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Judgment: approved by the Court for handing down | *Delivered:* **19/10/2006**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

KEVIN McMANUS

Attorney General's Reference No 4 of 2006
Before Nicholson LJ. Campbell LJ and Coghlin J

COGHLIN J

[1] This is a reference by Her Majesty's Attorney General to the Court of Appeal in Northern Ireland under Section 36 of the Criminal Justice Act 1988 of a sentence that he considers to be unduly lenient. Mr McCloskey QC appeared on behalf of the Attorney General while Mr Gallagher QC and Mr McHugh represented the respondent. The court is grateful to both sets of counsel for their succinct and helpful skeleton arguments and oral submissions.

[2] On 22 February 2006 the offender was arraigned before His Honour Judge Babington sitting at Omagh Crown Court on an indictment containing a single charge, namely:

> Causing death by careless driving having consumed excess alcohol contrary to Article 14(1) (b) of the Road Traffic (Northern Ireland) Order 1995.

Having been so arraigned, the offender pleaded not guilty.

[3] On 11 May 2006 His Honour Judge Babington at Omagh Crown Court conducted a hearing in accordance with the principles set out by this court in Attorney General's Reference (No 1 of 2005) Rooney & Ors (AG Ref 6-10 of

2005) [2005] NICA 44. At the conclusion of the Rooney hearing the offender was re-arraigned and pleaded guilty to the charge. On 20 June Judge Babington sentenced the offender to a Custody Probation Order of 15 months consisting of three months' imprisonment with the remaining 12 months to be served on probation. The offender was also disqualified from driving for 3 years.

[4] The facts of the case are as follows:

(1) On 3 October 2004 at approximately 2.30pm the offender collected two friends, a Mr Trimble and a Mr MacFarlane (the deceased), from Lisnaskea in his father's Vauxhall Astra car for the purpose of visiting Bundoran, County Donegal. They made one stop en route when all three men each consumed a pint of lager.

(2) On arrival in Bundoran they went to a hotel for a meal where the offender's two passengers each consumed 4-5 pints of beer while the offender himself drank "a couple of pints". They then went for a walk through the town and purchased some fast food. They then returned to the motorcar, the offender drove and Mr Trimble sat in the front seat. The deceased lay down in the rear seat with his back against the passenger side door. The offender then drove homewards with a couple of stops en route. It was accepted that road conditions were difficult and that it was raining.

(3) In the course of the journey home the offender lost control of the vehicle which struck a wooden fence and a utility pole ultimately causing the car to overturn. The deceased who, unlike Mr Trimble and the offender, was not wearing a seatbelt at the material time sustained severe head injuries as a result of which he died. The deceased was 23 years of age at the date of his death.

(4) A forensic engineer engaged on behalf of the Crown expressed the opinion that the vehicle had entered the right-hand part of an S bend at a speed which was too fast to allow it to successfully negotiate the bend, given the prevailing road conditions. However, he also noted that the speed involved was not necessarily excessive and that, while the impact was substantial, the damage to the fence and gatepost did not indicate a high degree of force on impact. There was no evidence that either Mr Trimble or the deceased had made any complaint about or criticism of the offender's driving prior to the collision.

(5) When the offender was initially cautioned he said:

> "We were in Bundoran, I came around the corner and the road was wet. The front wheel caught the grass verge and it pulled me in and I hit some sort of pole."

He stated that he had been driving at 50-60 mph. A specimen of breath was taken from the offender which registered 57 mg of alcohol in 100 ml of breath – the legal limit being 35 mg.

[4] It was accepted on behalf of the Attorney General that there were no aggravating factors in the case outside the terms of the statutory offence and that the following mitigating factors were present:

(a) The offender had no previous convictions and was of good character.

(b) The offender entered a plea of guilty. During the course of the hearing Mr Gallagher QC explained that, in view of the evidence relating to the road conditions, the defence had retained a forensic engineer to report on the slipperiness of the surface and the camber of the road etc but that the learned trial judge had been told at the arraignment that, on receipt of such a report, it was likely that a request would be made for a Rooney hearing.

(c) The offender and the two passengers had all been friends prior to the accident and the offender was genuinely and deeply remorseful about the death of his friend.

[5] During the course of the Rooney hearing the guidelines case of Attorney General for Northern Ireland's Reference (No 2, 6, 7 and 8 of 2003) [2004] NI 50 was drawn to the attention of the learned trial judge and discussed. In that case this court adopted the scheme of sentencing constructed by the Sentence Advisory Panel and the Court of Appeal in England and Wales in R v Cooksley [2003] 3 All ER 40. It was accepted both before the learned trial judge and, on behalf of the Attorney General, before this court that the instant case fell within category *(a)* of paragraph 13 of the judgment of Carswell LCJ, as he then was, being a case with no aggravating circumstances in which the starting point should be a short custodial sentence of perhaps 12-18 months, with some reduction for a plea of guilty. In the circumstances, the sole submission advanced by Mr McCloskey QC in this court was that this was not a case in which a Custody Probation Order was appropriate and we gave leave for the reference to proceed.

[6] At the conclusion of the Rooney hearing the learned trial judge said:

> "Having taken everything into consideration the maximum level of sentence that I would impose in this case is one of 15 months. Now, I should stress that (inaudible) of any Custody/Probation Order that that is of course subject to a satisfactory pre-sentence report and the fulfilment of the statutory conditions of the Criminal Justice Order. I can say

> for the record that I feel that this is a case in which a Custody/Probation Order should be imposed, therefore counsel can advise the defendant to what that means."

[7] A pre-sentence report was subsequently obtained from the Probation Board for Northern Ireland. Miss Doran, the reporting probation officer, when assessing the risk of harm to the public and the likelihood of re-offending, noted that the offender had no previous convictions and that the present offence, while serious in causing the death of another person, arose from a type of situation in which the circumstances were so unique that they were unlikely to reoccur in the future. She noted that the offender was now aware of the consequences of excess alcohol and its potential to impair driving ability and she recorded the fact that the offender now takes a taxi or arranges a lift when socialising. She considered that, in view of his prior patterns of behaviour and previous good character, he was an individual who represented a low risk of re-offending in the future. Ms Doran expressed her conclusions in the following terms:

> "The defendant would seem to have few presenting problems or issues which would merit probation supervision under a Custody Probation Order. The only area of work would be in regard to alcohol/awareness particularly with regard to its impact upon driving behaviour which could be part of the work undertaken should a Custody Probation Order be considered. However, it is my opinion that probation involvement is not essential in this case in that the defendant has learned from his tragedy and will be disqualified for a lengthy period."

[8] In the well-known passage in Attorney General's Reference (No 1 of 1998) McElwee [1998] NI 232 Carswell LCJ, as he then was, said at page 238/239:

> "It hardly needs to be said that the court should not regard it as correct as a matter of routine to make a Custody Probation Order where a custodial sentence of 12 months or more would be prima facie justified. Still less should it be tempted to resort to it as an easy option or compromise. In our view the court should look for some material which indicates that there will be a need to protect the public from harm from the offender or to prevent the commission by him of further offences.

> The relevant time at which the existence of that need falls to be determined is the time of his release. If, for example, the court takes the view that *after his release* the offender is likely to relapse into excessive drinking and to drive under the influence of alcohol, it may consider that a period of probation, with a condition attached that he undergo an appropriate course of treatment, would help to prevent the commission of further drink-driving offences. If so, it would be justified in making a Custody Probation Order. If it took the view, on the other hand, that by the time the offender is released probation would not be likely to help in such a way, it would not in our opinion be right to make a Custody Probation Order."

[9] In our view, the words used by the learned trial judge at the conclusion of the Rooney hearing in this case were unfortunate. At best they were ambiguous and we consider that they were capable of generating a perception on behalf of the offender that he would be the subject of a Custody Probation Order in any event. Mr Gallagher QC confirmed to this court that the offender had gained such an impression. No such perception should have been generated before the learned trial judge had an opportunity to see the content of the pre-sentence report. While we accept entirely that it is a matter for the learned trial judge, who has the most direct contact with the particular offender and the circumstances of the case, as to whether to make a Custody Probation Order in accordance with the provisions of Article 24 of the Criminal Justice (Northern Ireland) 1966, we do not consider that this particular pre-sentence report provided any grounds for doing so. In such circumstances, we consider that the sentence passed was unduly lenient within the meaning of the well-known passage from the judgment of Lord Lane CJ in Attorney General's Reference (No 4 of 1989) [1990] 90 CAR 366 at 371.

[10] However, as Lord Lane observed in Attorney General's Reference (No 4 of 1989) this court retains discretion as to whether to exercise its powers under Section 36 even when it does consider that the sentence in question was unduly lenient. In this case the offender has completed the custodial element of the sentence imposed by the learned trial judge and he has resumed his positive role in the community returning to live with well respected parents and take up once again his pre-conviction employment. Furthermore, he has engaged fully in his probation supervision sessions and attended all appointments. Taking account of the principle of double jeopardy the sentence that this court would have been minded to impose would have been one of 10-12 months' imprisonment. Imposing such a sentence in this case would result in the offender being returned to custody for a relatively short

period of weeks. Such a prospect in itself would not prevent this court from making such an order but it is a factor to be considered. After taking into account and giving careful consideration to all the circumstances, we do not consider that, on balance, such a course of action would be proportionate or serve the overall interests of justice and, accordingly, we propose to make no order on the reference.