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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 26/03/2010

IN HER IN HER MAJESTY'S COURT OF APPEAL
IN NORTHERN IRELAND

THE QUEEN

v.

CONRAD TRAFFORD DOOLE

MORGAN LCJ, HIGGINS LJ AND GIRVAN LJ

MORGAN LCJ (delivering the judgment of the court)

Introduction

[1] This is an application for leave to appeal against the sentence imposed upon the applicant at Antrim Crown Court on 8 January 2010 of 12 months imprisonment and three years disqualification from driving together with the requirement that he must pass an appropriate driving test before driving again. On 25 November 2009 the applicant had pleaded guilty to causing the death by careless driving of Robert Callaghan, contrary to Article 11A of the Road Traffic (Northern Ireland) Order 1995 (the 1995 Order). This is the first occasion on which this offence has come before this Court and we will, therefore, take the opportunity to give some general guidance as to how sentencing for this offence should be approached.

The relevant offence

[2] By virtue of Article 12 of the 1995 Order the offence of careless driving is committed by driving without due care and attention or without reasonable consideration for other persons using the road. Article 12A provides that a person is to be regarded as driving without due care and attention if and only if the way in which he drives falls below what would be expected of a competent and careful driver. The offence is generally one of low culpability

and that is recognised by the fact that the maximum sentence is a fine and disqualification.

[3] The offence under Article 11A of the 1995 Order of causing death by careless driving was introduced on 16 July 2008 and applies in respect of offences committed after that date. The maximum sentence for this offence is five years imprisonment and disqualification is mandatory. The offender may be required to undergo an approved test. The introduction of this offence punishable with a substantial term of imprisonment indicates a clear parliamentary intention that consequence should be an important consideration even in an offence where culpability is generally regarded as low.

Guidance

[4] An important function of this Court is to provide guidance to lower courts in the field of sentencing. In appropriate cases the Court may indicate appropriate guidelines for sentencers. This can be particularly helpful in relation to new offences in respect of which there is little previous guidance to be found in the sentencing decisions of the Crown Court or of this Court. It may also become necessary for this Court to revisit previous levels of sentencing where trends in society or new statistical evidence points to the conclusion that previous guidance is no longer appropriate and requires adjustment.

[5] The formulation by this Court of guidance or guidelines also helps to inform the Court itself on its proper approach to the actual appeal before it since the disposal of the appeal must be set in its proper context taking account of the factors and range of sentence appropriate to the appeal itself. Guidance and guidelines, accordingly, are not issued in an abstract context.

[6] A recurring theme in the caselaw of this Court is that guideline decisions are only what they purport to be, that is to say guidance to sentencers. They are not prescriptive. They are intended to provide a proper focus for sentencers but not a straight jacket. Every case must be decided justly in its own factual context taking account of the relevant considerations and evidence. Guidance and guidelines provide useful assistance to sentencers in the proper identification of those considerations. Excessively prescriptive guidelines, whether imposed by the Court or by any statutory body, would frustrate the sentencer's duty to decide the case before him or her justly on the merits. The duty of the court under article 6 of the ECHR is to ensure a fair trial by an independent and impartial duty. Excessive prescription has the potential to undermine judicial independence and thus infringe Article 6.

[7] In determining proper guidelines or guidance this Court takes account of but is not bound by the recommendations of the Sentencing Guidelines Council of England and Wales. Their Guidelines usefully identify relevant considerations in determining the seriousness of offences, aggravating and mitigating circumstances and factors relevant to personal mitigation. They usually put forward the starting point for sentences in carrying out the sentencing exercise. On occasion this Court recommends the adoption of a similar approach though in other cases it may recommend a different approach because of special factors in this jurisdiction.

[8] The English Council has produced Guidelines in relation to offences relating to causing death by driving. They usefully identify the issues relating to determining the seriousness of the relevant offence, the aggravating and mitigating circumstances and relevant factors that relate to personal mitigation. In particular in the present context it contains a section which deals with causing death by careless driving. We consider that the English Guidelines represent a fair and accurate assessment of the relevant factors which a sentencer in this jurisdiction should take into account in reaching his or her decision.

[9] A number of key points emerge from the Guidelines in the present context:

- (a) As the Introduction clearly states the central feature should be an evaluation of the quality of the driving involved and the degree of danger that it foreseeably created.
- (b) The degree to which an aggravating factor is present and its interaction with other aggravating and mitigating factors will be immensely variable. The court is best placed to judge the appropriate impact on sentence. Clear identification of those factors relating to the standard of driving as the initial determinants of offence seriousness should assist the adoption of a common approach.
- (c) Imprisonment is only appropriate when there is a level of carelessness which gives rise to real culpability. As para 8 of the Guidelines states:

“Where the level of carelessness is low and there are no aggravating factors even the fact that death was caused is not sufficient to justify a prison sentence.”

[10] The range of appropriate sentences in relation to causing death by careless driving put forward by the English Council are as follows:

- (a) In respect to careless driving falling not far short of dangerous driving it puts forward a starting point of 15 months with a range of 9 months to 3 years;
- (b) In respect of cases of careless driving arising from momentary inattention with no aggravating factors it recommends a community order disposal;
- (c) In relation to cases falling between those two ranges it recommends a starting point of 9 months with a range of 2 years down to a community order (high);

Subject to our comments below we agree with the general approach recommend by the Council.

[11] Accordingly there will be occasions where the culpability of the offender will be very low. In such circumstances a custodial sentence will generally not be appropriate even though death has resulted. Such an approach does not fail to recognise the extreme distress and hurt which this offence causes to the families and friends of the deceased. We repeat what was said by Lord Taylor CJ in Attorney General's Reference Nos 14 and 24 of 1993 (1994) CAR (S) 640 at 644.

“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 deceased victim to their loss, nor will it cure their anguish.”

[12] There are, however, cases of careless driving in which the standard of driving will lie very close to the test for dangerous driving. In those cases we agree that an appropriate starting point in a contested case for a driver with no previous convictions is 15 months imprisonment. Aggravating and mitigating factors may result in a higher or lower sentence but the range identified by the Definitive Guidelines will generally be appropriate.

[13] The large majority of cases of causing death by careless driving will fall between those categories. Prior to the introduction of this legislation the unintended tragic consequence of a death was not identified as a material aggravating factor (see Megaw (1992) 11 NIJB 25). The statutory purpose of this legislation was to alter that approach and we agree that in these cases the starting point in a contested case for a driver with no previous convictions is

now nine months imprisonment. We stress, however, the pressing need to pay careful attention to culpability in individual cases. This will move the starting point up or down as will relevant aggravating and mitigating factors. In some cases this will result in a sentence well above the starting point but in others it may properly lead to a suspended sentence or non-custodial disposal. In particular, where the application of these principles point to a prison sentence of less than 6 months sentencers should carefully consider whether a non custodial alternative would be more appropriate and meet the justice of the case. The imposition of a short prison sentence in such circumstances may tend to trivialise the tragedy of the death of the deceased victim but at the same time be a disproportionate penalty for the defendant who may have a completely clear record and good character.

[14] The final point we would like to make by way of guidance relates to the procedure which should be followed when a plea of guilty is entered in relation to this offence. It is apparent from what we have said earlier that it is extremely important for the court to be in a position to make a judgment about the manner of the driving. Where, therefore, a plea of guilty is entered to this offence the judge should require an agreed written factual basis for the plea to be provided. Where such agreement cannot be achieved it may be necessary to conduct a fact-finding hearing.

[15] The second procedural point relates to the investigation of this offence. A proper assessment of the standard of driving of the offender is clearly of considerable significance both to him and the victims. Where cases of this nature are being prosecuted the court will normally derive considerable benefit from the involvement of a forensic investigator. Such evidence is likely to be of considerable importance in assessing the correct starting point for the offender. We would strongly encourage the presentation of such evidence in these cases.

Background

[16] We now turn to the facts of this case. Shortly before 6 p.m. on 21 March 2009 Robert Callaghan left his home at 140 Causeway Road to walk his three greyhounds. He walked in the direction of Bushmills on the left-hand side of the road with his back to the traffic. He was seen by a motorist travelling in the opposite direction shortly before his death. At that stage one of the dogs was on the hedge or edge of the road and the other two dogs were close by.

[17] About 6:10 p.m. the applicant was driving his white transit van along the Causeway Road in the same direction as the deceased. The Causeway Road is a minor road approximately 18 feet 8 inches in width. It is bounded on each side by a ditch and hedge. As one travels towards Bushmills the road

risers. From Carrowreagh Bridge to the point of impact the applicant would have had an uninterrupted view of approximately 300 yards.

[18] The Causeway Road towards Bushmills travels due west at this point and on the evening in question the evidence indicates that there was a low sun which would have affected the view of any driver. One witness described it as blinding. At interview the applicant described how as he was halfway up the hill towards the brow of the hill he was blinded by the sun. He put on his window washers and reached for his sun visor. He had just got the shade in his eyes when he heard the bang. He stopped the van as soon as he heard the bang and got out to see the deceased who died very shortly afterwards. The applicant immediately dialled 999 for assistance. He stated that he had been travelling at 50 mph when he was blinded by the sun and that he had then taken his foot off the accelerator. He said that he did not see the deceased prior to the collision. The witness who had seen the deceased shortly before his death saw the applicant's white van travelling in the opposite direction after she had passed the deceased. She described it as travelling very fast. Another witness stated that the white van flew past a road junction at which she and her husband had been stationary.

[19] There was no agreed factual basis for the plea provided to the learned judge. It appears that no forensic investigator was directed in relation to this collision. The learned judge was, therefore, left to make an evaluation of the culpability of the driving on the basis of the facts set out above. The prosecution must prove the culpable aspects of the driving beyond reasonable doubt. In this case we are satisfied to the requisite standard that the speed of the applicant's vehicle was excessive in the circumstances. He should certainly have braked when blinded by the sun. We also consider that there would have been some opportunity for the applicant to have seen the deceased and his dogs prior to being blinded although we recognise that the evidence indicates that the dogs were very close in on the left-hand side when last seen and this may have impaired the applicant's view.

[20] In our view the learned judge was correct to conclude that the driving in this case fell within the middle bracket which applies to the vast majority of careless driving cases. In the absence of a report from a forensic investigator or more reliable evidence about excessive speed we do not consider that this is a case which shaded into the higher category. In those circumstances we consider that the appropriate starting point in a contested case for an offender without any previous convictions would have been nine months imprisonment.

Aggravating and Mitigating Factors

[21] The applicant is a 38 year old man with a good work background. The learned trial judge accepted that he has shown genuine remorse and this is

consistent with the pre-sentence report. The principal aggravating factor in this offence is the previous record of the applicant for driving offences. He has been convicted of excess speed in 1991, reckless driving in 1994, careless driving in 1995, excess speed in 1996 on two occasions and again in 1998 and 2001. Apart from a conviction for driving without insurance in 2008 he has not committed any offences in relation to driving since 2001.

[22] The number and nature of his convictions from 1991 to 2001 show a marked disregard for the safety of other road users during that period and justify a material increase in the starting point in this case. It is, however, necessary in determining the level of increase to recognise that during the 8 years prior to this tragedy he had not been convicted of any offence in respect of his driving. He has been assessed in the pre-sentence report as being at low risk of re-offending.

[23] In his favour is the fact that he has pleaded guilty and the learned trial judge acknowledged that he was entitled to full credit for that plea. Credit for a plea of guilty is intended to recognise that the offender thereby acknowledges his guilt, that he spares the victims the trauma of a contested trial and that court time and public resources are not inappropriately expended on a contested trial. In this case, however, the level of discount for the plea must be tempered by the fact that this was a case where the evidence to sustain the charge was considerable.

The Effect on the Victims

[24] The father and mother of the deceased have made statements describing the horrendous effects of this death on the whole family. Both have sought counselling and medical attention. Mrs Callaghan described how a part of her has been chopped away and their lives will never be right. Mr Callaghan described how the death of Robert was like losing his best friend as well as his son. It was to recognise the hurt caused to people such as Mr and Mrs Callaghan and their family that the legislature decided that their tragedy should be marked normally by a sentence of imprisonment although that sentence could neither reflect nor compensate for the grief and distress that those affected feel.

Conclusion

[25] For the reasons that we have given we consider that this was a case which had to be marked by a prison sentence but on the basis of the materials available we do not consider that the learned trial judge was entitled to treat this as a case shading into the category not far short of dangerous driving. Giving appropriate weight to the aggravating and mitigating factors we consider that the appropriate sentence was one of nine months imprisonment. We consider that in this type of case a sentence of imprisonment ought only to

be suspended where there are exceptional factors. Previous good character of itself will generally not be a material exceptional matter. We do not consider that any exceptional factors arise in this case and accordingly we allow the appeal to the extent of varying the term of imprisonment to one of nine months. In every other respect the sentence is affirmed.