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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

JONATHAN McQUILLAN

Before Kerr LCJ, Nicholson LJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an application for leave to appeal against sentences imposed by His Honour Judge McFarland at Belfast Crown Court on 1 April 2004. Leave was refused by the single judge. The applicant had pleaded guilty to six offences. These were:-

1. Causing grievous bodily harm with intent to resist or prevent lawful apprehension, contrary to section 18 of the Offences against the Person Act 1861 in respect of which the judge made a custody probation order comprising 6 years' custody and 12 months' probation;

2. Driving whilst disqualified, contrary to article 167(1)(b) of the Road Traffic (NI) Order 1981, for which the applicant was sentenced to 6 months' imprisonment;

3. Dangerous driving, contrary to article 10 of the Road Traffic (NI) Order 1995 for which he was sentenced to eighteen months imprisonment;

4. Driving without a valid policy of insurance, contrary to article 90 of the Road Traffic (NI) Order 1981 for which he was fined £750, with an immediate warrant;

5. Two offences of resisting an officer in the execution of duty, contrary to section 66(1) of the Police (NI) Act 1998 for which he was sentenced to one month on each charge.

[2] A further count (the second count on the indictment) of dangerous driving causing grievous bodily injury was not proceeded with by the prosecution and was ordered to remain on the books, not to be proceeded with without the consent of the Crown Court or the Court of Appeal. Disqualification from driving for a period of seven years was also imposed in respect of the charges appearing at 2, 3 & 4 above. The periods of imprisonment were ordered to run concurrently so that the effective sentence was one of six years' imprisonment followed by one year on probation. The judge indicated that the sentence that he would have passed, had he not made the custody/probation order, would have been one of seven years' imprisonment.

Factual background

[3] At approximately 12.45am on 1 June 2003 police at a vehicle check point on Shimna Road, Newcastle, stopped a car driven by the applicant. Constable Paul McConnell noticed a strong smell of alcohol from the applicant's breath. When asked whether he had been drinking the applicant told the police officer that he had drunk one pint of beer earlier that evening. Constable McConnell required him to take a breath test, which indicated that he was over the prescribed limit. The police officer then told the applicant that he was arresting him, to which he replied "No problem mate". At that point, however, he ran back to his car pursued by Constable McConnell. The applicant started the car. The constable managed to reach into the car through the window of the driver's door. This door was open and another officer, Sergeant Smyth, was standing between the open door and the sill of the car. Despite the position of the two officers the applicant drove off. Sergeant Smyth was caught by the open door and carried for about 20 feet, when he fell, sustaining minor injuries. (This part of the incident accounted for one of the charges of resisting an officer).

[4] Constable McConnell remained partly in and partly out of the car while the applicant drove along Shimna Road, accelerating and swerving from side to side in an attempt to dislodge the police officer. He cried out to the applicant, "Stop, you're going to kill me". Friends of the applicant who were in the car also tried to get him to stop but to no avail. Other police officers deployed a "stinger" device but, although it made contact with the vehicle's rear wheels, causing one to deflate, the applicant continued on his course, driving at a speed estimated at 35-40 miles per hour. After approximately 400 yards, Constable McConnell eventually lost his grip and was thrown from the vehicle. He fell to the road and rolled for some distance. The applicant drove on.

[5] At 1.03am the car was detected travelling towards Dundrum. A patrol activated its blue flashing lights and gave chase. The rear lights of the vehicle were extinguished and it was seen to brake hard on a number of occasions giving the impression that the applicant wanted to cause a collision between his vehicle and the following police car. The patrol managed to avoid this but maintained its chase as the applicant's car went through Dundrum, Clough and Seaforde, travelling at speeds of up to 90 miles per hour, sometimes in the oncoming lane. Throughout this time the rear offside tyre was deflated. Eventually, at Seaforde, another patrol used a "stinger" device which caused the offside tyres of the applicant's vehicle to disintegrate. He slowed the vehicle to 50-55 miles per hour, but continued until the car was travelling on the wheel rims. (This episode accounts for the charge of dangerous driving).

[6] The vehicle came to a halt and the applicant was instructed to disembark but made no move to do so. An officer smashed a window and the applicant was removed from the car. The applicant struggled and was placed on the ground and handcuffed. (This relates to the second offence of resisting an officer). He was arrested but made no reply after being cautioned. Subsequent inquiries disclosed that the applicant had been driving whilst disqualified and had no insurance.

[7] Constable McConnell was taken to Downe Hospital where he was found to have sustained abrasions to his body (forehead, knees, right buttock and right hand), bruising to the forehead, fractures of three teeth and a fracture of his right wrist. He was placed under neurological observation for a period and then discharged. He also suffered post traumatic stress and was off work for eight months.

[8] During police interviews the applicant said that he had panicked after he had been breathalysed. He denied intending to injure anyone. He claimed that he could not remember turning out the lights of his car or braking suddenly while he was being pursued by police. He described his driving as "inexcusable" and said that he stopped because he knew he would eventually hurt someone. The interview ended with the applicant making an apology.

Personal background

[9] A pre-sentence probation report described the applicant's background. He lives in West Belfast with his parents. He is the only member of the family to have been before the criminal courts. He left school at 16 with 9 GCSEs, later obtained qualifications as a welder and then became a self employed courier. He became involved with a group that indulged in heavy drinking at weekends. This led to the loss of his licence in November 2002 for driving while under the influence of alcohol. Apart from this the applicant had convictions for driving without insurance and tampering with a motor

vehicle. Both had been dealt with by way of fine. After his arrest on the present offences he reacted badly and attempted suicide, but since July 2003 he has made a conscious effort to change his lifestyle.

[10] The applicant expressed shame to the probation officer about his involvement in this episode. She considered that he had a clear sense of victim awareness. She believed that the applicant's alcohol abuse was the principal factor in the commission of these offences. He has abstained from alcohol since July 2003 and this, together with empathy with the victim, was judged to reduce the risk of re-offending. He appeared to be motivated to engage with probation. The report concluded that the applicant would benefit from statutory supervision to reinforce the progress he had made and to reduce the risk of relapse.

[11] A psychiatric report from Dr Philip McGarry was available to the sentencing judge and to this court. The applicant came under Dr McGarry's care when he tried to hang himself on 6 July 2003. When interviewed on 17 February, however, he denied having suicidal thoughts. Dr McGarry could find no evidence of significant psychiatric illness. He recorded that the applicant had expressed remorse for his actions and had told him that he felt guilty about the injuries sustained by the injured party.

The judge's sentencing remarks

[12] The applicant had given an account to the probation officer that one of the friends that he was with on the evening of the incident had agreed earlier to be the 'designated driver' but, after having consumed alcohol, `refused to drive the car. The applicant then decided to drive himself. The judge referred to the applicant's decision to drive in these circumstances as reprehensible. It had emerged in the course of the hearing before Judge McFarland that passengers in the car had remonstrated with the applicant and managed to pull the handbrake to bring the car to a halt. They then left the car. Even after this, the applicant drove at speed through Dundrum and Seaforde. The judge considered this to be a particularly serious aspect of the offence. He also expressed the view that the fact that a police officer was injured was significant. On this subject he said:-

> "It is the duty of the police to enforce road traffic laws and often they do this exposing themselves to a risk of harm or even death and the public demands a very high standard of competence and integrity from its police officers but, on the other hand, anyone injuring a police officer enforcing the law has to expect the full weight of the law to be brought down upon them both as a deterrence to others and speaking generally in relation to the

> public concerns about road traffic matters, the public is very concerned about drivers who continually flout the law, ignore the rules and regulations of the road, ignore orders of the Court and put innocent people at risk."

[13] The judge recognised the mitigating features of the applicant's guilty plea and co-operation with the police. He also noted the applicant's remorse. He acknowledged the applicant's inconsequential criminal record and the absence of any violent offending. He referred to the applicant's good family and employment background and to his mental health problems and took into account the fact that the sentences that he imposed would involve the applicant's been sent to prison for the first time and the impact that this would inevitably have on a young man. He chose a custody/probation disposal because, although he considered that there was a relatively low risk of re-offending, he was conscious of the benefit that the applicant would derive from the supervision that probation would provide.

[14] Mr Harvey QC, who appeared for the applicant before Judge McFarland and on the hearing before this court, submitted that the essence of the offence in the first count was "constituted in the driving" and he suggested, therefore that the sentence available under article 9 of the 1995 Order (*i.e.* the count that had been left on the books) should be the starting point for the selection of the sentence on the charge of causing grievous bodily harm with intent to resist arrest contrary to section 18 of the 1861 Act.

[15] It is clear that the judge did not accept this submission for he said:-

> "I would regard this particular incident as being more serious than the offence under article 9 [of] the Road Traffic Order in that, given the nature of your driving and the intent that you had, it puts you in a more serious category. However, it is not substantially more serious. I would have thought, looking at the case, if this had been an article 9 Road Traffic Order case, you would have been looking at a sentence in the region of very close to the maximum given the appalling state of driving. Because I regard this as more serious I would then take this beyond the maximum and of course I'm talking about the sentence that you would have received had you contested the issue. It would have been a sentence somewhere in the region, in my view, of ten or eleven years' imprisonment."

The application for leave to appeal

[16] Before this court Mr Harvey submitted that the sentencing judge failed to have adequate regard to the mitigating factors or to the contents of the pre-sentence and psychiatric reports. He suggested that the judge erred in concluding that the first count of causing grievous bodily harm with intent to resist or prevent apprehension was more serious that the second count of dangerous driving causing grievous bodily injury under article 9 of the Road Traffic Order.

[17] Mr Harvey referred us to the guidance provided by this court in cases of dangerous driving causing death and grievous bodily injury in the conjoined cases of *Re Attorney General for Northern Ireland's References* (Nos 2, 6, 7 and 8 of 2003) [2003] NICA 28. He suggested that the level of sentences in those cases should have guided the judge in his selection of sentence on the principal count in the present case.

Conclusions

[18] We do not accept the central proposition that lies at the heart of Mr Harvey's submissions. We consider that the judge was right not to choose the sentence for the first offence by reference to the range of penalties appropriate for disposal under article 9 of the Road Traffic Order. We say this for two principal reasons. The first of these is prosaic – the judge was sentencing the applicant for an offence under a different statutory provision from that which Mr Harvey suggests should have dictated his approach. It would have been quite inapt to choose a sentence for a different offence from that to which the applicant had pleaded guilty. The second reason relates to the distinction that must be drawn between the two types of offence involved. In the case of dangerous driving causing grievous bodily injury, usually the offender will not have intended to inflict the injury; it will have occurred as an unintended consequence of the dangerous driving. By contrast causing grievous bodily harm with intent to resist or prevent lawful misapprehension involves deliberation on the part of the offender.

[19] In dealing with the problems that arise in cases where sentences must be passed for offences of dangerous driving causing death or grievous bodily injury, this court said recently in *R v McE* [2004] NICA 46:-

> "[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."

[20] In sentencing the applicant on the first count, the judge did not have to confront the tension referred to in that passage. This is not a case of the applicant being responsible for devastating consequences of his offending in circumstances where his culpability was low. On the contrary, the blameworthiness of the applicant is high. He quite deliberately sought – and eventually succeeded – in dislodging the police officer from the car, knowing that he was likely to suffer significant injuries as a consequence.

[21] As to the level of the sentence imposed Mr Harvey wisely did not suggest that it was wrong in principle or manifestly excessive. Although comparison with other cases is not always helpful we consider that decisions such as *R. v. Hall* [1997] 1 Cr.App.R. (S.) 62; *R. v. Boulter* [1996] 2 Cr.App.R. (S.) 428; and *Attorney-General's Reference No. 78 of 2000 (Jason Jones)* [2002] 1 Cr.App.R. (S.) 127 are instructive as to the appropriate sentences for this type of offence. The sentence imposed on count 1 in the present case is entirely consistent with the level of sentencing in those cases.

[22] We are satisfied that the judge took into account all relevant matters in choosing the sentence on each of the offences. In a careful and well reasoned judgment he referred to each of the aggravating and mitigating features that were material. In particular he acknowledged the contents of the pre-sentence and probation reports and there is no reason to suppose that he failed to accord appropriate weight to them. We are entirely satisfied that the sentences imposed were fitting in light of the extremely serious circumstances in which these crimes were committed. The application for leave to appeal is therefore dismissed.