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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

DAVID ANTHONY McELHONE

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an application by David Anthony McElhone for leave to appeal against sentences imposed by His Honour Judge Smyth QC at Antrim Crown Court on 1 July 2004. The applicant (who will be seventeen years old on 28 January 2005) pleaded guilty on his arraignment on 12 May 2004 to two charges of causing death by dangerous driving; to a charge of causing grievous bodily harm by dangerous driving; to a charge of taking and driving away a motor vehicle without the consent of the owner; and to the offence of using a motor vehicle without insurance. These offences occurred on 25 January 2003 when the applicant was three days short of his fifteenth birthday. The two girls who died were classmates of the applicant and at the time of their death were aged fourteen and fifteen.

[2] He was sentenced to three years detention in the Young Offenders' Centre on each of the charges of dangerous driving causing death and grievous bodily harm; to six months detention on the charge of taking and driving away; and to a fine of £50 with an immediate warrant in respect of the offence of driving without insurance. Each of the periods of detention was ordered to run concurrently. He was also disqualified from driving for a period of eight years. Having given his consent, the applicant was also ordered to undergo a period of probation of eighteen months at the end of his time in custody. The

judge indicated that, if consent had been withheld, a sentence of four years detention would have been imposed.

[3] The application for leave to appeal was refused by the single judge and the applicant now renews that application to this court.

Factual background

[4] On the evening of 25 January 2003, while his parents were on holiday in Spain, the applicant invited a number of his friends to his home at 54 Greenan Road, Toomebridge for a party. Generally there would not be alcohol in the house but some beer remained after the Christmas period and the young people drank this. They telephoned two friends, Catherine Graham and Christina Maguire, asking them to come to the house, but the girls declined. At the applicant's suggestion a number of persons including the applicant, Ciaran O'Boyle and three others drove the applicant's father's Ford Transit van into Toomebridge to pick up more friends. One of the guests at the party drove although the applicant had offered to do so. For some reason the friends were not picked up and they returned to the house alone.

[5] Later, possibly around midnight, the same guest who had earlier driven the van suggested that he could drive himself home in it and that the applicant could then drive back on the return trip. The applicant agreed and the guest drove to his home in Toome, carrying the applicant and Ciaran O'Boyle as passengers. The applicant then took over the driving of the van. Ciaran O'Boyle suggested that they should go to find the girls whom they had telephoned earlier. They telephoned the girls again and found out where they were and the applicant then drove to pick them up. Catherine Graham and Christina Maguire got into the front of the van and another girl, Sinead Laverty, got into the back with Ciaran O'Boyle. The applicant then began to drive towards his home.

[6] Ciaran O'Boyle, who was in the back of the van, said that the applicant was "… driving normally. Now and again he went a bit fast but he seemed [to me] to drive normally … most of the time…" Sinead Laverty, who was also in the back, gave a different account. She described what happened in this way:-

> "David was driving very fast, swerving and stuff. Going round corners it felt like you were tipping up a wee bit. I told him to slow down more than once, maybe a few times …. He did not slow down; he just kept driving fast. I was scared being in the van with his driving. I knew David had been drinking … There were tools in the back of the van and they were moving about the floor

> when the van was being driven around corners and stuff … It was clear to me that David was driving too fast."

[7] The applicant lost control of the vehicle and it left the road and collided with a tree. After the collision the applicant, Ciaran O'Boyle and Sinead Laverty were able to leave the vehicle and the alarm was raised with a neighbour shortly before 12.30am. Catherine Graham and Christina Maguire were declared dead at the scene and had to be cut from the vehicle by a fire crew. Both had been wearing seatbelts. The applicant, who was said to have been visibly shaken, admitted at the scene that he had been the driver. A roadside breath test was administered which he failed. Some three and a half hours after the collision a blood test revealed that he had 62 milligrams of alcohol in 100 millilitres of blood. The legal limit for driving a motor vehicle is 80 milligrams.

[8] George Johnston, a forensic scientist, examined the scene. He found Carelane Road to be a narrow, single carriageway, rural road, bordered by grass verges and hedgerows leading to fields. At the point where the van left the road two cars would not have been able to pass each other without mounting the soft verge. The final approach to the scene was a straight section of road leading to a right bend followed by another relatively straight section of road on which the collision occurred. Throughout the road is on a gentle decline. It is constructed of tarmac and in good repair. At the point where the accident occurred the road is level, flat and 11 feet 2 inches wide. The speed limit on the road is 60 miles per hour. The night in question was wet with high winds.

[9] Mr Johnston's conclusions on the collision were expressed as follows:-

> "The driver lost control of the van on his approach to the collision scene, resulting in it crossing the verge on the driver's left and striking a farm gate and the substantial metal post on which the gate was hinged.
>
> Pieces of the van's front number plate, the radiator grille, the wrap-around section from the nearside end of the front bumper and the nearside headlamp, were all found in the area of the first impact. Their presence in this area and the nature of the damage to the front of the van indicate that when the van struck the gate and post it was orientated at an angle to the line of the road with the front largely towards the hedgerow on the driver's left. Whilst in this orientation the van was

sliding sideways as it continued in the general direction of Gallagh Road. The two tyre marks on the verge on the approach side of the first gateway were probably made by the front wheels of the van. The convergence of these marks indicates that the van was rotating anticlockwise as it crossed the verge.

After striking the gate and its supporting post at the first field entrance, the van continued in the direction of Gallagh Road striking the second support post and gate, and the hedgerow beyond the second field entrance.

These impacts increased the anticlockwise rotation of the van causing its rear to move towards the hedgerow so that it was progressing towards an orientation in which it was facing back in the direction it had come from with its rear facing in its original direction of travel. The van by-passed the next section of hedge without significant contact but with both offside wheels on the verge. As it did so, the rear offside wheel of the van created the furrowed tyre mark leading to the end of the undamaged section of hedge. As the van's contact with the hedge increased a point was reached where the rear offside wheel passed beyond the hedge-line followed almost immediately by the rear nearside wheel passing beyond the hedge-line. With both rear wheels beyond the hedge-line the van 'grounded' because of the difference in level between the verge and the field. It continued in this general orientation along the hedge-line in the direction of Gallagh Road scraping away the surface soil and vegetation until it struck the mature tree at the position of the passenger door……

The severity of the impact with the tree was such that the tree intruded severely in to the cab of the van at the passenger position. The van partly wrapped around the tree causing a severe overall curvature from front to back.

> It is clear from the orientation of the van when it struck the first gate that the driver began to lose control of the vehicle at some stage prior to that … It is possible that the driver began to lose control of the vehicle as he negotiated the right bend a short distance prior to the collision location.
>
> The severity of the damage sustained by the van when it struck the tree indicates that the vehicle was travelling at a speed which was excessive in view of the nature of the road, the prevailing weather conditions and the driver's lack of driving experience."

[10] Post mortem examinations revealed that Christina Maguire died of a severe head injury. She had been killed outright in the incident. Catherine Graham died of multiple severe injuries to the head, chest and abdomen. Again, she died instantaneously.

[11] Ciaran O'Boyle was admitted to Antrim Hospital and was found to have a 10cm laceration on the frontal area of the scalp, a laceration on the upper lip (which required sutures), damage to the upper teeth, bony damage to the thumb (which was splinted), pain in his left collar bone, tenderness in the neck. He was discharged on 30 January 2003, having had his teeth realigned under local anaesthetic.

[12] In police interview the applicant said that after the incident he had roused Ciaran O'Boyle and told him and Sinead Laverty to remain in the vehicle. He tried to get Christina Maguire and Catherine Graham from the van without success. He stopped a passing car and asked the occupant to telephone an ambulance. When asked about Sinead Laverty's assertion that he was driving too fast the applicant said that he could not recall her telling him to slow down. He maintained that he was driving well and that he had not had much to drink.

The applicant's personal background

[13] The applicant lives with his mother and father and is the youngest of 5 children. The family is described as close knit and all that is known about them suggests that the applicant comes from a stable and eminently respectable background. He and the other young people involved in the accident attended St Olcan's High School in Randalstown. Reports from his school speak highly of him, describing the applicant as capable and popular. He left school after completing his GCSEs and successfully applied to complete a National Diploma in Construction Management Courts at Ballymena College of Further Education.

[14] The applicant has attempted to lead as normal a life as possible since the incident, but has found the tragedy very difficult to cope with, especially as the deceased were both his friends and classmates. The community, including the families of the deceased, are supportive of him. He continues to receive psychiatric counselling.

[15] A pre sentence probation report stated that it was most unlikely that the applicant would re-offend in view of the impact that the entire experience has had on him. The probation officer considered that the applicant was genuinely sorry for what he had done. He had expressed his sorrow to the families of the two girls who died. They have been generous in their forgiveness of him. The applicant was said by the probation officer to have been living a "nightmare" since the incident.

[16] Dr Peter Gallagher, consultant child and adolescent psychiatrist, reported on the applicant on 17 June 2004 and 15 December 2004. He concluded that the applicant suffered from post traumatic stress disorder. The symptoms of this persist. The applicant had also suffered symptoms of depression but these have been "managed" with the support of family and a counsellor.

Sentencing guidelines

[17] In *Re Attorney General for Northern Ireland's Reference* (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 28 this court gave guidance as to the level of sentencing in cases of dangerous driving causing death or grievous bodily harm. The court recognised the tension between, on the one hand, the devastating consequences of such offences and, on the other, the relatively low level of culpability in many of such cases. This tension gives rise to particular difficulty in selecting the appropriate sentence. The synthesis adopted by the court was that the outcome of the offence, including the number of people killed, was relevant to the sentence, but that the primary consideration had always to be the culpability of the offender. Another factor of critical importance acknowledged by the court was that the incidence of death and injury caused by road traffic accidents had been the subject of increasing public and Parliamentary concern over a number of years. This had been reflected in the increase in maximum penalties for these offences. The courts were bound to respond appropriately to these developments.

[18] This court in *Attorney General for Northern Ireland's Reference* considered the decision of the Court of Appeal in England and Wales in *R v Cooksley, R v Stride, R v Cook; A-Gs Reference* (*No 152 of 2002*) [2003] EWCA Crim 996, which followed advice given by the sentencing advisory panel. After rehearsing the various arguments considered by the panel the court concluded that it should follow the guidance provided in *Cooksley*. The following paragraphs taken from the court's judgment set out its conclusions:-

"[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 of 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 para (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 *R v Cooksley* [2003] 3 All ER 40 at [32] 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, [1984] 1 WLR 1047. 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 judge's sentencing remarks

[19] The judge identified a number of aggravating factors:- taking the van without authority; the fact that the applicant did not have a licence; the bad driving, possibly over a period; failure to respond to a request to slow down from a passenger; consumption of alcohol and the fact that the incident resulted in two deaths and left another seriously injured.

[20] The judge accepted that there was what he described as a "wealth of mitigation" including the applicant's timely plea of guilty; his authentic remorse; the trauma that he suffered and his distress at returning to school with the reminders of his classmates who had died. The judge recognised that he was "dealing with a child who made some dreadful choices which had appalling consequences, but who did not in any way intend to bring about those consequences and who will suffer from that realisation for many years."

[21] The issue of whether the medical evidence was sufficient to justify the view that there were exceptional circumstances was considered by the judge. He concluded that it did not. The reaction of the applicant to the events and his current medical condition were such as would be expected from a sensitive, young person who acknowledged responsibility for an awful tragedy.

The application for leave to appeal

[22] For the applicant Mr Dermot Fee QC submitted that he had suffered very considerable psychological effects as a consequence of the accident. He suggested that the sentencing judge should have recognised that the case qualified as one where there were exceptional circumstances on that account. The effect on the applicant went far beyond what might have been anticipated for a normal individual having to deal with the aftermath of such an accident.

[23] Mr Fee further argued that the application of the guidelines set out in the *Attorney General for Northern Ireland's Reference* required to be adapted to accommodate the principle that a sentence of detention should only be passed on a child offender where no alternative disposal was reasonably possible. The approach to be adopted where a defendant crossed a relevant age threshold between the date of commission of the offence and the date of conviction was clear – *Ghafoor v R* [2002] EWCA Crim1857. The starting point was the sentence that the defendant would have been likely to receive at the date of the commission of the offence. The applicant should be sentenced on the basis of the appropriate disposal for a boy of fourteen years, therefore.

[24] Even if the guidelines supplied by the *Attorney General for Northern Ireland's Reference* were applicable to the applicant's case, Mr Fee argued that the judge's selection of the starting point in paragraph 13 (c) was unwarranted. He suggested that the fact that the applicant did not have a licence should not be regarded as an aggravating factor since he could not have obtained such a licence. The bad driving of the applicant had to be considered in light of his lack of experience. It was not clear that the applicant could hear the request to slow down and the consumption of alcohol was a less reprehensible feature than might have been appropriate in the case of an adult.

Conclusions

[25] Any discussion about the proper disposal of this case must begin with an acknowledgment of the dreadful tragedy that has befallen all who were associated with the events of the evening of 25 January 2003. Apart from the shocking loss of young life one must remember that Ciaran O'Boyle sustained serious injuries and that the families of all concerned have, in their various ways, been devastated by the accident. The relatives of Catherine Graham and Christina Maguire have been bereaved in appalling circumstances. It is a testament to their generosity and humanity that they have been able to forgive David McElhone for what happened on that terrible night. David McElhone himself and his family have also suffered. His youth has been cut short. He has had to confront the awful consequences of his actions on that night and he has been required to undergo an unenviable ordeal in coping with return to the school that he and the others attended. Above all he has had to deal with detention in a Young Offenders' Centre when all his background and experience would have suggested that this was something that he would never have had to contemplate. The knowledge that his family must share his suffering in their isolation from him must inevitably increase the pain of his separation from them.

[26] The applicant's youth must rank as one of the most important factors in the selection of the appropriate sentence. This does not involve a departure from the principles enunciated in the *Attorney General for Northern Ireland's Reference*. On the contrary, the judgment in that case recognised that a mechanistic approach to the decision on sentence was to be avoided and that the individual features of each case required to be considered.

[27] We do not consider, however, that the guidelines should be abandoned where the offender is a young person. It is incumbent on the sentencer to keep in mind that a young person's culpability is likely, as a general rule, to be less than that of a fully mature person. And it is to be remembered that this court in the *Attorney General for Northern Ireland's Reference* reiterated the principle that the primary consideration in sentencing, even in this species of case, was the culpability of the offender. But the other considerations identified by the court in that case are as potentially pertinent in the case of a young offender as they are in the case of an adult.

[28] In the present case a number of 'aggravating' features can be readily identified. Some of these sound directly on the question of culpability in the sense that they are directly related to the moral responsibility of the applicant for the offences. Others are more concerned with the consequences of the offences. The expression 'aggravating' is not perhaps as apt to describe the latter as the former since in its normal connotation the word refers to a type of behaviour over which the person responsible for it has a measure of control.

Nevertheless, it is now well settled that the consequences of this class of offences must be reflected in the chosen sentence.

[29] We are satisfied that the following are properly to be regarded as aggravating factors:-

1. The applicant's consumption of alcohol. We consider that it is likely that this was not inconsiderable. He failed a breath test at the scene of the accident. The metabolising effect between the time of the accident and the taking of the blood sample must be taken into account in estimating his likely level of intoxication while he was driving. We consider that it is probable that, for a fourteen year old, the effect of the alcohol on his ability to drive would have been substantial.

2. The speed at which the applicant drove. We recognise that the accounts of the surviving passengers do not coincide on this issue but we consider that the version of Sinead Laverty cannot be discounted. She gave a graphic description of the tools in the back of the van moving with the speed of the vehicle and she was prompted to complain to the applicant about the speed of the vehicle. That the vehicle was travelling at speed is also confirmed by the report of Mr Johnston as outlined in paragraph [9] above.

3. The applicant failed to respond to a passenger's request to slow down. Sinead Laverty has said that she asked the applicant to reduce speed. He has claimed that he cannot remember whether he heard this but we have concluded that he must have done. A front seat passenger heard Sinead Laverty say this and it is inconceivable that the applicant could have failed to do so.

4. Two young people were killed as a result of this accident and a third was seriously injured.

[30] To this list of aggravating factors might be added the applicant's taking his father's van without consent and the fact that he did not have a driving licence. We do not regard these as significant features in the present case, however. The applicant was not a joy-rider. It was reprehensible for him to have used his father's van but this was not remotely as serious as the case of someone stealing a motor vehicle with the express purpose of driving at dangerous speeds which is the trait of the joy-rider. Likewise, the fact that the applicant was not the holder of a driving licence reflects his lack of maturity and sense of responsibility.

[31] There are substantial mitigating features, as the sentencing judge acknowledged. We have already adverted to many of these. The applicant freely admitted his guilt from the outset. He pleaded guilty at the earliest

opportunity. His life has been devastated by this experience but he met his responsibilities in a mature and responsible way in the immediate aftermath of the accident and since. He has undoubtedly suffered substantially and the dreadful outcome of this incident will remain with him forever. He must live with the knowledge of the effects that this has had on the families of the girls who were killed and on his own family. We have taken all these into account and have considered carefully all that has been said on his behalf.

[32] The inescapable fact remains, however, that the applicant was responsible for the loss of two young lives and for the serious injury of another young person. It is also indisputable that four aggravating factors must be recognised in the assessment of the appropriate sentence in his case. On that basis the case ranks as the most serious in the scheme adopted in *Cooksley* and by this court in the *Attorney General for Northern Ireland's Reference*. A normal starting point of six years custody is recommended for this category of case. Plainly, a significant variation of that starting point is warranted because of the powerful mitigating features that are present and because of the applicant's youth. We do not consider, however, that these qualify as exceptional circumstances that would justify a wholly different disposal. After much anxious thought we have concluded that the learned judge's sentence in this case was neither wrong in principle nor unduly severe. The application for leave to appeal against sentence must therefore be dismissed.