Neutral Citation No: [2018] NICA 52	*Ref:* **DEE10776**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **21/12/2018**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

THE QUEEN

v

DECLAN DOHERTY

_____

Before: Deeny LJ, Treacy LJ and McAlinden J

_____

DEENY LJ (delivering the judgment of the court)

Introduction

[1] Declan Doherty has appealed against the overall sentence imposed on him by HHJ Marrinan at Antrim Crown Court on 6 March 2018.

[2] The appellant had been first arraigned on 12 January 2018 and had pleaded not guilty to two counts on the indictment. He then applied to be re-arraigned and pleaded guilty on 6 February 2018 to a first count of dangerous driving causing grievous bodily injury and to a second count of failing to provide a specimen of blood to police at the scene of the accident. The judge imposed a determinate custodial sentence of 3 years and 6 months on the first count evenly divided between custody and licence with a disqualification from driving of 2 years and until an extended driving test was passed. He imposed a sentence of 2 months' custody on the alternative charge but to run concurrent to the sentence on the first count.

[3] Mr Richard Greene QC and Mr James Toal appeared for Doherty at the hearing before this court but had not appeared below when the appellant had different solicitors as well as counsel. Miss Susanne Gallagher appeared for the prosecution. We are grateful to all counsel for their cogent written and oral submissions although the discussion at the hearing expanded beyond those skeleton arguments.

Factual Matrix

[4] An agreed basis of plea was put before the court below. From that and the sentencing remarks of the judge we extract the following summary. On 31 December 2016 Declan Doherty attended the wake of the mother of a close friend of his. He consumed alcohol. The following morning at about 11am he was telephoned from Antrim Area Hospital by his wife. She had given birth two days beforehand and had developed sepsis. She asked him to come to the hospital. He then drove to the hospital in his Mercedes car although, as he belatedly admitted, knowing he was still under the influence of alcohol. He turned off the Dunsilly roundabout onto the Ballymena Road, Antrim, at about 11:30am. It seems he thought he was on a dual carriageway but in fact this was a two lane road. He proceeded to drive for some 500 metres on the wrong side of the road and crashed head on into another vehicle driven by a gentleman who sustained severe injuries as a result of collision, including a fractured pelvis and injuries to the head, leg and spine. His mobility has been restricted as a result of this accident and further surgery may still be required.

[5] It seems that the injured party did not see the defendant who clearly did not see him. A witness in the car behind the injured party did see what was happening and that car stopped and indeed had time to reverse to avoid being involved in the collision. That witness describes Doherty getting out of the car after a pause. The court was told that he had some injuries himself including a fractured wrist. He did then attempt to assist the principle injured party. When police attended he refused to provide a sample as he claimed to them that he had consumed brandy in the car after the accident which he now accepts was untrue. The police drove him to the hospital where his wife was and he admitted that he was responsible for the accident on the way there.

[6] It is regrettable that a plea of not guilty was entered by him initially given the overwhelming evidence against him. The sentencing of Doherty was adjourned to 6 March 2018 when the judge had the assistance of a victim impact report and a pre-sentence report on Doherty.

Appellant's Case

[7] As stated above the appellant had changed legal representation after the plea. As a result of that there was a slight delay in lodging the Notice of Appeal. The court considers it proper to extend time in the circumstances and does so.

[8] The core of the submissions of counsel for Doherty were that the judge erred in concluding on the authorities and on the facts that the appellant required to be placed by him in a category for penalty of higher culpability pursuant to the decision of the Court of Appeal in England and Wales in R v Cooksley and Others [2003] EWCA Crim 996 which had been endorsed by this court in Attorney General's References for Northern Ireland (Nos: 2, 6, 7 and 8 of 2003) [2003] NICA 28, and

which had in turn been followed and endorsed by this court in R v McCartney [2007] NICA 41. We shall turn to those authorities in a moment.

[9] The two factors which the judge identified as aggravating factors warranting the category of higher culpability were the consumption of alcohol by Doherty "to the point you were over the limit for driving". In fact the appellant failed to provide a sample when asked so there is no reading of his alcohol level at the time. But we consider that the judge was entitled to infer that he was over the limit given his gross driving error in driving on the wrong side of the road for some 500 metres and his failure to provide a specimen at the scene of the accident.

[10] The second aggravating factor which the judge took into account and, indeed, described, at page 12 of his remarks, as "the cornerstone of placing you into the higher culpability" was the criminal record of Doherty. Mr Greene submitted that, properly considered these two factors did not warrant treating the case as one of "higher culpability" but that it ought to have been treated as a category of "intermediate culpability attracting a lower sentence".

[11] Mr Greene submitted that the sentencing exercise required three assessments by the court. Firstly, which band of culpability the accused should be placed in. Secondly, in accordance with the decisions of this court, most recently R v Stewart [2017] NICA 1, balancing the aggravating and mitigating factors to arrive at a starting point, which in this context would be in the band found at the first level of assessment. Thirdly, the court should give a discount for the plea depending on its promptitude or otherwise. On that basis he said the judge's starting point, which was 5 years, implied at least 5½ and more likely 6 years before mitigation which was too high even if he had the correct band.

[12] We will address Miss Gallagher's submissions in response in the course of our consideration of the case.

Consideration

[13] In R v Cooksley and Others op. cit. Lord Woolf CJ, sitting with Gage and Moses JJ, delivered a judgment on the day of hearing relating to three appeals against sentence and one Attorney General's Reference, "listed together to enable us to decide whether we should issue fresh guidelines as to sentencing for the offence of causing death by dangerous driving and careless driving while under the influence of drink or drugs in view of the advice of the sentencing advisory panel of February 2003 which recommended that there should be new guidelines". (Emphasis added). The Court very largely adopted the recommendations of that panel.

[14] The judgment in Cooksley was then considered by this court in Attorney General's References (Nos: 2, 6, 7 and 8 of 2003) op. cit. The court largely, though not completely, adopted the views of the Court of Appeal in England and Wales.

[15] One of the reasons the court would have felt it proper not to slavishly follow the English decision was that the statutory provisions here differed in an important respect from their equivalent in England. This is explained by Carswell LCJ at [38]:

> "Section 1 of the Road Traffic Act 1988, the comparable English provision to Article 9 of the 1995 Order, comprises only causing death by dangerous driving, whereas Article 9 extends also to causing grievous bodily injury, as did its predecessor legislation since 1955."

Cooksley applies therefore to causing death only which was not the outcome here of the appellant's driving.

[16] It is appropriate to set out in extenso the conclusions of this court with regard to the sentencing guidelines for these cases:

> "[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 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 paragraph (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 paragraph 32 of its judgment in R v Cooksley 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. 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."
>
> (Emphasis added)

[17] These same paragraphs were set out and followed by this Court in the judgment of Kerr LCJ in R v McCartney op. cit.

[18] Attorney General's References (Nos 2, 6, 7 and 8 of 2003) therefore clearly expresses the law in Northern Ireland and should be followed by sentencers here, with this judgment, in preference to Cooksley.

[19] The judge in sentencing Doherty found that these two aggravating features were "crucial in the sense in that they present this case (sic) into what is called the higher culpability category of the four starting points identified in Cooksley …" (page 6 of sentencing remarks). Although the judge mentions McCartney and Cooksley at that point in his judgment his attention does not appear to have been drawn to the cautionary words of Lord Carswell cited in McCartney or he would have seen that this was not a mere box ticking exercise but something rather more subtle.

[20] As one sees above at [11] of the judgment of Carswell LCJ these are only "a series of possible aggravating factors". He warns that the Court of Appeal in England "pointed out that they cannot be approached in a mechanical manner, since there can be cases where three or more aggravating factors which are not as serious as a case providing a bad example of one factor". He echoes the warning in Cooksley 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".

[21] We pause there to consider that aspect of this matter in particular. If one looks at the Cooksley list of aggravating factors under the rubric "highly culpable standard of driving at time of offence" one sees that they constitute almost all of the causes of dangerous driving i.e. drink and drugs, greatly excessive speed, driving while avoidably distracted e.g. by use of a mobile phone, driving when knowingly tired or in a poorly maintained vehicle. Miss Gallagher correctly pointed out that one could be guilty of dangerous driving by overtaking without excessive speed on a blind corner or hill. An accident caused by speed which is not "greatly excessive"

would also be out with this list. But these are almost the only kinds of dangerous driving that are not encompassed by the Cooksley/AG Reference aggravating factors.

[22] The general meaning of aggravate is to make more grievous or worse. Chambers says that in law, of an offence, it means "rendered more serious". The Oxford Dictionary agrees.

[23] The concept of aggravation also exists in the civil law. A tortfeasor is liable to pay compensatory damages to the injured party but in certain circumstances, such as oppressive conduct by the state, may be liable to pay in addition aggravated damages because of his actions.

[24] The defendant here has driven dangerously because of alcohol and, the judge found, distraction by hurrying to visit his seriously ill wife in hospital. He is culpable because he was still under the influence of alcohol to a substantial extent. There is therefore a risk of double counting his fault if one then regards the very alcohol consumption that makes him guilty of the offence to be also an aggravating feature.

[25] Our view of this matter is that sentencers should be cautious in addressing these factors but that in this particular case the fact that he drove in broad daylight for half a kilometre on a road without noticing that he was on the wrong side of the road approaching ongoing traffic indicates such a high level of alcohol still in his blood as to require weight to be given to that factor by way of aggravation. But as the quotations above from Carswell LCJ show this has to be handled with care by the sentencer.

[26] Indeed, this Court in the AG References case, cited in R v McCartney, continues at paragraph 14 of the earlier judgment to say this:

> "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."

[27] As Kerr LCJ said at paragraph 21 of his judgement in McCartney:

> "These guidelines form the basis for sentencing decisions in this jurisdiction for these types of offences since the judgment in that case was given."

[28] The second factor on which the judge relied to put this into the higher culpability category was the driving record of the defendant. He set this matter out at page 5 of his judgment.

> "The question of your driving record is another aggravating feature, there has been some debate about that, but I am firmly of the view, following the rulings in the cases I have just discussed that it is an aggravating feature, albeit one that should be treated with some caution, that when you were much younger, in 1997 for all three of them, on three separate occasions you were convicted of dangerous driving; on 15 February, 8 March and 22 March. Extraordinary pattern of driving dealt with in two courts East Tyrone Magistrates Court in November 1997 and January 1998 in Magherafelt. In relation to those matters you were fined and disqualified but you were not imprisoned. Nevertheless, they are relevant in the extent to which they are relevant I will come back to. It is fair to say thereafter, apart from relatively minor convictions for no insurance in 1998 also and no insurance in 2008, you have no driving convictions and therefore you can come before the court fairly as someone who over 20 years has not been convicted of any significant driving matter."

[29] We consider this a fair summary of the appellant's record with one qualification. The only matter omitted is that his age at the time of the three dangerous driving offences, all within a single month in 1997, was only 18. Nevertheless, later in his remarks at page 12, the judge considered these convictions to be:

> "the cornerstone of placing you into the higher culpability, were so long ago that that must have had a dampening effect on the court's attitude to where you fit into the category between 4½ and 7 years and it is my view that it should reduce this case to the figure of 5 years as a starting point before taking into account the mitigating features and before taking into account the – well certainly before taking into account the plea of guilty."

[30] There are two aspects of this finding. It can be seen that the mere fact of the driving record, coupled with the alcohol question has led the judge to conclude he has to put the defendant into the higher culpability category. That is wrong in law.

He has to evaluate the one factor with the other factor, and then decide on the category.

[31] It seems clear that the judge's attention was not drawn to two relevant and recent decisions of this court. In R v Stewart – DPP Reference (No: 1 of 2016) this court said the following at [30]:

> "We accept that the three driving convictions of the respondent as a teenager establish that he did not have a clear criminal record but we do not consider that those convictions represented a material aggravating factor in this case."

[32] We note that convictions there were for no insurance, no driving licence and fraudulently using a vehicle registration mark and road fund licence – see [22]. They are therefore so different from the dangerous driving convictions here as to not make that view binding upon us but it is material as to what weight must be given to a record acquired while only a teenager.

[33] The judge's attention does not appear to have been drawn either to R v Michael Berry (DPP's Reference No: 5 of 2012) [2013] NICA 9 where Morgan LCJ in this Court said the following at [7]:

> "He had a limited but relevant criminal record consisting of road traffic offences all arising from one court appearance in 1986 but this was properly not treated as an aggravating factor by the sentencing judge."

[34] We should follow those views with which in any event we agree. As counsel pointed out they were spent convictions for some purposes of the law. The passage of time between an offence and its consideration by the court has been considered to be relevant in other areas of the criminal law e.g. Criminal Justice (Evidence) (Northern Ireland) Order 2004 at Article 6 (4).

[35] We consider that the fact that these were offences of exactly the same character and that there were three of them means that they should not be ignored. But the fact that they were committed 20 years before, were the subject only of disqualifications and modest fines and that the appellant was only 18 at the time largely negative the impact on sentencing by the judge. They should not have been viewed by him as the cornerstone of putting this matter into the higher culpability category. They were only of slight weight.

Conclusions

[36] As this court has made clear in AG's References of 2003 and R v McCartney sentencing in this field is a delicate matter. It is not a box ticking exercise.

Sentencers must evaluate aggravating factors and not merely enumerate them. In particular they should be careful not to double-count against a defendant by treating the sole cause of the accident as an aggravating factor of itself.

[37] The judge erred in concluding that alcohol, which was the culpable cause of the dangerous driving and a record of dangerous driving 20 years before when the defendant was only 18 together required him to sentence him within the higher culpability category. Mr Greene for Doherty did not seek to persuade us that it was in the lowest of the four categories but accepted that he should have been sentenced and should now be sentenced by this court within the intermediate category.

[38] The band of sentencing for that category laid down by this court in R v McCartney following the decision of the Court of Appeal in England in R v Richardson and others [2006] EWCA Crim 3186, following the increase in maximum penalties by the legislature is 2-4½ years. Where in that category should the appellant be placed? Again, his counsel said that there would be no justification for the maximum within that range but that a sentence of 3½-4 years before fixing the starting point in accordance with the previous decisions of this court, most recently R v Stewart, would be appropriate.

[39] One must express some sympathy for sentencers at this point because they have already taken into account aggravating factors in fixing the band of sentencing. The normal approach would be to balance aggravating and mitigating factors in fixing the starting point. Given the role aggravation has already played the emphasis must be on mitigating factors. The judge identified genuine remorse on the part of Doherty. He noted that he did try and assist the injured party at the scene. He noted various testimonials from his priest, family and the chairman of the Bellaghy Wolfe Tones GAA for whom he had done voluntary work. There is a further reference from his employer. As mentioned above he was conscious that Doherty was going to his wife's sick bed although, of course, the need to go there does not mean that he could not have sought a lift from his family or hired a taxi rather than driving his car.

[40] We consider that the starting point here after balancing these factors would be a sentence of 3 years' imprisonment. The judge did not grant a full discount, quite properly, because Doherty had stupidly lied at the scene to the police and had, regrettably, not pleaded guilty at the first arraignment. The discount therefore was 25% as it followed shortly after the first arraignment and without the necessity for a jury and witnesses to attend. This is an approach which this court accepts and we thereby reduce the sentence to one of 27 months. We direct that it should consist of 13 calendar months and two weeks in custody and 13 calendar months and two weeks on licence. The disqualifications remain the same as does the sentence on the lesser count.