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Judgment: approved by the Court for handing down | *Delivered:* **27/06/2013**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

KEVIN BRANNIGAN

DIRECTOR OF PUBLIC PROSECUTION'S REFERENCE
(NUMBER 7 of 2013)

(Morgan LCJ, Higgins LJ and Coghlin LJ)

MORGAN LCJ (ex tempore)

[1] This is a reference by the PPS pursuant to section 36 of the Criminal Justice Act 1988 of a total sentence of 9 months' imprisonment suspended for two years imposed by Judge Kinney in Belfast Crown Court on 22 April 2013 after the offender pleaded guilty on 12 February 2013 to several charges arising from a road traffic accident in which he knocked over a pedestrian in Chichester Street, Belfast, on 29 June 2011.

[2] Initially the indictment contained a charge of causing grievous bodily harm by dangerous driving. At arraignment the respondent pleaded not guilty to all counts. On 12 February 2013, the day that the case was listed for trial, it could not be heard because time was not available. The offender pleaded guilty to the counts of perverting the course of justice and failing to stop, remain at the scene and report the accident. The prosecution then accepted a plea of guilty to the lesser offence of causing grievous bodily injury by careless driving. The count of causing grievous bodily harm by dangerous driving was left on the books.

Background

[3] The background was that the injured party was out with friends in Belfast in the early hours of 29 June 2011. He left Thompson's Garage at around 1.30 am and proceeded to cross Chichester Street which comprised a parking bay and three lanes

of traffic. Road conditions were dry. As he entered the middle lane he started to run. At the point where he was about to cross from the middle lane into the final lane he was struck by the respondent's car. CCTV showed that the respondent did not brake before the impact but did so immediately afterwards. Expert witnesses from the prosecution and defence agreed that the respondent's speed was in the region of 45 mph and that it took 2.9 seconds for the injured party to cross from the edge of the footpath to the area of the impact. If the respondent was travelling at 45 mph then the victim would have been 38 metres away when the injured party was at the outside of the layby and according to the Highway Code the typical stopping distance for a car travelling at 45 mph was 36 metres and indeed for a vehicle at 30 mph 23 metres. Travelling at either of those speeds this accident should never have happened because the car should have been able to stop. Following the impact the respondent drove to an address near his home. A witness observed him driving with no lights and drive through a red light. Subsequent examination of the car indicated that the front nearside headlight unit lens was broken, the front windscreen was shattered, there were dents on the roof and on the bonnet and the driver's side wing mirror was missing. The prosecution case was that driving the vehicle in this condition was the basis of the dangerous driving charge.

[4] At 8.45 am on the same morning police located the respondent's car which had been covered with tarpaulin. The front and rear number plates were removed and were under the vehicle. The tax and MOT discs were not displayed but Mr McGrory for the prosecution has not pursued the contention that this was done deliberately in the appeal before us. These facts, constituting the hiding of the vehicle, were the basis of the charge of perverting the course of justice. It appears that after finding the vehicle police contacted the respondent's home. He made contact with his solicitor as a result of which he attended for interview with police.

[5] The injured party was propelled up and forward through the air landing 34 metres from the point of impact. He was in hospital for about 8 weeks, 8 days of which were spent on a life support machine. He sustained multiple injuries which included a traumatic brain injury, a severed left ear, jaw bone broken in two places, three lost front teeth, fractured vertebrae, a punctured left lung, a fractured right elbow and a damaged nerve. A victim impact report indicated the injured party's life had been changed forever. His brain injury has affected his cognitive functioning and intelligence and he now suffers from epilepsy and fatigue. He was not sure that he would be able to run again and he has facial scaring.

[6] The respondent attended voluntarily at the police station in the early afternoon of the same day. He at that stage claimed that he had been driving normally and the pedestrian had darted out in front of him so that he could not do anything to avoid the collision. He claimed that he swerved but the pedestrian hit the car. He said that he panicked and drove on and it never occurred to him to do anything about the victim. He was in a state of shock when he got home. He denied deliberately removing the licence plates saying they had fallen off and he denied removing the tax and MOT discs. He apologised for the injuries caused but he felt

that the accident was not his fault. He realised the car lights had gone out and that he travelled home without lights.

[7] The pre-sentence report indicates that he was at that time 20 years old and had passed his driving test some two years before. He attributed his accident to panic and fear. He said that he had stopped driving and did not think that he would ever drive again. He was assessed as presenting a low likelihood of offending and not posing a risk of serious harm. A report by Dr Harbinson, Consultant Pychiatrist, indicated that as a child he was diagnosed as suffering from Attention Deficit Hyper-activity Disorder and had been taking medication on a daily basis. Dr Harbinson stated that his impulsive decision to drive on rather than stop would be a feature of his ADHD. He had taken his medication that morning, so the effect would largely have worn off by the time of the accident and this was put forward by Mr McDonald QC on behalf of the respondent as a mitigating feature in relation to his conduct subsequent the accident.

Consideration

[8] The respondent has one conviction for driving without due care and attention which arose from an incident that occurred before the subject offences but in respect of which he was dealt with after the offences. So far as the sentencing principles are concerned the learned judge accepted that the relevant sentencing guideline in this jurisdiction is R v Doole [2010] NICA 11 which endorsed the relevant guideline of the England and Wales Sentencing Council. He noted that imprisonment is only appropriate where there is a level of carelessness which gives rise to real culpability. He accepted that the basis for the charge was that the respondent was travelling too fast and failed to keep a proper lookout with disastrous consequences. The learned judge identified as the appropriate sentencing range the top category where there is careless driving falling not far short of dangerous driving. The starting point is 15 months with a range of 9 months to 3 years. A discount would be made for a guilty plea. The learned judge imposed a sentence of 9 months' imprisonment in respect of the offence of careless driving causing grievous bodily injury. The Director in his submissions takes no issue with the length of that sentence albeit that he describes it as lenient. The sentence is one which in our view is appropriate taking into account the mitigation in this case.

[9] What has concerned us is the approach of the judge to the offence of dangerous driving which was committed with a view to leaving the scene and the offence of perverting the course of justice which shows some deliberation in relation to trying to avoid his responsibilities in relation to these matters. It is absolutely clear from the authorities particularly in relation to the offence of perverting the course of justice that almost invariably a sentence in relation to such activity will be an immediate sentence of imprisonment consecutive to the sentence that needs to be imposed in respect of the offence itself. There was a degree of deliberation in relation to the respondent's conduct which affects the extent of the sentence but it is submitted on his behalf that the other factor to take into account in his favour was

that the period during which he maintained the deception was relatively short. We accept that the period was short but it is significant that in the end his detection arose not because of any activity on his part but because of the diligence of the police officer who managed to note the vehicle as having been in the vicinity who then established that the vehicle was under the tarpaulin. We accept that the learned judge was entitled and indeed obliged to have regard to this respondent's medical history and that he was entitled as Mr McDonald has submitted to take into account that that medical history was one that may well have affected the way in which he responded to the situation in which he found himself and that his activities thereafter may have been the type of impulsive reactive activities in which his medical condition may have played some part. It seems to us that on any view, even taking all of those matters into account, the appropriate sentence in relation to the dangerous driving and the perverting the course of justice should have been at least 6 months' imprisonment consecutive to the sentence of 9 months' imprisonment making a total sentence of at least 15 months' imprisonment.

[10] The next issue is whether or not any of these sentences should be appropriately suspended. Mr McDonald has properly drawn our attention to the remarks in Attorney General's Reference (No 4 of 1989) [1989] 11 Cr App R(S) 517 indicating that sentencing is an art rather than a science and that an appeal court has to pay proper respect to the views of the sentencing judge. It is not for us to interfere with the sentence because we think it is lenient it is only if the sentence is unduly lenient that we should become involved. In sentencing for these types of offences both in relation to the careless driving causing grievous bodily injury and in relation to offences around perverting the course of justice the authorities make it clear that it is only in exceptional circumstances that the sentence can be suspended. In this case the learned judge appears not to have reflected upon that issue because he makes no mention whatsoever of the need for exceptional circumstances. Personal mitigation is of course a matter that can be taken into consideration but it seems to us that the personal mitigation played no role at all in relation to the original offence of the careless driving causing grievous bodily injury and we have reflected the personal mitigation in the sentence that we have identified as appropriate for the consecutive sentences for dangerous driving and perverting the course of justice. In those circumstances we do not consider that exceptional circumstances have been demonstrated. We do not consider that it was appropriate to suspend the sentences and we consider that it was unduly lenient to do so.

[11] Finally, we have to turn to the question of double jeopardy. This is a young man who left court initially believing that he was not going into custody and having been given a suspended sentence it will undoubtedly come as a considerable blow to him to find that he now must serve a sentence. We consider that the approach should be generous in relation to that and taking into account those difficult circumstances we consider that we should impose a sentence of 9 months' imprisonment which we effect by making the dangerous driving and the perverting the course of justice sentences of 6 months each concurrent having regard to double jeopardy. He will report to Maghaberry at 10 am on Monday 1 July.

[12] The last thing I will say about this is that it is important that sentencers and advocates have regard to the fact that in cases of this sort where there is a serious issue about the need to demonstrate exceptional circumstances they should be extremely careful in the way in which they deal with the issues around the imposition of a suspended sentences. They ought to bear in mind that if it is the case that the sentence that they have imposed is unduly lenient, if they have not taken into account the need to examine the existence of exceptional circumstances, those who have been the subject of such sentences can be significantly affected by the fact that if they come to this court we may, as in this case, find ourselves in a position where we have to impose sentences of imprisonment.

Conclusion

[13] We substitute a sentence of 9 months' imprisonment on the count of causing death by careless driving. For the reasons given we substitute sentences of 6 months imprisonment concurrent on the counts of perverting the course of justice and dangerous driving.