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Judgment: approved by the Court for handing down | *Delivered:* **16/12/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

-v-

JAMES JOHN STEWRT CASWELL

Applicant

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the court)

[1] The applicant was arraigned on 28 September 2010 at Belfast Crown Court and pleaded not guilty to one count of causing grievous bodily injury by dangerous driving in a public place contrary to article 9 of the Road Traffic (Northern Ireland) Order 1995. On 30 March 2011 the applicant was re-arraigned and pleaded guilty. On 20 May 2011 at the same court the applicant was sentenced to a determinate sentence of 21 months comprising a period of 10 months 2 weeks in custody and the same on licence. He was disqualified from driving for eighteen months and until an appropriate driving test was passed. He seeks leave to appeal against the determinate sentence. At the hearing on 9 December we dismissed the application but reserved our reasons which we now give. In this judgment we give guidance on how to establish the factual basis for a plea where there is a dispute as to the relevant circumstances and also look at how the guideline cases in this area should be approached.

Background

[2] On 26 May 2009 at approximately 8 pm the applicant drove his mother's vehicle into the Northcott Shopping Centre car park in Glengormley. The shopping centre car park is large and open plan but at that time there were very few cars or people in it. A number of his friends in two cars had already congregated there. The victim, Philip James, had stopped his motorcycle adjacent to one of his friends' cars and was talking to them through the car window. The evidence of the occupants of the car and of third parties is that they heard a loud engine noise and the screeching of tyres. The

victim turned to see where the noise was coming from and saw the applicant's car approaching at what he estimated as 40 miles per hour. In interview the applicant was unable to say what speed he was travelling at although he estimated it as 30 – 35 mile per hour. The car slid out of control, spun through approximately 180 degrees, swerved and struck the victim's motorcycle. The victim was pinned to the car of the occupants to whom he had been talking and that in turn was pushed into an adjacent car.

[3] At the scene the applicant claimed his brakes had failed and he had applied the handbrake. He attributed the screeching noise heard by the witnesses to "brake squeal". The applicant claimed that during the course of driving the car he had been conscious of such a noise from the brakes. The car was examined and it was established that the braking system was in working order. A moving brake test was carried out on the vehicle and it was established that the braking system was capable of stopping the car. Further, a technical report established that "brake squeal" does not result in a deterioration of the braking capability of the vehicle although the writer of the report recognised that the sudden appearance of brake squeal could startle a novice driver and cause him to think the brakes were defective.

[4] The victim sustained a crush injury and lacerations to the lower left leg. He was in the Royal Victoria Hospital for 8 days and during that time had 3 operations, one of which was a skin graft. He was on crutches for 6 weeks and attended 3 physiotherapy appointments. He was an apprentice mechanic at the time and was required to take four months off work. He still walks with a slight limp and if he runs or is on his motorbike for too long his left ankle swells up. He has 3 long scars and two dents/deformities on his leg.

[5] The applicant has no previous convictions. He was 19 years old at the time of the offence and had passed his test about 8 weeks prior to it. He lives with his parents and works full time. He has no issues in respect of alcohol or drug use. He is assessed in the pre-sentence report as presenting a low likelihood of re-offending. The applicant and the victim were good friends at the time of the incident but this is no longer the case. The pre-sentence report states this has caused the applicant a great deal of distress in addition to his upset in relation to the offence. The report states the applicant was visibly upset during the interview and expressed regret for the injuries caused to the victim and for the impact this had on their friendship.

The factual basis of the plea

[6] Prior to the guilty plea being entered the prosecution had indicated that it contended that the applicant's speed was grossly excessive for the car park and that the braking manoeuvre was a deliberate attempt at a handbrake turn to show off in front of his friends. The defence had requested the prosecution to accept that there had been no deliberate attempt to engage in a

handbrake turn although it was accepted that the appellant had engaged the handbrake in a foolish attempt to slow down the vehicle. The parties were not able to agree the basis of plea and after the plea was entered both counsel went to see the learned trial judge in chambers. Both parties explained their differing views about the factual basis of the plea and the learned trial Judge indicated that his primary concern was the speed which he considered to be unacceptable. No Newton hearing was held. The prosecution opened the case on the basis that showing off was an aggravating factor as a result of which the sentence fell into the intermediate category. The defence contended that there was no showing off and that the case therefore fell within the lowest category.

[7] The learned trial Judge indicated that he did not accept the applicant's account at interview that the use of the handbrake was in reaction to hearing the brake squeal. He did not, however, expressly resolve the issue of whether there was showing off or whether this was a case which fell within the intermediate or lowest categories. In his sentencing remarks after commenting on the applicant's speed he said that "somehow or another a manoeuvre came about which led to him losing control of the car in circumstances where it was highly foreseeable not only that damage to other vehicles would occur but an injury and possibly even worse might occur to those to whom he was in close proximity."

[8] We consider that the principles to be followed where the defendant pleads guilty but disputes the prosecution case are to be found in R v Underwood [2005] 1 Cr App R 13:

(a) the prosecution may accept and agree the defendant's account of the disputed facts or reject it in its entirety; if the prosecution accepts the defendant's basis of plea it must ensure that it is factually accurate and enables the sentencing judge to impose a sentence that is appropriate to reflect the justice of the case;

(b) in resolving any disputed factual matters the prosecution must consider its primary duty to the court and must not agree with or acquiesce in any agreement which contains material factual disputes;

(c) if the prosecution does accept the defendant's basis of plea it should normally be reduced to writing and made available to the judge prior to the prosecution's opening;

(d) an agreed basis of plea that has been reached between the parties must not contain any matters which are in dispute;

(e) on occasion the prosecution may lack the evidence positively to dispute the defendant's account especially where the defendant asserts

a matter outside the knowledge of the prosecution; simply because the prosecution does not have evidence to contradict the defendant's assertion does not mean that those assertions should be agreed; in such a case the prosecution may test the defendant's evidence and submissions by requesting a Newton hearing; where the defendant does not give evidence an adverse inference may be drawn if appropriate;

(f) where there is a dispute about whether the differing factual bases are material to the sentence the court should invite the parties to make representations and if it decides that the difference is material should invite such further representations or evidence as it may require to decide the dispute in accordance with the principles set out in Newton.

[9] We have no doubt that the differing factual bases put forward in this case were material to the sentencing outcome. If the court had concluded that the applicant had been showing off in the manner alleged by the prosecution we consider that such an irresponsible piece of driving would have constituted a serious aggravating factor. Despite the applicant's clear record and good background the starting point on a contest would have been in the middle of the intermediate range in which sentences start between two years and 4½ years. The outcome would, therefore, have been a sentence considerably in excess of that imposed. We are satisfied, therefore, that the disputed factual basis of the plea ought to have been decided in open court in accordance with the principles set out in Underwood.

Guidelines

[10] We accept, however, that it would not now be appropriate for us to engage in a Newton hearing on the disputed facts. We approach the application for leave to appeal on the basis of the facts admitted by the applicant. Mr O'Donoghue QC submitted that in a case where there were no aggravating factors the guideline case, R v McCartney [2007] NICA 41, indicated that the starting point was between one and two years imprisonment. In light of the plea and other circumstances he suggested that the appropriate sentence in this case was somewhere between nine months and 18 months imprisonment. For the prosecution Mr Henry submitted that cases of intermediate culpability "may involve an aggravating factor" but need not necessarily do so. He submitted, therefore, that the starting point on a contest in this case should be in excess of two years and that the sentence imposed by the learned trial Judge was appropriate.

[11] Guideline cases are designed to assist sentencers in assessing the culpability of the offender and to promote consistency of sentencing having regard to the offender's culpability and the harm caused. In this case the culpability of the offender lies not just in the fact that he drove at a speed

which was clearly far in excess of that which was appropriate in a shopping centre car park but also in his decision to execute a manoeuvre to bring his vehicle to a halt close to the victim and other vehicles by using his handbrake rather than using the broad expanse of the car park to allow his vehicle to come to a halt. Guideline cases are not to be interpreted like statutes. It is not necessary to determine whether this culpable manoeuvre is expressly set out in the guideline cases before giving it appropriate weight in the sentencing decision.

[12] There are two factors upon which the applicant relied in mitigation upon which we wish to comment. The first is the issue of his inexperience. We accept that inexperience may be a mitigating factor for a driver who fails to appreciate extreme danger which a more experienced driver would have identified (see Attorney General's Reference (No 1 of 2009) (McCaughan) [2009] NICA 2). We do not consider, however, that inexperience contributed significantly to the circumstances of this collision. It seems to us that the applicant would have been well aware that his speed was far in excess of what was appropriate and his decision to use his handbrake close to the victim and the other vehicles plainly gave rise to a real danger that he would lose control of the vehicle.

[13] The second factor which was urged upon us was that a distinction should be drawn between those cases in which grievous bodily injury is sustained and those cases in which death is caused. It is accepted that in R v Sloan [1998] NI 58 this court said that the offence is aimed at really bad driving and the culpability of that driving can rarely be judged simply by regarding the fact that serious injury rather than death is the consequence. In Attorney General's Reference (Nos 2,6,7 and 8 of 2003) [2003] NICA 28 this court approved that statement and stated that the penalty ought not to be substantially reduced because the consequence was injury and not death. We apply that approach in this case.

[14] Taking into account the culpability of the applicant we consider that a starting point on a contest in excess of two years was entirely appropriate in this case. We do not consider that the sentence can be criticised. For those reasons we dismissed this appeal.