while disqualified; driving without insurance; driving while a learner without supervision; taking a vehicle without consent; driving a stolen vehicle

(k) previous convictions for motoring offences, particularly offences which involve bad driving or

the consumption of excessive alcohol before driving

Outcome of offence

(l) more than one person killed as a result of the offence (especially if the offender knowingly put more than one person at risk or the occurrence of multiple deaths was foreseeable)

(m) serious injury to one or more victims, in addition to the death(s)

Irresponsible behaviour at time offence

(n) behaviour at the time of the offence, such as failing to stop, falsely claiming that one of the victims was responsible for the crash, or trying to throw the victim off the bonnet of the car by swerving in order to escape

(o) causing death in the course of dangerous driving in an attempt to avoid detection or apprehension

(p) offence committed while the offender was on bail."

We would add one specific offence to those set out in paragraph (j), that of taking and driving away a vehicle, commonly termed joy-riding, which is unfortunately prevalent and a definite aggravating factor.

[12] The list of aggravating factors was followed by one of mitigating factors, as follows:

"(a) a good driving record;

(b) the absence of previous convictions;

(c) a timely plea of guilty;

(d) genuine shock or remorse (which may be greater if the victim is either a close relation or a friend);

(e) the offender's age (but only in cases where lack

of driving experience has contributed to the commission of the offence), and

(f) the fact that the offender has also been seriously injured as a result of the accident caused by the dangerous driving."

Again, although this list represents the mitigating factors most commonly to be taken into account, it is possible that there may be others in particular cases.

[13] The Court of Appeal went on in *R v Cooksley* to set out sentencing guidelines, stating firmly that in these cases a custodial sentence will generally be necessary and emphasising that in order to avoid that there have to be exceptional circumstances. It ranked the cases in four categories:

(a) Cases with no aggravating circumstances, where the starting point should be a short custodial sentence of perhaps 12 to 18 months, with some reduction for a plea of guilty.

(b) Cases of intermediate culpability, which may involve an aggravating factor such as a habitually unacceptable standard of driving or the death of more than one victim. The starting point in a contested case in this category is two to three years, progressing up to five years as the level of culpability increases.

(c) Cases of higher culpability, where the standard of the offender's driving is more highly dangerous, as shown by such features as the presence of two or more of the aggravating factors. A starting point of four to five years will be appropriate in cases of this type.

(d) Cases of most serious culpability, which might be marked by the presence of three or more aggravating factors (though an exceptionally bad example of a single factor could be sufficient to place an offence in this category). A starting point of six years was propounded for this category.

The Court of Appeal added in paragraph 32 of its judgment in *R v Cooksley* a warning that in the higher starting points a sentencer must be careful, having invoked aggravating factors to place the sentence in a higher category, not to add to the sentence because of the same factors.

[14] We are conscious that we stated in this court in *R v Sloan* [1998] NI 58 at 65 that it is inadvisable, indeed impossible, to seek to formulate guidelines expressed in terms of years. When that view was expressed the court did not have the benefit of a carefully thought out scheme of sentencing in these

difficult cases, such as that constructed by the Panel and the Court of Appeal in *R v Cooksley*. We consider that it should be adopted and followed in our courts, and that these guidelines should be regarded as having superseded those contained in *R v Boswell* [1984] 3 All ER 353. We would, however, remind sentencers of the importance of looking at the individual features of each case and the need to observe a degree of flexibility rather than adopting a mechanistic type of approach. If they bear this in mind, they will in our view be enabled to maintain a desirable level of consistency between cases, while doing justice in the infinite variety of circumstances with which they have to deal.

The Individual Cases

[15] We can now move from these prolegomena to consideration of the individual cases. In doing so we shall have regard to the three governing principles set out in the judgment of the Court of Appeal in *Attorney General's Reference (No 4 of 1989)* [1990] 1 WLR 41 at 45-6:

> "The first thing to be observed is that it is implicit in the section that this court may only increase sentences which it concludes were *unduly* lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this court the sentence was less than this court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in the so-called guideline cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based on law as it is in literature.
>
> The second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this court has a discretion as

> to whether to exercise its powers. Without attempting an exhaustive definition of the circumstances in which this court might refuse to increase an unduly lenient sentence, we mention one obvious instance: where in the light of events since the trial it appears either that the sentence can be justified or that to increase it would be unfair to the offender or detrimental to others for whose well-being the court ought to be concerned.
>
> Finally, we point to the fact that, where this court grants leave for a reference, its powers are not confined to increasing sentence."

Gavin James Robinson

[16] The offender, now aged 21 years, pleaded guilty at Omagh Crown Court to a count of causing the death of Robert Dennis Grimley by driving a vehicle without due care and attention on Killadeas Road, Lisnarick, Co Fermanagh, having consumed alcohol in excess of the prescribed limit, contrary to Article 14(1)(b) of the 1995 Order. This plea was accepted and the court ordered that a count of dangerous driving causing death lie on the file. On 27 January 2003 he was sentenced by His Honour Judge Foote QC to three years' detention, suspended for three years, and was disqualified from driving for three years.

[17] The offender, who was then aged 18 years, spent the evening of 31 March 2001 with his girlfriend in the village of Lisnarick. During the evening he drank some beer, which he estimated at four cans. He had not intended to drive that evening, it having been arranged that his girlfriend's parents would collect her and take her home to Belleek. When they were unable to do so, he decided to drive her home himself. On his way home he received a call on his mobile telephone from his sister, asking him to collect her from her place of employment at Manor House Hotel, Killadeas. He was on his way there when the accident happened.

[18] He was negotiating a right hand bend outside the village of Lisnarick when he struck a pedestrian Robert Grimsley, also a resident of Lisnarick who was a close friend of the offender. Mr Grimsley had left his home about 11.50 pm to walk to a local inn and was walking on the left hand side of the Killadeas Road, where there was no footpath or verge. He was wearing dark coloured trousers and a dark blue jacket with red and white bars. The portion of the road where the accident occurred was an unlighted stretch between two lighted parts. It was not subject to any speed limit apart from the general national limit of 60 miles per hour. There was a SLOW sign painted on the road and a sign warning of the bend. The offender's car appears to have

struck the victim and gone out of control, striking the bank in two places and travelling some 120 metres from the point of impact before coming to rest. The body was carried to a point about 20 metres short of the car's location. The offender averred that he was travelling at about 35 or 40 miles per hour, which would have been a safe speed to negotiate the bend, although the driver of an approaching car stated that his car appeared to be travelling very fast, which might account for the severity of the damage to the front of the car.

[19] The offender was very shocked and distressed after the accident. A blood sample was taken at 2.41 am, when the alcohol content was found to be 99 mg per 100 ml. If one makes allowance for the decline in level which takes place with the passage of time, it is apparent that it must have been substantially higher at the time of the accident.

[20] The driver's airbag in the offender's car had deployed, which may have contributed to his having lost control. The headlamp was found on test to be in the full beam position, though the offender claimed that his headlights were in the dipped position at the time of impact. If they were dipped, it would have been more difficult to pick out the victim, walking away from him in dark clothing on a drizzly night.

[21] The offender has no previous convictions. He was gainfully employed since leaving school. His family are respected in the area and several references were given to the court which described the offender in favourable terms. The probation officer who prepared the pre-sentence reports describes him as extremely and genuinely remorseful, accepting full responsibility for his behaviour. She considered that the risk of harm and the likelihood of his reoffending were minimal. She did not regard probation as being required to assist in his future. A report from Dr Manley, a consultant psychiatrist, states that the offender had an acute adjustment reaction to the fatal accident, characterised by depressed mood, disturbed sleep pattern, frequent intrusive thoughts and nightmares.

[22] The judge in his sentencing remarks stated that the offence would normally warrant an immediate custodial sentence. He took into account in his favour his early plea, his youth, his good family background and work record, his clear record and his remorse over killing his best friend. He concluded :

> "There are really no aggravating features in this case as alcohol is part of the offence and in fact you were only slightly above, though of course that is no excuse whatsoever for driving while intoxicated, but at the time you were drinking you did not intend to drive on that night.

> Taking all of these matters into consideration and having read and heard the references, which speak very highly of you, from prominent people in the community, I feel that in this case nothing would be gained and indeed a great deal would be lost if I were to impose an immediate custodial sentence."

[23] There are no aggravating factors, the consumption of alcohol being a constituent element of the offence under Article 14. The reference listed the mitigating factors as the early plea, the offender's remorse, the fact that the victim was his close friend and his clear record. We have already referred to the fact that a charge under Article 14 carries the same maximum penalty as causing death by dangerous driving, and respectfully agree with the view expressed by Lord Woolf CJ in *R v Cooksley* at paragraph 34, that it is possible for judges to fit such cases into one of the four guideline categories propounded for the latter offences.

[24] Mr Ferriss QC for Robinson submitted that the judge was right when he expressed the view that nothing would be gained by imposing a custodial sentence. It is not required to deter him from re-offending, nor would it have any real effect in preventing others from making errors of judgment or alertness. He further submitted, relying on the analogy of *Attorney General's Reference No 77 of 2002 (Scotney)* [2003] Crim LR 52, that the combination of mitigating factors sufficed to constitute exceptional circumstances which justified the judge in not imposing an immediate custodial sentence, a properly exercised sentencing judgment with which this court need not and should not interfere.

[25] We do not find it possible to accept this submission. It is true that there were no aggravating factors and several clear mitigating factors, but we agree with the contention of Mr Morgan QC for the Attorney General that the latter, taken singly or cumulatively, do not amount to exceptional circumstances. The judge relied on the fact that the offender did not originally intend to drive, but he deliberately took the chance of doing so when his girlfriend needed transport, knowing that he had consumed alcohol. The level of alcohol in his blood was not just slightly above the prescribed limit, but more than sufficient to take him well over it. As Lord Taylor of Gosforth CJ remarked in *Attorney General's References Nos 14 and 24 of 1993* (1993) 15 Cr App R (S) 640 at 643, whoever drives with excess alcohol does so at his or her peril, and in the absence of exceptional circumstances a custodial sentence is inescapable.

[26] We consider that the sentence imposed by the judge was unduly lenient. The case would in our judgment come about the top of the lowest

category of culpability defined in *R v Cooksley.* A proper sentence would in our judgment have been one of eighteen months' to two years' detention. Taking into account the element of double jeopardy, and in particular the lapse of time, we think it appropriate to quash the suspended sentence imposed by the judge and substitute for it an immediate custodial sentence of twelve months' detention. The three-year disqualification will stand.

Graeme Humphreys

[27] The offender pleaded guilty to two counts, dangerous driving causing grievous bodily injury and driving without insurance. On 2 April 2003 at Antrim Crown Court His Honour Judge Smyth QC sentenced him on the first count to fifteen months' detention, suspended for three years, disqualified him from driving for four years and ordered him to retake his driving test. On the second count he was fined the sum of £750.00.

[28] On 14 August 2002 the offender, then 19 years of age, was drinking with a number of friends, including one John Beattie, in the Highways Hotel, Larne, and then in The Kiln public house. The timings are difficult to establish, but the offender stated in interview that they started drinking about 10 pm. In The Kiln Beattie gave the keys of his Peugeot 106 car to the offender, who collected it from Beattie's house. He was not covered by insurance to drive the car. The two men drove about for a time, then contacted Nicola Burns and asked her to come out for a run in the car. She did so and they drove about for a further period, the offender driving, Beattie in the front passenger seat and Miss Burns in the rear.

[29] They drove along the Old Glenarm Road, Branch Road and Coast Road towards Ballygalley. At one stage they were travelling at a speed which caused one of the passengers to tell the offender to slow down, as they were within the 30 mph limit and the police might be about. The offender took a call on his mobile telephone while he was driving, and in the course of the call Beattie changed the gears for him.

[30] The group drove back to Larne and toured the area for some time. At 2.28 am a police patrol saw the car in Killyglen Road and decided to follow it. Beattie told the offender that he had seen the police, and the offender accelerated away down Upper Cairncastle Road, in an attempt to avoid being stopped. He told the probation officer that he was in a panic, no doubt because he knew that he was unfit to drive through his consumption of alcohol. He travelled down this road, which is a suburban road lined with houses and subject to a speed limit of 30 mph, at a speed estimated by a police officer as approximately 60 mph. The passengers were shouting at him to slow down, but he kept going faster and faster. When he came to a hairpin bend at the bottom of the road he was going too fast to take it and crashed the car into a lamppost. Miss Burns was injured and screamed to the two men to

help her out of the car, but they ran off. Beattie was pursued and apprehended by the police. The offender was later arrested at his home.

[31] Miss Burns sustained a fractured vertebra, which required reconstructive surgery with a bone graft, and soft tissue injuries to her left wrist. She was detained in hospital until 28 August 2002 and off work for over four months. When the case was presented on 2 April 2003 she was still receiving physiotherapy and had been advised by her doctor that she could not resume playing hockey in the foreseeable future.

[32] A blood sample taken from the offender at 4.55 am showed an alcohol content of 65 mg per 100 ml. Given that this was approximately two and a half hours after the accident, the alcohol level at that time must have been materially above the limit of 80 mg. It would have been higher again when the offender commenced to drive the car.

[33] The offender has no previous record. He has been in fairly regular employment and is from a stable family background. A number of favourable references were put before the court. The probation officer who prepared the pre-sentence report stated that the offender fully realised the danger created by his actions and regretted what had happened, especially the injuries to Miss Burns. He expressed the view that the offence appeared to be out of character and the risk of reoffending was low.

[34] The sentencing court was informed that Miss Burns did not hold a grudge against the offender and did not wish him harm. One of the police officers who had been in the pursuing car, when called to give evidence, expressed the opinion that the offender was truly remorseful, that he had suffered enough and that a custodial sentence was not required. The judge said in his sentencing remarks that the offender could be regarded as having been just over the limit for alcohol intake. He would ordinarily regard the offence as attracting an immediate custodial sentence of 18 months, but considered that it could be suspended. He considered that it was an aberration in the offender's life and that there would be sufficient deterrent impact in a suspended sentence.

[35] The following aggravating factors were set out in paragraph 4 of the reference:

> "(a) at the time of the accident the Offender was likely to have been driving with excess alcohol;
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> (b) the Offender was travelling at a grossly excessive speed, estimated at around 60

mph in a residential area with a speed limit of 30 mph;

(c) the Offender was speeding in an attempt to evade being caught by the police and breathalysed;

(d) the Offender ignored requests by both his passengers to reduce his speed;

(e) the Offender left the scene of the accident and made no check as to the health of his injured passenger;

(f) the accident happened after an earlier period of bad driving in which the Offender had allowed his passenger to change gears on the car whilst he engaged in a call on his mobile telephone and had been given an earlier warning to reduce his speed.

(g) the Offender held only a provisional licence and was not insured."

The only qualification which might be made is that the police officer who gave evidence agreed that the road was wide and the car could have gone faster, with the apparent implication that the speed, though twice the legal limit, was not unduly dangerous in the circumstances.

[36] The reference set out in paragraph 5 the following mitigating factors:

"(a) the Offender made full admissions and pleaded guilty at the earliest opportunity;

(b) the Offender was truly remorseful;

(c) the Offender was of good character;

(d) the victim was known to the Offender and has remained on good terms with him."

[37] Mr L McCrudden QC for the offender accepted that there were not exceptional circumstances on which he could rely, but emphasised that this was the only case in the group of references in which the consequence was injury rather than death, implying that the court should start from a materially lower base, nearer to that of dangerous driving *simpliciter.* He

suggested that when all the circumstances were taken into account the judge's sentence was merciful but within the range of reasonably available sanctions and was not unduly lenient.

[38] Section 1 of the Road Traffic Act 1988, the comparable English provision to Article 9 of the 1995 Order, comprises only causing death by dangerous driving, whereas Article 9 extends also to causing grievous bodily injury, as did its predecessor legislation since 1955. We had occasion in this court to consider the effect of the distinction in *R v Sloan* [1998] NI 58, when MacDermott LJ said at page 64:

> "Before proceeding we pause to note that the equivalent English provision (s 1 of the Road Traffic Act 1988 – causing death by dangerous driving) does not refer to causing grievous bodily injury. `Causing death or grievous bodily injury' has been the formulation in this jurisdiction since at least 1955 and was intentionally continued in that form despite the ongoing English limitation to cases in which death occurred. We have no doubt that the local reference to grievous bodily injury as well as death is both rational and sensible. The offence is aimed at really bad driving whether described as dangerous or reckless and the culpability of that driving can rarely be judged simply by regarding the fact that serious injury rather than death is the consequence of the dangerous driving. This is a logical approach because the borderline between serious injury and death is often a fine one – some people survive appalling injury others succumb to a comparatively minor injury. As Lord Taylor CJ said in *A-G's Ref (Nos 24 and 45 of 1994)*(1995) 16 Cr App R (S) 583 at 586: `[E]ssentially we have to look at cases in the light of the offender's criminality.'
>
> Thus it appears to us that it cannot be argued that `causing death' is the major offence and `causing grievous bodily injury' is the minor offence and that sentencing should reflect such a distinction. Understandably, and rightly, Mr Gogarty did not seek to argue along such lines – if Parliament had intended that such a distinction should be drawn it would have created two distinct offences with different penalties attaching to each."

[39] Looked at in this way, this has to be regarded as a serious case. The offender drove in an irresponsible manner at excessive speeds, knowing that he had drunk a quantity of alcohol which unfitted him to drive safely. He attempted to avoid being stopped by accelerating away from the police car and then made good his escape from the scene after the accident, leaving a seriously injured passenger in the crashed car. The mitigating features and the otherwise good character of the offender cannot in our view outweigh the serious aspects of the case, nor can the penalty be substantially reduced because the consequence was injury and not death. We consider that the sentence imposed was unduly lenient. In our judgment the case comes within the category of intermediate culpability and called for an immediate custodial sentence of three years' detention. From the terms of the pre-sentence report we do not think that the offender requires supervision by a probation officer and a custody probation order is therefore not an appropriate disposition. Taking into account the element of double jeopardy, we shall quash the sentence passed by the judge and substitute one of two years' detention. The disqualification from driving of four years and the fine of £750.00 on count 2 will stand.

Colm Peter McGuone

[40] The offender, now aged 21 years, was charged at Omagh Crown Court on one count of dangerous driving causing death. He pleaded not guilty on arraignment, but changed his plea to guilty when re-arraigned on 7 March 2003. On 4 April 2003 he was sentenced by His Honour Judge Foote QC to three years' imprisonment, suspended for three years, and disqualified from driving for five years.

[41] On 7 November 2001 at about 5 pm the offender was driving between Pomeroy and Dungannon. The road in question runs through a country area. It is approximately 20 feet wide, and at the material place has hazard lines and cat's eyes down the middle. It was dark and the road was damp, though it was not raining.

[42] The offender was travelling behind a Mercedes car driven by Mrs Helen McCann, who was driving, on her own account, at approximately 45 to 48 mph. He stated in interview that he stayed behind the Mercedes for about a mile before he closed up behind it. He had decided to overtake it, but saw the lights of a car approaching in the distance. The lights disappeared for a short period when the oncoming car was in a dip in the road. He waited behind the Mercedes until this car reappeared and passed, then pulled out to overtake, thinking that the road ahead was clear. There was in fact a second car approaching, a Toyota Carina driven by Mrs Vivienne Nelson, and when the offender saw it he tried to brake to resume his position behind the Mercedes. He was not successful in doing so and collided with the oncoming Toyota. His car was knocked into the air by the impact and crashed into the

Mercedes, which was seriously damaged and pushed off the road, but without injury to the occupants. Mrs Nelson received multiple injuries, including brain damage, from which she died the following morning. The offender sustained a dislocated ankle and fractures of the left radius and ulna.

[43] Evidence was given to the judge by Mr James Shields, a consultant forensic engineer, who had examined the stretch of road where the accident happened. He told the court that there was a dip in the road a short distance ahead of the crest where the impact occurred, commencing some 32 metres from the point of impact and ending at a crest on the Dungannon side 150 metres from the point of impact, beyond which there was another longer dip. The headlights of a car would disappear for a distance of 73 metres in the dip nearer to the point of impact. Mr Shields advanced the theory, which had also been advanced by the offender himself in police interview, that the offender saw the lights of an approaching car before it entered the nearer dip, then when a car passed him thought that it was the one which he had seen. There were in fact two cars. The one whose lights the offender had seen was the second one, the lights of the first one apparently being obscured when it was in the dip. When the first car emerged from the dip and passed him, the offender thought that the road ahead was clear, whereas the second car was still in the dip and its lights were obscured.

[44] The theory advanced by the engineer was not challenged by the Crown and was not probed in cross-examination. The judge appears to have accepted it, but we find it difficult to reconcile with the offender's own account given in police interview, which placed the oncoming headlights (which must have been those of Mrs Nelson's car) "roughly one hundred and fifty to two hundred yards" ahead as he was commencing to overtake the Mercedes after the first car had passed him.

[45] The offender had not consumed any alcohol before the accident. He had no previous criminal record. He comes from a respected family background and favourable references were produced on his behalf. He is now aged 21 years and has been employed by the Roads Service as a trainee engineer, engaging, with their sponsorship, in part-time study for a degree in civil engineering at the University of Ulster. His career with the Roads Service may be in jeopardy if he is sent to prison. The pre-sentence report states that he now accepts responsibility for an impulsive driving decision and has expressed sincere regret towards the victim's family for having been the cause of her death. The probation officer who prepared the report expressed the view that he is unlikely to reoffend or pose a risk of causing harm to the public in the future. She also stated that there were no issues or problems in the offender's background or present life which would merit the involvement of probation supervision.

[46] The judge in the course of his sentencing remarks said:

> "Dangerous driving causing death is really by definition always a serious offence. But there's a wide range of examples of that offence, and I dealt just an hour or so ago with a very bad example where the degree of culpability was very high indeed. This is not such a case. You are a young man who has led a blameless life. There are, in my view, no aggravating features in this case, because overtaking when you weren't able to see, in fact weren't able to see what you thought you could see, is in fact the essence of the dangerous driving in this charge. I also take the view that virtually all of the mitigating factors apply to this case. I think when you add to that the evidence that I have heard from Mr Sheals, an experienced forensic engineer, that this makes this a unique case, and one in which I feel it is not necessary to impose an immediate custodial sentence."

[47] The reference stated that there appeared to be no aggravating factors in this case. It set out several mitigating factors in paragraph 5:

> "(a) the accident resulted from a momentary misjudgment;
>
> (b) the Offender pleaded guilty;
>
> (c) the Offender showed remorse;
>
> (d) the Offender was himself injured in the accident;
>
> (e) the Offender was of good character and held a clean licence."

[48] Mr Gallagher QC for the offender urged upon us that we should not be ready to upset the decision of an experienced judge, who regarded this case, unlike some others with which he has had to deal, as one which justified a degree of leniency. As against that, it has to be taken into account that the offender crossed the hazard warning line at a point where the sight lines are not very long and there was a dip ahead. We cannot escape the conclusion that he was acting impulsively or impatiently in pulling out to pass the Mercedes without being sufficiently certain that it was safe for him to do so. It is clear from the judgment in *R v Cooksley and others* that where a death has been caused by dangerous driving the court must impose an immediate

custodial sentence in the absence of exceptional mitigating features. We are unable to accept that there are such features in the present case.

[49] We accordingly conclude that the suspended sentence passed by the judge was unduly lenient and must be quashed. We regard the present case as falling within the bottom category of culpability and we should have regarded a sentence of eighteen months' imprisonment as appropriate. We do not think that it is a case for a custody probation order, in the light of the pre-sentence report. Taking into account the element of double jeopardy, we shall substitute a sentence of twelve months' imprisonment. The disqualification from driving of five years will stand.

Dean Noel James

[50] The offender, now aged 29 years, was charged at Omagh Crown Court with one count of causing death and three of causing grievous bodily injury by dangerous driving. He pleaded not guilty on arraignment, but changed his plea to guilty on all four counts when re-arraigned on 7 March 2003. On 4 April 2003 he was sentenced by His Honour Judge Foote QC to three years' imprisonment on the first count and two years on the other counts, all concurrent, each sentence being suspended for three years. He was also disqualified from driving for five years.

[51] On 20 December 2001 at about 6.35 or 6.40 am the offender was driving his employer's van from Omagh to Cookstown, having picked up a passenger in Omagh. The road was a single carriageway in each direction, some 23 feet 4 inches at the material point, with a white centre line and studs in the middle. It was governed by the national speed limit of 60 mph. It was dark at the time, and the road was wet, though the weather was then dry and cold.

[52] The offender was travelling behind two other vehicles. The vehicle immediately in front of him was a Renault Clio and in front of that was a lorry. They came to a sweeping left hand bend on an incline, followed by a relatively long straight stretch of road towards Cookstown. The driver of the Renault car, who was travelling at about 50 to 55 mph, put on his right indicator and moved out to see if he could pass the lorry. He saw oncoming headlights and moved back in behind the lorry. A couple of seconds later the offender pulled out, passed the Renault and made to pass the lorry. When his van was alongside the lorry, it collided heavily with a Vauxhall Astra car coming in the opposite direction.

[53] The driver of the Astra, Stephen Francis Ward, received multiple injuries from which he died shortly afterwards, being certified dead in Tyrone County Hospital at 8.15 am. His rear seat passenger, his brother Colin Barry Ward, sustained broken ribs, a tear in his liver and bruising to his liver, kidneys, bladder, chest and abdomen. He was detained in hospital until 28

December 2001. The front seat passenger, Elaine Anne McAllister, the girlfriend of the deceased, sustained a fracture of the clavicle, two broken wrists, cuts to the face, leg and foot and abdominal bruising. She was detained in hospital for two days. Barry Davies, the front seat passenger in the offender's vehicle, sustained a fracture of the left radius, injuries to the neck and lower back, lacerations and abrasions to the face, right knee and leg and general bruising. He was detained in hospital for four days.

[54] The offender received serious injuries in the accident. He had multiple leg fractures, involving both thigh bones, the left calcaneus and the right talus, with a fracture-dislocation of the right ankle joint and a fracture-dislocation of the right metatarso-phalangeal joint. He had surgical treatment of these injuries, and was detained in hospital until 25 January 2002. He suffered an adjustment reaction with depressive features. His depression and distress have continued. He had not returned to work by the time of the court hearing in April 2003 and his counsel informed the court that he was effectively disabled from future manual work. The up-to-date medical report dated 17 June 2003 stated that there was some avascular necrosis of part of the right talus, which will give rise to lifelong difficulty and may lead to the necessity for arthrodesis of the ankle joint and fusion. He still has pain and discomfort and difficulty in walking, which affects his employability. The report of 18 June 2003 from Dr Deehan states that he remains clinically depressed and anxious.

[55] When interviewed by the police on 20 February 2002 the offender said that he had no recollection of any other vehicles on the road and that he thought that his van had gone out of control on ice. A report dated 4 March 2003 obtained from Mr SW Quinn of Forensic Science Northern Ireland, who visited the scene of the accident on the afternoon of 20 December 2001, effectively negates that suggestion. He expressed the firm opinion, based on the physical findings, that the offender had severely applied his brakes shortly before impact, locking his front wheels, and had not skidded on ice.

[56] The offender had not consumed alcohol and there was no issue of alcohol in the case.

[57] The offender has a record of five convictions, but none is related to a road traffic accident or his manner of driving. After a disturbed childhood and adolescence he appears to have settled down and was in regular employment in the construction industry prior to the accident. Since his injuries he has been unable to resume manual employment and it is uncertain whether he will be able to do so in the future. He feels a sense of guilt and responsibility for the accident and the death and injuries which it caused. The probation officer who prepared the pre-sentence report expressed the view that he presents a low risk of reoffending. She did not feel that he was in

need of probation supervision, his reactions being appropriate to the nature of the offence.

[58] The judge, in a decision given the same day as in the *McGuone* case dealt with in this group of references, had been furnished with a copy of the judgment in *R v Cooksley.* He asked himself whether it was necessary to impose a sentence of immediate custodial imprisonment in this case, and answered his question in the negative, stating that he regarded the level of culpability as low. He defined the number of people injured as the only aggravating feature, which he put down to being "largely a matter of bad luck."

[59] The Attorney General also propounded as the only aggravating factor the fact that in addition to the death caused there were three people seriously injured. The mitigating factors set out in paragraph 5 of the reference were:

(a) The accident resulted from a momentary misjudgment.
(b) The offender pleaded guilty.
(c) The offender showed remorse.
(d) The offender was himself seriously injured in the accident.

[60] Mr Gallagher made a submission in this case similar to that which he advanced on behalf of McGuone. He asked us not to interfere with the sentence of the judge which, though merciful, was within the parameters of the proper discretion of the sentencer, especially taking into account the grievous effects of the offender's own injuries upon his life. He referred us in particular to the decision in *Attorney General's Reference (No 152 of 2002) (Crump),* one of the *Cooksley* group of cases. The offender in that case took a deliberate chance to try to get through a level crossing barrier before it came down and struck a woman who had stepped out, causing her injuries which led ultimately to her death. He suffered from a serious dermatological condition which would give the prison service extreme difficulty in coping with it. The Court of Appeal declined to quash the suspended sentence, which the judge had imposed on the basis that the interplay between the offender's psychological make-up and his medical difficulties were such as to constitute exceptional circumstances. The court considered the sentence unduly lenient, regarding the case as falling within the two to three year bracket. In the exercise of its discretion, however, it approved the sentence as an act of humanity in the circumstances.

[61] There were no factors in this accident itself which are capable of constituting exceptional circumstances, a concession rightly made by the offender's counsel. He relied on the offender's injuries to bring the case into the exceptional category, but we are unable to accept that proposition in the present case, serious though they were in their effect on him. We observe that in the *Crump* case the offender's psychological difficulties and physical

ailment were likely to make imprisonment particularly difficult for him. Even so, the court did not regard these as constituting exceptional circumstances, and only invoked the overriding discretion not to impose the sentence otherwise appropriate.

[62] To describe the offender's act as a momentary misjudgment runs the risk of categorising it as a venial error and obscuring the dangerously impetuous nature of his overtaking when he did. It is correct to say that it was a single act which led to the accident, and that there was no course of previous bad driving, but that is true of many dangerous actions on the road. It was a highly dangerous action on his part to push past the two vehicles in front without ascertaining that the road was clear, the more so when the driver of the Renault had pulled back in after moving out. We cannot accept the argument propounded by the offender's counsel that we should not take into account the fact that three people were seriously injured as well as one killed in the accident. If it is to be regarded as an aggravating factor that more than one death results from a piece of dangerous driving, as we must accept, then the same must hold good for serious injuries resulting from it. We regard the case as falling into the category of intermediate culpability and one which would ordinarily carry a penalty of some four years' imprisonment. We are entitled on accepted principles to have regard to the offender's injuries and the effect upon his life, and we shall make some allowance for that factor, but we do not consider that it can suffice to permit the appropriate sentence of imprisonment to be suspended.

[63] We regard the sentences imposed by the judge as unduly lenient and propose to quash them. In the light of the probation officer's opinion set out in the pre-sentence report that the offender is not in need of probation supervision, we do not regard a custody probation order as appropriate. Taking into account the factor of double jeopardy and the physical effects of the accident upon the offender, we shall substitute an immediate custodial sentence of two years on count 1 and eighteen months on the other counts, all concurrent. The disqualification from driving will stand.

Conclusion

[64] We may say in conclusion that we have not found these cases easy to decide. We fully appreciate that to many it may seem unfairly draconian to impose imprisonment upon a young man who has made an error in the course of driving a vehicle, even a serious one, the more so when the consequences in his life of having to serve a prison sentence may bear very heavily upon him. We have nevertheless to bear in mind the consequences which have ensued from those errors, irremediable and sometimes catastrophic to the bereaved families, and the clamant public demand, which finds its expression in the intention of Parliament contained in the legislation, that condign punishment be visited upon defendants in such cases, by way

both of retribution and deterrence. The balance which the courts must attempt to strike between the level of culpability of the offenders and the magnitude of the harm resulting from the offences is difficult to achieve and involves making decisions which may be painful. It is, however, the duty of the courts to make this attempt, and to that end we have set out in this judgment the guidelines which they should follow in undertaking their onerous task.